

Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines

William C. MacLeod

May 12, 2010

UPDATE: FTC Extends Public Comment Period on Proposed Revised Horizontal Merger Guidelines Through June 4.

The Federal Trade Commission ("FTC") has extended the deadline for members of the public to comment on the joint FTC/Department of Justice proposed revised Horizontal Merger Guidelines through June 4, 2010, at the request of several organizations that plan to submit comments. The proposed Guidelines were issued on April 20, 2010, and the original comment period was set to expire on May 20, 2010.

The draft Guidelines are designed to better reflect how the FTC and the Department of Justice, Antitrust Division, evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. The proposed update will replace the Merger Guidelines last revised in 1997. Key changes and their implications are outlined below.

Headline Changes

- The draft Guidelines add new topics not included in the 1992/1997 version, such as innovative effects, auction markets, and minority stakes in competitors.
- Although the draft Guidelines add new topics, they are generally consistent with current enforcement analysis used at the agencies.
- De-emphasis of market definition is replaced with emphasis on flexible, fact-based, competitive effects analysis.
- The draft Guidelines put less emphasis on, and revise, the Herfindahl-Hirschman Index ("HHI") threshold as a predictive market concentration screen.

Takeaways

- Strategic transactions in concentrated markets need a compelling pro-competitive, merger-specific rationale, along with customer support.
- Clayton Act, Section 7 case law still recognizes an important role for relevant market definition, and the agencies cannot change precedent by revising guidelines.

- The new Guidelines will influence antitrust and competition authorities in other countries.

The proposed Guidelines are available now on the FTC's website at:

<http://www.ftc.gov/opa/2010/04/hmg.shtm>. Public comments are being accepted until June 4, 2010.

Please contact us to discuss how this development might impact your business plans, or if you would like to submit comments.

Kelley Drye & Warren LLP

Kelley Drye is recognized as a premier antitrust and competition firm. Our national reputation stems from our proven track record of successfully representing clients in complex competition issues arising under federal and state antitrust laws. Our professionals include officials from the ABA Antitrust Section, and former officials of the United States Department of Justice Antitrust Division and the FTC. Our firm is also supported by [Georgetown Economic Services](#), an economic consulting firm.

For more information about this client advisory, please contact:

[William C. MacLeod](#)

202-342-8811

wmacleod@kelleydrye.com