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Antitrust

Antitrust Agencies Seek Public Comments On Revised Horizontal Merger Guidelines

Federal antitrust agencies are seeking public comment on proposed revisions to their Horizontal Merger Guidelines that have not been updated since 1992, according to an announcement by the Federal Trade Commission.

The proposed revisions, while containing few substantive changes, alter the formula for assessing a merger's impact on market concentration and reflect a less formulaic and more narrative approach to describing the considerations the agencies will utilize in assessing the impacts of a horizontal merger on competition, according to health care antitrust attorneys who spoke to BNA.

Public comments are due May 20, FTC said in an April 20 press announcement.

The proposed changes to the market concentration screening thresholds based on the Herfindahl-Hirschman Index (HHI) were expected because the pre-existing thresholds were no longer meaningful from a merger review and enforcement perspective, the attorneys said. The adoption of an approach that is more descriptive of the review process could, however, affect the ability of health care antitrust attorneys to provide meaningful prospective merger analysis, they added.

The release of proposed revisions follows a series of public workshops the two agencies conducted to explore whether a rewrite was needed. They held five workshops that generated a large number of comments from attorneys, academics, economists, consumer groups, and businesses, FTC said.

At the time those workshops were announced, health care antitrust attorneys said a rewrite could have a significant effect on health care because the need for increased monitoring and oversight of health care mergers, on both the provider and payer side, have been cited as part of health care reform discussions and as a key priority of the Obama administration and federal enforcement agencies.

New, Less Formulaic, Approach. According to Douglas Ross, with Davis Wright Tremaine LLP, Seattle, the proposed guidelines are, in some ways, nothing new because they describe the process the government has been using for several years. "They do, however, contain a great deal that is different from what was in the 1992 version because the horizontal merger review process has evolved a great deal since then," he said.

"The new guidelines are less formulaic than the old guidelines, adopting a more descriptive assessment of the review process that is arguably less predictive of the outcome," Ross continued. "They also increase the HHI screen but in health care mergers, at least, the old screen numbers simply were no longer meaningful," he said. "It remains to be seen, however, if the new ones will be more meaningful," he added.

"The guidelines do describe a variety of sources the agencies will look to for information and because of the variety, the amount of information that might be relevant is broad," Ross said. "But again, this simply describes how they have been doing business in recent years so hospitals and others shouldn't fear that once these guidelines are final, new burdens will be imposed on merging parties. Those burdens are there now," he said.

Richard Raskin, with Sidley Austin LLP in Chicago, said the proposed guidelines appear to be more "nuanced, reflecting the agencies' actual merger review practices." Raskin said he was concerned, however, that this change in approach could make it more difficult for health care antitrust attorneys to advise their clients.

"The revised Guidelines address a number of nuances that have long been a part of merger analysis, but were not addressed in the Guidelines themselves—issues like direct effects, power buyers, and innovation. In that sense, they provide greater transparency, and that's good," Raskin said.

"I do worry, however, that there is something of a trade-off between nuance and clarity, and that the revisions will make the task of conveying to clients the thought processes of the agencies even more challenging than it already was," he said.

FTC, in its announcement, said the two agencies relied on their collective experience since 1992, on previous public comments, and on feedback from their workshops. FTC Chairman Jon Leibowitz noted that the proposed guidelines "reflect the current state of merger analysis at the FTC and DOJ and will help make the process more transparent to American businesses and courts."

Proposed Changes. The updated guidelines provide stakeholders with insight into how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law.

The two agencies held joint public workshops over the past six months to discuss whether an update to the guidelines was warranted. "The five workshops were open to the public and generated a large number of

comments from attorneys, academics, economists, consumer groups, and businesses,” the FTC reported.

The agency also pointed out that a significant portion of the proposed guidelines reflect refinements and changes previously identified in the *Commentary on the Horizontal Merger Guidelines*, which the agencies issued jointly in 2006.

The FTC provided several clarifications and differences between the current and proposed guidelines, such as:

- The proposed revision would clarify that merger analysis does not use a single methodology but is a fact-specific process through which the agencies use various tools to analyze the evidence to determine whether a merger may substantially lessen competition.

- The proposed revision would 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.

- The proposed revision explains that market definition is not an end itself or a necessary starting point of merger analysis, but is a useful tool for illumination of a merger’s likely competitive effects.

- The proposed revision provides an updated explanation of the hypothetical monopolist test used to define relevant geographic and product markets and how the agencies implement that test in practice.

- The proposed revision offers 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.

Public comments on the merger guidelines should be submitted to Secretary, FTC, 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.

The proposal is available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.