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By Electronic Submission

HMG Review Project – Comment, Project No. P092900

Federal Trade Commission
Office of the Secretary, Room H-135 (Annex P)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Sir or Madam:

The Antitrust Law Section of the New York State Bar Association is pleased to submit the attached comments to the Federal Trade Commission and the Department of Justice on the Horizontal Merger Guidelines Review Project No. P092900. Thank you for the opportunity to comment on this important set of issues.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Executive Committee of the New York State Bar Association and should not be construed as representing the position of the New York State Bar Association.

If you have any questions after reviewing these comments, we would be happy to provide further responses.

Sincerely,

Bruce J. Prager
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**COMMENTS OF THE ANTITRUST LAW SECTION OF THE NEW YORK
STATE BAR ASSOCIATION REGARDING THE FEDERAL TRADE
COMMISSION AND THE U.S. DEPARTMENT OF JUSTICE HORIZONTAL
MERGER GUIDELINES REVIEW PROJECT (PROJECT NO. P092900)**

December 2, 2009

The Antitrust Law Section of the New York State Bar Association (“Antitrust Law Section”) is pleased to offer these comments on the Federal Trade Commission’s (“FTC”) and the U.S. Department of Justice’s (“DOJ”) (together, the “Agencies”) project to consider whether to revise their jointly issued Horizontal Merger Guidelines (the “Guidelines”).¹

With more than 500 members, the Antitrust Law Section is a diverse association of antitrust experts and practitioners in the State of New York in the private and public sectors. Due to the breadth of its constituency, the Antitrust Law Section is unlikely to achieve a consensus in responding to the numerous questions the Agencies posed for public comment in connection with the upcoming workshops. Rather than address each of the Agencies’ questions, therefore, the Antitrust Law Section endorses generally the concept of revising the Guidelines and provides two broad comments that address the greatest concerns of its members. First, the revisions should close the gap between the enforcement policies embodied in the Guidelines and the actual practices of the Agencies. Second, the revisions should reflect certain analytical tools reflected in recent scholarly legal and economic commentary that are not now included in the Guidelines.

The Antitrust Law Section believes that increasing transparency of the Agencies’ merger enforcement decision-making process can only serve to make the application of the Guidelines more predictable to the business community and the public at large. Predictability and transparency, the Section believes, ultimately foster a more competitive marketplace.

I. The Guidelines Should Reflect The Agencies’ Practice

To be useful to the public, antitrust practitioners, and the courts, the Guidelines should reflect the reality of the Agencies’ enforcement decisions. Indeed the Guidelines’ stated purpose is to “describe the analytical framework and specific standards normally used by the Agencies in analyzing mergers.” In practice, however, a noticeable discrepancy has developed between enforcement theory and enforcement practice.

Perhaps nowhere do the Guidelines present such a false sense of precise guidance as with respect to the numerical benchmarks associated with the Herfindahl Hirschman Index (“HHI”). According to the Guidelines, markets characterized by a post-merger HHI above 1800 points are considered to be “highly concentrated.” The Guidelines go so far as to state that where the post-

¹ The opinions expressed herein are those of the Antitrust Law Section of the New York State Bar Association and do not represent the opinions of the New York State Bar Association unless and until the opinions have been adopted by the Association’s House of Delegates or Executive Committee. Executive Committee members who are employed by the Federal Trade Commission or the Department of Justice did not participate in the discussion or drafting of these comments.

merger HHI exceeds 1800 points, and where the merger increases concentration in a relevant market by at least 100 points, the Agencies will “presume[]” that the proposed transaction “will likely create or enhance market power or facilitate its exercise.” The Guidelines warn that, absent a rebutting of this presumption of illegality, the parties to such a transaction should expect the Agencies to seek injunctive relief to block it. In actual practice since 1992, however, the Agencies have rarely challenged mergers that were close to the 1800 HHI borderline region. It seems clear that, with experience, the Agencies have determined informally that transactions in this region pose less of a threat of creating or enhancing market power than was thought originally in 1992. If so, the Guidelines’ statement of enforcement with respect to market concentration may actually be misleading, especially to counsel, courts and businesses who are unfamiliar with the Agencies’ history of enforcement.

The issue of practice diverging from policy is not limited to market concentration measurement. Rather, there are many other Guideline sections where statements of intention and patterns of enforcement are not congruent. Accordingly, the Antitrust Law Section urges the Agencies to clarify those areas of the Guidelines where experience has moved the Agencies in a different direction from their stated positions.

II. The Guidelines Should Be Revised To Include Emerging Analytical Tools

Since 1992, there has been a rich discussion in the academic literature about merger enforcement policy and innovative ways to assess the competitive effects of a merger. For example, commentators, including prominent members of the current administration of both Agencies, have argued that so-called “diversion ratios” might be a more accurate measure of competitive effects than the conventional HHI analysis in a proposed combination of sellers in a highly differentiated product market. Other commentators have argued that the concept of defining relevant markets should be eliminated entirely in situations where the government or the parties have access to direct evidence of competitive effects. The notions of “natural experiments” and “critical loss” analysis, while not new, are examples of other common evidentiary or competitive effect analyses that are not developed in the Guidelines yet are often debated in merger litigation.

The questions posed by the Agencies in connection with the proposed workshops touch upon some of these questions but only to a limited degree. While the Antitrust Law Section does not endorse any specific analytical methodology for determining the likely competitive effects of a merger or acquisition, it is interested in seeing that the Guidelines address all relevant methodologies that the government actually considers in deciding whether to exercise its prosecutorial discretion. Accordingly, the Antitrust Law Section recommends that the Guidelines be revised to contain a section(s) that would explain the circumstances under which the Agencies might consider each of these alternative analytical methodologies, including the impact, if any, of the likely acceptance of such methodologies by the federal courts. (The above examples are included by way of illustration and are not intended to be an exhaustive list of such methodologies.) Conversely, to the extent the Agencies intend largely to continue to rely heavily upon traditional market definition and concentration analysis, the Antitrust Law Section recommends that the Agencies explain why it rejects these alternative models. Finally, the Antitrust Law Section suggests that the Agencies explain the importance it places on the

documents of companies at issue and third parties in relation to the analytical methodologies upon which it relies.

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The Antitrust Law Section would like to thank the Agencies for considering these comments and would be happy to respond to any follow-up questions the Agencies may have.