

# **Horizontal Merger Guidelines: Questions for Public Comment**

**Federal Trade Commission and U.S. Department of Justice**

**September 22, 2009**

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) will be holding a series of public workshops in the coming months to obtain public input into possibly updating the Horizontal Merger Guidelines (“Guidelines”). The FTC and the DOJ (the “Agencies”) issued the current Guidelines in April 1992; the Agencies revised Section 4, “Efficiencies,” in April 1997.

The Agencies invite public comment on the Guidelines as part of this process. Participants in the workshops will be selected in part based on the comments they submit.

Updating the Guidelines could serve two primary and closely related goals. First, updated guidelines could more accurately and clearly describe current Agency practice. Second, updated guidelines could reflect and incorporate learning and experience gained since 1992.

The Agencies have identified a number of areas where an examination of the current Guidelines may be most valuable. The questions below are intended to focus the public conversation on these areas of the Guidelines.

The Agencies encourage anyone submitting comments in response to these questions to provide answers from two perspectives: (1) whether revisions in the areas raised in the questions could yield guidelines that more accurately describe actual Agency practice, and (2) whether revisions could lead to a more accurate and/or more efficient merger review process.

The Agencies intend that the Guidelines, if updated, would continue to be “designed primarily to articulate the analytical framework the Agency applies in determining whether a merger is likely substantially to lessen competition, not to describe how the Agency will conduct the litigation of cases it decides to bring.” (Guidelines, §0.1) The Agencies anticipate retaining the basic “hypothetical monopolist” test used to ensure that antitrust markets are not unduly narrowly defined. They also anticipate continuing to use the Herfindahl-Hirschman Index (HHI) to measure levels of and changes in market concentration, and to apply the basic structural presumptions built into the Guidelines. The Agencies do not anticipate changing the basic

“timeliness, likelihood, sufficiency” approach to entry analysis. Nor do the Agencies plan on altering the fundamental approach to efficiencies or the failing firm defense taken in the current Guidelines. However, as indicated by the questions below, a number of meaningful revisions could be made while retaining these basic aspects of the Guidelines. Moreover, not wanting to overlook promising areas for revisions that are not reflected in the questions below, the Agencies welcome thoughtful and well-informed comments on all aspects of the Guidelines. Comments are also invited on whether aspects of the “Commentary on the Horizontal Merger Guidelines,” issued by the Agencies in March 2006, should be incorporated into the Guidelines themselves.

1. The Guidelines (§0.2) specify a five-step analytical process to determine whether to challenge a horizontal merger. Should the Guidelines be revised to indicate that the Agency’s assessment of whether the merger is likely to reduce competition may not entail following the five steps in the order listed and that not all five steps are needed in all cases? If so, what can be said about when such departures are and are not appropriate?
2. Should the Guidelines be revised to address more fully how the Agencies use evidence about likely competitive effects that is not based on inferences drawn from increases in market concentration? If such revisions are undertaken, what types of such direct evidence are pertinent? How should the following categories of evidence be used?
  - a. For an already consummated merger, evidence of actual, adverse competitive effects.
  - b. Evidence based on so-called “natural experiments,” such as variations across geographic markets, time periods, customer categories, or similar product markets showing how customers are affected by competitive conditions whose variation may be comparable to the change to be wrought by the merger.
  - c. Evidence of the merging firms’ post-merger plans.
  - d. Evidence from customers about how they will respond to, and be affected by, the merger.
  - e. Evidence that the merging firms have engaged in significant head-to-head competition leading to lower prices or other customer benefits.
  - f. Historical evidence of actual or attempted coordination in the industry.

3. Should the Guidelines include a more detailed discussion of how the hypothetical-monopolist test for market definition (§1.11) is applied? This could include discussion of the following points.
  - a. Why the hypothetical monopolist approach often leads to properly defined relevant antitrust markets that do not include the full range of functional substitutes from which customers choose.
  - b. How to conduct “critical loss analysis,” including the proper use of evidence regarding pre-merger price/cost margins.
4. Should the hypothetical monopolist test in the Guidelines (§1.11) be simplified so that any collection of substitute products constitutes a relevant product market if a hypothetical monopolist over that group of products would find it profitable to impose at least a small but significant and non-transitory increase in price (SSNIP), including the price of a product of one of the merging firms? This would involve dropping the requirement that products be added in the order of “next best substitutes” and the use of the “smallest market” principle.
5. The Guidelines state (§1.11) that the size of the SSNIP will “in most contexts” be five percent. All else equal, the larger the SSNIP, the broader the market. Should the size of the SSNIP “in most contexts” be increased to ten percent? Should the Guidelines provide further explanation of the base price from which the SSNIP is calculated? Should the Guidelines provide further explanation of the conditions under which the Agencies will use a SSNIP other than the standard SSNIP?
6. In defining the geographic market, the Guidelines refer (§1.21) to the locations at which the relevant product is *produced*. The locations of *customers* who are likely to be affected by the merger may be quite different from the locations of the suppliers. Should the Guidelines be revised to state that the geographic market may be defined based on the locations of customers rather than, or in addition to, the locations of suppliers, depending upon circumstances? Should other indicia employed in geographic market definition be discussed, such as legal and regulatory constraints?

