

# Fried Frank Antitrust & Competition Law Alert<sup>®</sup>



[Please click here to view our archives](#)

## Federal Antitrust Agencies Issue Revised Horizontal Merger Guidelines

On April 20, the Antitrust Division of the Department of Justice (“DoJ”) and the Federal Trade Commission (“FTC”) released their highly anticipated revisions to the Horizontal Merger Guidelines (the “Guidelines”). The proposed Guidelines provide insight into how the Agencies analyze transactions among competitors. Their publication follows a series of public workshops initiated in September 2009 by the new Administration, which has pledged to reinvigorate antitrust enforcement, and marks the first major revision since the publication of the 1992 Guidelines.<sup>1</sup>

The new Guidelines are a substantial rewrite of the current ones and generally reflect (and do not depart from) current enforcement policy. Overall, they embrace a flexible fact-based approach to merger review that, among other things, reduces the role of market definition and endorses the use of a variety of tools and methodologies in determining whether a transaction is anticompetitive. Consistent with the new Administration’s efforts to promote transparency, the Guidelines are helpful in identifying and describing the range of economic tools and evidence used by the Agencies in evaluating competitive effects resulting from a merger. Some subjects, such as unilateral effects, receive expansive treatment. Other sections discuss issues which have been the focus of enforcement efforts in the past but were not addressed in the 1992 Guidelines (e.g., partial acquisitions and innovation effects).

It is too early to know the extent to which the new Guidelines will influence the courts. The Guidelines are not binding, but the 1992 Guidelines have played an important role in judicial decisions. Questions remain as to how courts will treat these revisions and whether they will depart from the more mechanical approach of the current Guidelines. If followed, the new Guidelines could enhance the ability of the Agencies to successfully challenge mergers in court.

The following are several key points and implications of the revised Guidelines.

### Unilateral Effects

The Guidelines include a significantly expanded discussion of unilateral effects (i.e., anticompetitive harm that may result solely from the elimination of competition between the merged companies such as an enhanced ability to raise price or reduce output unilaterally). This is particularly significant as unilateral effects theories have predominated at the Agencies since the

---

<sup>1</sup> The proposed Guidelines are subject to a 30-day public comment period.

publication of the 1992 Guidelines, particularly in mergers among close competitors in differentiated products industries. The FTC's successful challenge of the Staples/Office Depot merger alleging anticompetitive effects in an office superstore market, where the two firms were each others' closest competitors, is one example. DoJ's unsuccessful challenge in Oracle/Peoplesoft, which involved a merger between the vendors of ERP software, is another.

In the case of differentiated products industries, the new Guidelines support a range of different tools and methodologies which can be employed depending on the available data. These include various economic models used in practice but not previously highlighted in the 1992 Guidelines (such as sales diversion ratios, "upward pricing pressure," and merger simulations) and the use of different types of evidence (documentary and testimonial evidence, win/loss reports, evidence of discounting, customer switching patterns, and customer surveys). Market definition, and even market shares and concentration, are de-emphasized. For example, a presumption included in the 1992 Guidelines of anticompetitive unilateral effects for mergers involving shares in excess of 35% has been eliminated. Further, the Guidelines suggest that in certain circumstances (e.g., high margin industries) a merger could be anticompetitive even where the parties are not each others' closest competitors. While the Guidelines do not represent a dramatic change, the enhanced flexibility reflects a desire to promote more active enforcement.

### Market Definition

The new Guidelines de-emphasize the role of market definition – previously the first step in merger analysis under the 1992 Guidelines. The revised Guidelines state that the exercise of identifying a relevant market "is useful to the extent it illuminates [a] merger's likely competitive effects" and is "not an end in itself," but merely one of a number of tools. Although market definition may have a place, albeit reduced, in every analysis, "[r]elevant markets need not have precise metes and bounds." The Agencies have encountered difficulties in overcoming objections raised with respect to market definition in prior cases. For example, market definition in the Whole Foods/Wild Oats transaction was a critical issue, with the FTC endorsing a narrow market for premium, natural, and organic supermarkets ("PNOS") in its challenge to the merger. However, the district court rejected the PNOS market definition as unsupportable.<sup>2</sup>

