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## DOJ & FTC ISSUE REVISED HORIZONTAL MERGER GUIDELINES

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On August 19, 2010, the DOJ and FTC (the “agencies”) jointly issued their much-anticipated revised Horizontal Merger Guidelines (the “new Guidelines”) that outline how the federal antitrust agencies evaluate the likely competitive impact of proposed mergers and whether those mergers comply with U.S. antitrust law or should be challenged. These changes are the first major revisions to the merger guidelines in 18 years. The agencies report that the new Guidelines are designed to give companies and the courts greater clarity and predictability of how these antitrust agencies will actually evaluate proposed mergers and acquisitions by outlining the techniques and types of evidence they use to identify and determine whether a particular merger is likely to curb competition. The new Guidelines extensively revise the 1992 Guidelines and incorporate a number of significant changes, some of which are discussed below:

### **DE-EMPHASIS ON MARKET DEFINITION:**

- The old 1992 Guidelines relied heavily on market definition and defining the relevant market in which companies operate according to the “hypothetical monopolist” test.
- The new Guidelines strongly disclaim any singular focus on market definition by stating that market definition “is not an end in itself” and only “one of the tools” in merger analysis. The new Guidelines indicate that the agencies no longer believe that a clearly defined relevant market is an initial step, or in some cases a necessary step, in identifying a merger’s likely competitive effects. The new Guidelines further state that direct evidence, such as evidence of head-to-head competition and actual effects, will play a significant role in determining whether a proposed market definition is plausible.

### **REVISIONS TO MARKET-SHARE ANALYSIS AND MARKET-CONCENTRATION INDICATORS:**

- The agencies calculate market concentration using a market-share formula and then characterize markets as unconcentrated, moderately concentrated, or highly concentrated based on the results of that formula (measured by the Herfindal-Hirschman index, or “HHI”). The new Guidelines significantly relax the concentration thresholds for determining if a market is moderately concentrated or highly concentrated. The new Guidelines consider a market with an HHI below 1500 unconcentrated, which is an increase from 1000 in the 1992 Guidelines. A market with an HHI between 1500 and 2500 is now considered to be moderately concentrated under the new Guidelines, while the 1992 Guidelines were from 1000 to 1800. And a market with an HHI above 2500 is now considered to be highly concentrated, compared to 1800 in the 1992 Guidelines. Previously, the agencies considered

as highly concentrated an industry having less than six equal competitors; however, the new Guidelines take a more lenient approach by raising that threshold to an industry with four or fewer equal competitors.

#### **INCREASED IMPORTANCE OF OTHER BASES FOR CHALLENGING A MERGER:**

- The new Guidelines list four other evidentiary bases for challenges in addition to market shares / concentration — actual effects in a consummated merger, analogous historical events in similar markets, substantial head-to-head competition, and elimination of a disruptive competitor.
- Examples of a disruptive competitor are a price maverick or a company with a new technology or business model.
- A substantial head-to-head competitor may be considered more significant than other competitors where a significant amount of the acquiring company's lost sales have gone to that competitor.

#### **THE NEW GUIDELINES ARE REplete WITH ALTERNATIVES AND QUALIFIERS:**

- The new Guidelines state that the “unifying theme of these guidelines is that mergers should not be permitted to create, enhance, or entrench market power.” The new Guidelines cover a wide range of topics, including the above concepts as well as many others. In the discussion of virtually every concept, the new Guidelines are careful to note alternative tests and list qualifiers to the general rules.

The Guidelines were originally issued to provide businesses and their lawyers with a measure of clarity and predictability as to the merger process. The simplicity of the Guidelines became an impediment for the agencies in merger litigation when courts repeatedly used the Guidelines to rule for defendants. The inclusion of multiple avenues of challenge and complexity of analysis in the new Guidelines may be intended to give the agencies much greater latitude, not only in challenging mergers and other allegedly anticompetitive conduct, but also in seeking to sustain those challenges in court.

Companies considering a merger or acquisition should carefully consider the new Guidelines. Because the new Guidelines provide a more in-depth understanding of the concerns the agencies have in reviewing a proposed merger, proactive parties may want to focus their pre-merger reviews on any likely concerns the agency reviewing their merger or acquisition will have, which will hopefully decrease the chances of a challenge.

The new Guidelines are available [here](#). For more information or if you have questions concerning this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed on the following page.

**CONTACTS:**

**Gregory S.C. Huffman**

214.969.1144

[Gregory.Huffman@tklaw.com](mailto:Gregory.Huffman@tklaw.com)

**L. James Berglund, II**

214.969.1385

[James.Berglund@tklaw.com](mailto:James.Berglund@tklaw.com)

**William M. Katz, Jr.**

214.969.1330

[William.Katz@tklaw.com](mailto:William.Katz@tklaw.com)

**Richard J. Zook**

713.951.5812

[Richard.Zook@tklaw.com](mailto:Richard.Zook@tklaw.com)

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