ROBINSON & COLE LLP
ATTORNEYS AT LAW

UPDATE
Business Transactions

OCTOBER 2010

The FTC and the DOJ Issue Revised Horizontal Merger Guidelines

The Federal Trade Commission and the Department of Justice (collectively, the Agencies) recently released the final version of the revised Horizontal Merger Guidelines (2010 Guidelines). The 2010 Guidelines outline the analytical techniques, practices, and enforcement policy of the Agencies with respect to mergers and acquisitions involving actual or potential competitors. They replace the 1992 version of the Horizontal Merger Guidelines (1992 Guidelines), which were again revised in 1997. While the 2010 Guidelines, which went into effect on August 19, 2010, are not law, they are an important guide for both practitioners and businesses in understanding the current approach of the Agencies in evaluating whether to challenge a specific transaction.

FACTORS DRIVING REVISION

The decision to revise the 1992 Guidelines was largely driven by three factors. First, the Agencies' actual review process had evolved significantly since 1992, and there was widespread agreement both inside and outside of the government that their current practices needed to be more transparent to the public and more accurately reflected in the guidelines. Second, the Agencies felt restricted by the rigid, linear process set forth in the 1992 Guidelines and believed they needed a more flexible approach that would permit them to emphasize certain elements and to disregard others, based on the facts of the specific transaction. Third, the 1992 Guidelines had become a hindrance to the Agencies in court cases, as some courts rejected challenges by the Agencies when they determined that the Agencies had strayed from the rigid analytical approach set forth in the 1992 Guidelines.

THREE SIGNIFICANT CHANGES

The 2010 Guidelines contain three significant changes. First, they eliminate the singular step-by-step evaluation process from the 1992 Guidelines in favor of a more flexible, economically- and fact-driven approach. Under this new approach, the Agencies have discretion to use any "reasonable available and reliable evidence" to evaluate the competitive effects of a particular transaction. As a result, they can tailor their review process based on the facts of the transaction, without risk that the 2010 Guidelines will be used against them by the courts.

Second, the 2010 Guidelines de-emphasize defining the relevant product and geographic markets of the merging parties. Defining markets was a central component of the analysis under the 1992 Guidelines. Instead, the 2010 Guidelines explicitly state that "[t]he Agencies' analysis need not start with market definition." In fact, some of the Agencies' analytical tools can be applied without reliance on market definition. It remains to be seen whether the courts, including the United States Supreme Court, which have been similarly focused on market definition for decades, are receptive to this change. It is also not clear how the change can be practically implemented in some cases. For example, to assess the market concentration using the Herfindahl-Hirschman Index (HHI), the market has to be defined.

Lastly, it should be noted that while the Agencies continue to assess market concentration using the HHI, the 2010 Guidelines have raised the HHI concentration thresholds. For example, in the 2010 Guidelines, the market is considered "moderately concentrated" if postmerger the HHI is 1,500 to 2,499 and "highly concentrated" if postmerger, the HHI is 2,500 or higher. Additionally, a merger is presumed anticompetitive if it results in the HHI increasing by 200 points or more in a market that is "highly concentrated." In keeping with the discussion on market definition, the 2010 Guidelines note that HHI calculations are not dispositive; rather, they are another tool that may be used by the Agencies to assess competitive concerns. The Agencies declare that these HHI threshold increases merely reflect current practices at the Agencies and do not relax their standards.

OTHER REVISIONS

The 2010 Guidelines also contain an updated discussion on the Agencies' assessment of the unilateral effects of a transaction, that is, whether a combined firm is incentivized to raise prices on products because it no longer worries about losing sales to its (now merged) competitor. The 2010 Guidelines introduce the use of a diversion ratio - a measure of the fraction of unit sales diverted to a second product when the price of the first product increases - as another analytical tool of the Agencies to measure these unilateral effects.

The 2010 Guidelines also provide that the Agencies can consider the nonprice effects of a transaction, such as potential harm to innovation and/or product variety, when evaluating whether a proposed transaction will have anticompetitive effects. Also, as a way of providing further flexibility to the Agencies, the 2010 Guidelines eliminate the presumption that the Agencies will not investigate the unilateral effects of a transaction unless the merged company has a combined market share of 35 percent or more.

WHAT REMAINS THE SAME?

- Similar to the 1992 Guidelines, the 2010 Guidelines apply to all horizontal mergers, regardless of whether the transaction is reportable under Hart-Scott-Rodino and regardless of whether the transaction has closed.

- The Agencies can continue to solicit evidence not only from the parties themselves but also from suppliers, customers, competitors, and other industry participants and observers.

- Entry into the market is still a valid defense as long as the potential entry is timely, likely and sufficient to counter the competitive effects of concern.

- The 2010 Guidelines continue to impose a high burden on parties asserting the "failing firm" defense - a claim that the transaction does not enhance market power, as the failure or exit of one of the parties is imminent.

ANTITRUST REMINDERS:

The release of the 2010 Guidelines also provides a timely opportunity to offer these general reminders about competition issues in Mergers and Acquisitions transactions:

- Avoid comments on market share, market power and/or the ability to raise prices or exclude any competitor from the market. If the transaction is reportable under Hart-Scott-Rodino, the parties may have to disclose documents with these comments (i.e., "4(c) documents") to the Agencies.

- Do not attempt to coordinate or control the other party's business activities prior to closing. While limited integration planning is permitted, the Agencies will aggressively investigate and prosecute any excessive preclosing coordination (i.e., "gun-jumping").

- Remember that the Agencies have the ability to challenge any transaction, regardless of whether the transaction is reportable under Hart-Scott-Rodino and regardless of whether the transaction has closed.

If you have any questions about these changes and how they affect your proposed transaction, please contact any of the following attorneys in our Business Transactions Group:

Kathleen M. Porter	William T. Sellay	Brian M. Flaherty
Boston Office	Hartford Office	Boston Office
(617) 557-5989	(860) 275-8292	(617) 557-5932
kporter@rc.com	wsellay@rc.com	bflaherty@rc.com