### Market Concentration

The new Guidelines increase market concentration thresholds – as measured by the Herfindahl-Hirschman Index ("HHI") – under which the Guidelines establish a rebuttable presumption that a merger is anticompetitive. For example, under the new Guidelines, mergers resulting in an HHI increase of more than 200 points (previously 100) in a highly concentrated market – a market with post-merger HHIs of 2500 (previously 1800) – are presumptively anticompetitive. While this represents a significant change, it more accurately depicts current practice. DoJ and FTC merger

---

<sup>2</sup> See *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 28 (D.D.C. 2007). A divided panel of the DC Circuit Court of Appeals subsequently overturned the district court decision, *FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C. Cir. July 29, 2008), and the parties ultimately settled the action with Whole Foods agreeing, among other things, to divest 32 stores and related assets in 17 geographic markets. See FTC Press Release, "FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats was Anticompetitive," (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/wholefoods.shtm>.

data have indicated that merger challenges involved concentration levels far in excess of the 1992 Guidelines' thresholds.<sup>3</sup>

### Price Discrimination

The new Guidelines devote an entire section to price discrimination theories. A merger may be anticompetitive where it enables the combined firm to raise prices to certain targeted customers, including even a single individual customer harmed by the merger. For example, in a market comprised of large and small buyers, small buyers may not have the same tools to discipline pricing and therefore may have greater exposure to their suppliers. While the Agencies often have challenged transactions based on such theories, the Guidelines perhaps give the Agencies greater flexibility to challenge transactions that arguably have a limited impact on only a small number of customers.

### Coordinated Effects

The Agencies will consider whether a merger will enable coordinated interaction, making it more likely for a group of firms to successfully engage in interdependent behavior or tacit collusion to raise prices or otherwise harm consumers. The new Guidelines move away from the 1992 Guidelines' checklist approach to analyzing coordinated effects. They explain that there are many forms of coordination and evaluating the risk of coordinated effects is often not susceptible to quantification or a checklist. Thus, while the 1992 Guidelines discuss in detail a specific set of relevant factual conditions that support coordination among competitors and that enable detection and punishment of deviations, the new Guidelines explain that "the Agencies evaluate the risk of coordinated effects using measures of market concentration in conjunction with an assessment of whether a market is vulnerable to coordinated conduct." The revised Guidelines discuss many of the same factors, however, there is a difference in tone and flexibility.

### Entry

The Guidelines' view with respect to entry issues remains largely unchanged. A merger is not likely to be anticompetitive if third party entry would be timely, likely and sufficient to constrain any anticompetitive effects. But the revisions illustrate the Agencies' desire for flexibility. For example, whereas the 1992 Guidelines would consider entry that took place within two years of initial planning, the revised Guidelines require that entry must be rapid enough to make action leading to anticompetitive effects unprofitable overall without identifying a specific timeframe.

### Efficiencies

The new Guidelines follow the current Guidelines in recognizing that cognizable merger-specific efficiencies may offset any potential anticompetitive effects resulting from a transaction. The new Guidelines are unchanged in substance, but they express a greater degree of skepticism with respect to efficiencies claims. As the Guidelines note, "the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers."

---

<sup>3</sup> FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MERGER CHALLENGES DATA: FISCAL YEARS 1999-2003 (2003), p.3, tbl.1, available at <http://www.justice.gov/atr/public/201898.pdf>.

## Innovation Markets

The Guidelines contain a new section addressing unilateral effects with respect to innovation – specifically anticompetitive effects arising from “reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.” This discussion is new, but the Agencies often have challenged mergers based on non-price theories such as harm to innovation. A common example is the case of overlapping pipeline drugs in a pharmaceutical merger. Notwithstanding support for such theories, merger challenges based on innovation effects alone have been controversial. Their viability has been debated as they often involve circumstances where there is considerable uncertainty over the likelihood of an actual product being commercialized and/or realized. And courts have generally not had an opportunity to consider such theories. The Guidelines give greater support for pursuing such claims.

## Partial Acquisitions

The new Guidelines add a section on partial acquisitions (e.g., acquisitions of minority equity interests in competitors). The Guidelines state that partial acquisitions not resulting in effective control of the target firm can lessen competition by (1) allowing the acquiring firm to use a voting interest or other mechanism to influence the target’s competitive conduct, (2) diminishing the acquiring firm’s incentive to compete aggressively against its minority position holding, and (3) giving the acquiring firm access to competitively sensitive information from the target. The new Guidelines provide little additional guidance on this issue, but its inclusion is notable given that the Agencies have challenged numerous transactions based on such theories.