7. Should the discussion of how market shares are measured (§1.4) or interpreted (§1.52) be expanded? Is the interpretation of market shares, or the probative value of market concentration, different in cases involving unilateral effects than those involving coordinated effects?
8. Should the Guidelines be revised to explain more fully than in the current §1.521 how market shares and market concentration are measured and interpreted in dynamic markets, including markets experiencing significant technological change?
9. Do the HHI thresholds in the Guidelines accurately reflect current Agency practice? Should they be adjusted? If so, to what values?
10. The concept of unilateral effects was explicitly introduced into the Guidelines in 1992. Since then, the Agencies and private parties have acquired a great deal of experience evaluating unilateral effects using a variety of evidence and methods, and economic learning regarding unilateral effects has advanced. Should the Guidelines be updated to reflect this experience and learning? Please comment on the value of including expanded discussion of the following topics:
  - a. The relationship between market definition and unilateral effects.
  - b. Localized effects within a relevant market.
  - c. Unilateral effects in markets with auctions or negotiations.
  - d. The role of diversion ratios and price/cost margins in evaluating unilateral effects.
  - e. The use of market shares as a proxies for diversion ratios.
  - f. The thirty-five percent combined market share threshold in §2.211 of the Guidelines.
  - g. The use of merger simulation models to predict unilateral effects.
  - h. The role of product repositioning in evaluating unilateral effects.
11. The discussion of price discrimination in the Guidelines (chiefly §1.12 and §1.22) is quite limited. Should this discussion be expanded? Specifically, please comment on the value of elaborating on the identification of “targeted buyers” and on the analysis of competitive effects in markets where prices are negotiated.

12. The Guidelines do not explicitly address the implications of large buyers. Merging firms commonly argue that the merged entity would not be able profitably to raise price because it will be selling to large, powerful buyers. Should the Guidelines be revised to discuss the implications of large buyers for merger analysis? For example, even if large buyers are able to negotiate more favorable terms than smaller buyers, what further evidence is required to establish that they are immune from harm due to the loss of competition resulting from the merger? Are large buyers less susceptible to non-price effects than small buyers? Even if large buyers are protected, under what circumstances should antitrust analysis attend to the interests of smaller buyers?
13. The Guidelines distinguish between uncommitted and committed entry. Uncommitted entrants (§1.32) are treated as market participants and can be assigned positive market shares. Committed entrants (§3.0) are not. How useful in practice is the distinction between uncommitted and committed entry? How should the market presence of uncommitted entrants be measured?
14. The Guidelines ask (§4) whether cognizable efficiencies are sufficient to reverse the merger's potential to raise price. In making this determination, the Guidelines distinguish between fixed and marginal costs, with savings in marginal costs more likely to influence price. Should the Guidelines be updated to state that any cognizable cost reductions are relevant to the extent that they are likely to generate benefits for customers in the foreseeable future? Who should bear the burden of making this showing?
15. Should the Guidelines be updated to address more explicitly the non-price effects of mergers, especially the effects of mergers on innovation?
16. Should the Guidelines be updated to address acquisitions involving minority interests?
17. Should Section 5 of the Guidelines, "Failure and Exiting Assets," be revised?
18. Should the Guidelines be revised to include a discussion of how the Agencies approach merger remedies? Such a discussion could include the following topics:

- a. The overall goal of protecting customers by preserving pre-merger levels of competition.
  - b. The relationship between the remedy and adverse competitive effects.
  - c. The shortcomings of behavioral remedies in horizontal merger cases.
19. Should the Guidelines include illustrative examples? If so, which aspects of the current or revised Guidelines would benefit from the inclusion of examples? Would real-world examples or hypothetical examples be more valuable? Would the inclusion of examples risk undue reliance on them and, if so, what caveats should be provided?
20. Should the Guidelines be revised to reflect learning based on merger retrospective studies?