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## **FTC URGED TO REVISE GUIDELINES FOR REVIEW OF HORIZONTAL MERGERS**

The Washington Legal Foundation (WLF) this week criticized the Federal Trade Commission's (FTC) proposed Guidelines for its review of horizontal mergers, and urged the agency to revise them substantially before issuing them in final form.

In formal comments filed with the FTC, WLF stated that the proposed Guidelines suggest that the FTC is intending to adopt a much more aggressive posture in its review of proposed mergers. WLF argued that such aggressiveness is unwarranted and threatens to discourage mergers that would promote competition and benefit consumers.

Federal antitrust laws prohibit mergers whose effect "may be substantially to limit competition." They require large corporations contemplating a merger to provide the FTC and the Justice Department's Antitrust Division (DOJ) with 30-days advance notice of an intent to merge. That advance notice provides the FTC and the DOJ with an opportunity to investigate the merger and, if they determine that the merger would have anti-competitive effects, to file a court action to prevent its consummation. The FTC for many years has made publicly available its Guidelines regarding how it goes about evaluating the propriety of proposed mergers.

The current Guidelines focus squarely on the extent of "market concentration" in the markets served by the merging firms (*e.g.*, a given market is deemed highly concentrated if only a few companies produce most of the products that comprise that market). The current Guidelines require the FTC to define the relevant market(s) and indicate that, in general, unless the merging companies are two of the largest sellers in a highly concentrated market, the FTC is unlikely to oppose the proposed merger.

The proposed Guidelines would drastically reduce the importance of such market-concentration analysis in the FTC's review. While the proposed Guidelines provide that market concentration continues to be one factor to be considered by the agency, they state that the agency will also look at a wide variety of other factors in determining whether the merger should be deemed to have anti-competitive effects. In its comments submitted to the FTC, WLF criticized this shift in focus. WLF argued that the shift of focus eliminates virtually all "safe harbors" and thus deprives large

firms of meaningful guidance which they can rely on to ensure that their proposed mergers will not lead to federal antitrust enforcement.

WLF's comments also criticized the FTC's increased focus on "unilateral effects" analysis. That analysis postulates that when two firms sell "differentiated" products that serve as close substitutes for one another, a merger of those firms can raise anticompetitive concerns because the merged firm can now raise the price of one product yet will be able to capture some of the lost sales – they will merely be diverted to the product of the merger partner. According to the FTC, such a price increase will lead to increased profit if even a small fraction of the lost sales are diverted to the merger partner – thereby injuring consumers. In criticizing that approach, WLF argued that the mere fact that two products may serve as close substitutes for one another does not necessarily imply a lack of competition elsewhere in the market. Unless the FTC begins by calculating market share and concentration, it is unlikely to fully consider the likelihood that non-merging firms will respond to any price increase by repositioning their products and quickly beginning to sell close substitutes, WLF asserted. It noted that any such repositioning would render unprofitable any attempt by the merged firm to raise prices.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. WLF regularly litigates in federal court in support of its belief that the antitrust laws should be applied sparingly and only for the purpose of promoting competition, not competitors.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).