## Monopsony

The new Guidelines expand on the brief monopsony discussion in the 1992 Guidelines. In analyzing whether a transaction enhances market power on the buying side – “monopsony power” – the Guidelines note that the Agencies employ the same framework used in evaluating seller-side market power. Although monopsony challenges are infrequent, the Agencies have investigated such theories and will challenge transactions resulting in monopsony power where anticompetitive effects are likely to occur.

## Consummated mergers

In a new section on categories and sources of evidence that the Agencies have found helpful (e.g., natural experiments, head-to-head competition), there is discussion on evidence of actual effects in consummated mergers which have received increased scrutiny under the new Administration. The Guidelines explain that the Agencies will give substantial weight to evidence of post-merger price increases, which could be treated as dispositive, when evaluating consummated mergers. However, even in the absence of post-merger price increases, a consummated merger may be anticompetitive. As noted in the Guidelines, a merged firm may “be aware of the possibility of post-merger antitrust review and moderating its conduct.” The current Administration has been quite active in investigating consummated merger transactions. The DoJ’s recent challenge of a \$5 million acquisition involving voting systems (ES&S/Premier) exemplifies this trend.

\* \* \*

The Agencies are accepting public comments on the proposed new Guidelines until May 20, 2010, and it is expected that the new Guidelines will be finalized by the Fall. The revised Guidelines go a long way in providing transparency to the current enforcement policies of the Agencies. There are outstanding questions as to how they will be implemented in practice by the Agencies and the degree to which they will be relied upon by courts. Overall, they reflect a trend of, and allow for, more active antitrust enforcement.

### Authors and Contributors

---

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

#### US

[Peter Guryan](#)  
+1.212.859.8477

[Richard Park](#)  
+1.202.639.7064

[Barry Nigro](#)  
+1.202.639.7373

---

## Fried, Frank, Harris, Shriver & Jacobson LLP

### New York

One New York Plaza  
New York, NY 10004-1980  
Tel: +1.212.859.8000  
Fax: +1.212.859.4000

### Washington, DC

1001 Pennsylvania Avenue, NW  
Washington, DC 20004-2505  
Tel: +1.202.639.7000  
Fax: +1.202.639.7003

### Frankfurt

Taunusanlage 18  
60325 Frankfurt am Main  
Tel: +49.69.870.030.00  
Fax: +49.69.870.030.555

### Shanghai

40th Floor, Park Place  
1601 Nanjing Road West  
Shanghai 200040  
Tel: +86.21.6122.5500  
Fax: +86.21.6122.5588

## Fried, Frank, Harris, Shriver & Jacobson (London) LLP

### London

99 City Road  
London EC1Y 1AX  
Tel: +44.20.7972.9600  
Fax: +44.20.7972.9602

## Fried, Frank, Harris, Shriver & Jacobson (Europe)

### Paris

65-67, avenue des Champs  
Elysées  
75008 Paris  
Tel: +33.140.62.22.00  
Fax: +33.140.62.22.29

## Fried, Frank, Harris, Shriver & Jacobson

### Hong Kong

9th Floor, Gloucester Tower  
The Landmark  
15 Queen's Road Central  
Hong Kong  
Tel: +852.3760.3600  
Fax: +852.3760.3611

### *A Delaware Limited Liability Partnership*

The information and materials offered in this publication are for general informational purposes only; it does not constitute legal advice and is presented without any representation or warranty whatsoever, including as to the accuracy or completeness of the information.

Fried Frank Antitrust & Competition Law Alert® is published by the Antitrust & Competition practice group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

Fried Frank Antitrust & Competition Law Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to [Antitrust\\_Alert@friedfrank.com](mailto:Antitrust_Alert@friedfrank.com) and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous Fried Frank Antitrust & Competition Law Alerts®, please visit our [archives](#) on the Fried Frank website.

To view previous Antitrust & Competition To Our Client Memoranda, please visit our [archives](#) on the Fried Frank website.

To unsubscribe from all Fried Frank Email Alerts and electronic mailings send a blank email to [unsubscribe@friedfrank.com](mailto:unsubscribe@friedfrank.com).