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SUMMARY OF SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act (Section 7)¹ is the principal federal substantive law governing mergers, acquisitions, and joint ventures.² Section 7 prohibits not only the acquisitions of “stock” but also the acquisitions of “assets” where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” The original Section 7, enacted in 1914, only prohibited the acquisitions of “stock” of one corporation by another corporation, and, by its explicit term, it was not applied to the “assets” acquisitions. As a result, businesses found their ways to evade the prohibition by buying target corporation’s assets. Congress amended Section 7 to “plug [this] loophole”³ by passing the Celler-Kefauver Antimerger Act (Celler-Kefauver Act).⁴ The “assets” include not only tangible assets but also intangible assets including patents, trademarks, copy rights, and certain contractual rights.⁵ Celler-Kefauver Act also enabled Section 7 to reach vertical and conglomerate mergers as well as horizontal mergers⁶ by removing original “acquiring-acquired” term.⁷

One of the distinctive characteristics of Section 7 regarding the merger context is its lowered standard of proof for the anticompetitive effects. Under Section 7, mergers could be forbidden where “the trend to a lessening of competition in a line of commerce was still in its incipency”⁸ and had not ripened into monopoly power, whereas the Sherman Act requires proof of extant

¹ 15 U.S.C. § 18.

² ABA SECTION OF ANTITRUST LAW, MERGER REVIEW PROCESS [hereinafter MERGER REVIEW PROCESS], 1 (4th ed. 2012)

³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962)

⁴ Celler-Kefauver Antimerger Act of 1950, 64 Stat. 1225.

⁵ ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS [hereinafter ANTITRUST DEVELOPMENTS], 335 (7th ed. 2012); *see, e.g.*, *SCM Corp. v. Xerox Corp.*, 645 F.2d. 1195 (2d Cir. 1981); *United States v. Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960).

⁶ A “Horizontal” merger generally occurs when one firm acquires another firm that manufactures the same product in the same geographic market. A “Vertical” merger typically occurs when one firm acquires either a customer or supplier. A “Conglomerate” merger encompasses all other acquisition. *See* ANTITRUST DEVELOPMENTS, *supra*, note 5, at 337.

⁷ *See* 370 U.S. at 317.

⁸ *Id.*

harm to competition.⁹ The term “may be substantially to lessen competition” indicates that Section 7 illegality is based on probable, rather than definite, anticompetitive effects.¹⁰

Section 7 covers, by the amendment in 1980,¹¹ the acquisitions not only among “corporations” but also among “persons.” This change allowed the section to cover the acquisitions by natural persons, partnerships, and other unincorporated associations and business entities.¹² Some courts also have applied Section 7 to nonprofit corporations.¹³

The Supreme Court admitted that Section 7 applied to most acquisitions of “any part” of the stock of a company.¹⁴ The courts, however, have not stated how large a percentage of stock must be acquired to raise concerns about the anticompetitive effects by the transaction.¹⁵ Nevertheless, the courts have held that Section 7 violation generally involved acquisitions of holding of at least fifteen percent.¹⁶

Stock acquisitions made “solely for investment” are exempted from the Section 7 application.¹⁷ In order to qualify for the exemption, the stock must not be used “by voting or other wise to bring about, or in attempting to bring about, the substantial lessening of competition.”¹⁸

Section 7 is mainly enforced by the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). It may also be enforced by state attorneys general and private parties pursuant to Section 4 or 16 of the Clayton Act.¹⁹

Section 7 application generally requires a determination of the product and geographic dimensions of the relevant market.²⁰ In analyzing the competitive effects within the defined relevant market, the key issues will be whether the acquisition will create or enhance market power or facilitate its exercise, either by coordination or unilateral conduct.²¹ In order to understand the substantive merger standards and the federal enforcement agencies’ position, the Horizontal Merger Guidelines,²² jointly issued by the DOJ and the FTC, is of particular help. The National Association of Attorneys General also has issued merger enforcement guidelines.²³

⁹ ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS – UNDERSTANDING THE ANTITRUST ISSUES [hereinafter M&A ANTITRUST ISSUES], 4-5 (3d ed. 2008); *See* 370 U.S. at 317-8; *United States v. Phil. Nat’l Bank*, 374 U.S. 321, 362 (1963); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

¹⁰ M&A ANTITRUST ISSUES at 5.

¹¹ Antitrust Procedural Improvements Act of 1980, 94 Stat. 1154.

¹² M&A ANTITRUST ISSUES, *supra* note 9, at 5.

¹³ *See, e.g.*, *FTC v. Freeman Hosp.*, 69 F. 3d. 260 (8th Cir. 1995).

¹⁴ *E.I. du Pont de Nemours & Co.*, 353 U.S.at 592.

¹⁵ ANTITRUST DEVELOPMENTS, *supra* note 5, at 335-6.

¹⁶ *Id.*

¹⁷ 15 U.S.C. § 18.

¹⁸ 15 U.S.C. § 18.

¹⁹ 15 U.S.C. § 15 (a), 26.

²⁰ *See E.I. du Pont de Nemours & Co.*, 353 U.S.at 593.

²¹ MERGER REVIEW PROCESS, *supra* note 2, at 3.

²² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>; <http://ftc.gov/os/2010/08/100819hmg.pdf>

²³ NAT’L ASSOC. OF ATT’Y GEN., HORIZONTAL MERGER GUIDELINES (1993), *available at* http://naag.org/assets/files/pdf/at-hmerger_guidelines.pdf