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Horizontal Merger Guidelines Revised To Reflect Merger Review Process

Jody Coultas (Wolters Kluwer Law & Business) · Thursday, August 26th, 2010

On August 19, 2010, the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) issued the final revised Horizontal Merger Guidelines in order to reflect changes to the agencies’ merger review process and to assist businesses in understanding how the agencies evaluate proposed mergers and acquisitions. The current guidelines are meant to replace the guidelines first issued in 1992 and revised in 1997.

The Guidelines outline the techniques, practices, and enforcement policies used by the DOJ and FTC to assess mergers and acquisitions involving actual or potential competitors under the federal antitrust laws, specifically Section 7 of the Clayton Act which prohibits mergers if the effect of such an acquisition may be to lessen competition or to tend to create a monopoly. The guidelines reflect legal and economic changes that have taken place over the 18 years since the last revision and congressional intent that merger enforcement stop competitive problems in their infancy without interfering with transactions that will not have a competitive impact on the market.

Unlike the more rigid approach imposed by the 1992 Guidelines, the current Guidelines emphasize that horizontal mergers will be assessed based on the competitive effects of a deal and provide detailed descriptions and examples of the evidence the agencies consider in the merger review process. FTC Chairman Jon Leibowitz noted that the Guidelines “contain revised discussions of several factors that may be important in analyzing a merger, among them innovation and product variety, coordinated effects, price discrimination, and market entry.” Where evidence of competitive effects already exists, market definition will not be as crucial to the agencies’ merger analysis under the revised Guidelines and will serve only to identify market participants and measure shares after a competitive concern is identified. The devaluation of market definition in the assessment of merger transactions reflects the agencies’ actual experience in failed merger challenges.

Other changes to the Guidelines include: an explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice; updated concentration thresholds that determine whether a transaction warrants further scrutiny; an expanded discussion of how the agencies evaluate unilateral competitive effects; an updated section on coordinated effects; a 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; and new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

“These Guidelines properly consider competitive effects first, and market definition second, thereby making clear that while market definition is important to assessing competitive effects and that the market must be defined at some point in the process, ultimately merger analysis must rest on the competitive effects of a transaction. Additionally, these Guidelines make a substantial contribution by listing at the outset a variety of empirical evidence that may illuminate those competitive effects,” according to Commissioner J. Thomas Rosch.

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