NEW HORIZONTAL MERGER GUIDELINES RELEASED BY DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION

By Alan S. Gutterman[1]

The proposed terms of any merger transaction must be reviewed in light of the potential impact of federal and state antitrust laws. The principal federal antitrust statute dealing with mergers is § 7 of the Clayton Act, which prohibits certain acquisitions of stock or assets where the effect of such acquisition may be to substantially lessen competition, or to create a monopoly, in any line of commerce in any section of the country.[2] In certain cases, the parties will need to comply with the notification and review requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[3] This statute and the regulations promulgated under the Act[4] require purchasers and sellers in transactions that meet "size of the parties" and "size of the transaction" tests to file notification forms with the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) and to observe a 30-day waiting period prior to consummating the transaction.

One area in which the DOJ and the FTC have been active in attempting to provide some form of administrative guidance is with respect to mergers and other transactions that might be covered by Section 7 of the Clayton Act. The DOJ published a set of Merger Guidelines in 1982[5] and released revised Guidelines in 1984 that contained a mathematical formula, commonly referred to as the Herfindahl-Hirschman Index or "HHI", that combines market share data and concentration ratios, resulting in a numerical index used by DOJ and the FTC in deciding whether to challenge a transaction.[6] The DOJ and the FTC jointly issued revised Horizontal Merger Guidelines (the "1992 Merger Guidelines") on April 2, 1992 and made further partial revisions thereto in 1997.[7] On March 27, 2006 the DOJ and the FTC jointly released a "Commentary on the Horizontal

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[2] 15 U.S.C.A. § 18. While it is possible to challenge mergers under § 1 of the Sherman Act, 15 U.S.C.A. § 1, as "combinations in restraint of trade," § 7 of the Clayton Act can be used even in cases where there is no existing restraint of trade if a showing can be made that the merger is likely to have anticompetitive effects in the future.

[3] 15 U.S.C.A. § 18a(d).

[4] 16 C.F.R. § 801.1 to 16 C.F.R. § 803.90.

[5] 47 Fed. Reg. 28,493.

[6] See 1984 Merger Guidelines (published June 14, 1984), reprinted in 4 Trade Reg. Rep. (CCH) Para. 13,103.

[7] See 1992 Merger Guidelines (published April 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) Para. 13,104.

Merger Guidelines" that seeks to explain how the agencies apply particular principles embodied in the 1992 Merger Guidelines.[8]

The latest major revisions to the Guidelines were issued on August 19, 2010.[9] The DOJ and the FTC noted that the 2010 Guidelines derived from their collective experience in assessing thousands of transactions focusing on the types of evidence the agencies use to decide whether a merger of competitors may harm competition. Many of the proposed refinements and changes reflect issues previously identified in the "Commentary on the Horizontal Merger Guidelines" and the agencies claim to have taken into account a wide range of opinions gathered through a series of joint public workshops, as well as hundreds of public comments submitted by attorneys, academics, economists, consumer groups and businesses which were posted on the FTC website.

The DOJ and the FTC provided a list of what they believed are material differences between the 1992 Merger Guidelines and the 2010 Merger Guidelines and noted specifically that the 2010 Guidelines:

- Clarify that merger analysis does not use a single methodology, but is a fact-specific process through which the agencies use a variety of tools to analyze the evidence to determine whether a merger may substantially lessen competition.
- Introduce a new section on "Evidence of Adverse Competitive Effects." This section discusses several categories and sources of evidence that the agencies, in their experience, have found informative in predicting the likely competitive effects of mergers.
- Explain that market definition is not an end itself or a necessary starting point of merger analysis, and market concentration is a tool that is useful to the extent it illuminates the merger's likely competitive effects.
- Provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.
- Update the concentration thresholds that determine whether a transaction warrants further scrutiny by the agencies.
- Provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.
- Provide an updated section on coordinated effects. The guidelines clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.
- Provide a simplified discussion of how the agencies evaluate whether entry into the relevant market is so easy that a merger is not likely to enhance market power.
- Add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

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[8] Available at:
http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

[9] Available at http://ftc.gov/os/2010/08/100819hmg.pdf

The agencies emphasized that the 2010 Merger Guidelines were implemented to take into account legal and economic development that had occurred over the 18 years since the issuance of the 1992 Merger Guidelines and were not intended to represent a change in the direction of merger review policy, but to offer more clarity on the merger review process.