ADVISORY BULLETIN

August 2010

COMPETITION, ANTITRUST & WHITE-COLLAR CRIME UPDATE

FTC and DOJ Issue Revised Horizontal Merger Guidelines

FTC Also Proposes Amendments to the HSR Rules and Form

On August 19, 2010, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (the "Agencies") issued revised Horizontal Merger Guidelines. The new Guidelines mark the first significant revision to the Agencies' Merger Guidelines since 1992. The revised Guidelines are intended to explain the analytical processes that the Agencies currently use to evaluate the competitive impact of mergers and acquisitions.

The new Guidelines are not a radical departure from the 1992 Guidelines. The same general techniques are used to evaluate relevant markets, competitive effects, market concentration levels, entry and efficiencies. The focus of the new Guidelines remains the same, i.e., whether the merger will allow the merging parties to exercise market power (raise prices, reduce output, and/or restrict innovation). But the new Guidelines provide some helpful clarifications on how the Agencies actually approach merger analysis.

First, the new Guidelines make clear that the Agencies do not apply a single analytical approach to all transactions ("merger analysis does not consist of uniform application of a single methodology"). The Agencies will apply the approach that best fits the facts of a particular case.

Second, the new Guidelines represent an effort to downplay the significance of market definition, particularly where the theory of economic harm is based on a "unilateral effects" analysis. ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition…").

Third, the new Guidelines place an even greater reliance on economic models to evaluate competitive effects, so much so that Commissioner Rosch publicly objected to the overreliance on such models in the new Guidelines.

One thing is clear; the new Guidelines more accurately reflect how the Agencies actually evaluate the potential competitive effects of mergers. Even if courts may be reluctant to embrace some of the economic models explained in the new Guidelines, merger parties and their counsel must be prepared to deal with them. After all, most merger cases are not won or lost in court; they are won or lost when the Agencies decide whether to bring a challenge.

The revised Guidelines are on the FTC's website at http://www.ftc.gov/os/2010/08/100819hmg.pdf and at http://www.justice.gov/atr/public/guidelines/hmg-2010.html on the DOJ's website.

© 2010 THOMPSON HINE LLP. ALL RIGHTS RESERVED.

HIGHLIGHTS OF THE REVISED MERGER GUIDELINES

Evidence of Adverse Competitive Effects

The Agencies introduced a new section in the revised Guidelines that discusses several categories and sources of evidence that they have found to be particularly informative in predicting the likely competitive effects of a merger:

- actual effects observed in **consummated** mergers such as post-merger price increases or other changes adverse to customers (this is consistent with the Agencies' recent emphasis on challenging consummated mergers);
- so-called "natural experiments" such as recent mergers, entry, expansion or exit in the market and how those events affected competition in the market;
- market shares, level of concentration and change in concentration in a relevant market caused by a merger (this evidence is relevant to the traditional "coordinated effects" approach to merger analysis);
- substantial head-to-head competition between the merging firms (this evidence is relevant to determining whether the merging parties will be able to raise prices without regard to other market participants, i.e., "unilateral effects"); and
- disruptive role of one of the merging parties (sometimes referred to as a "maverick" firm).

The Guidelines state that the Agencies will gather evidence of this type from many different sources, but the "most common sources of reasonably available and reliable evidence" are the merger parties, customers, suppliers, distributors, other industry participants and industry observers.

Unilateral Effects

The new Guidelines substantially expand the discussion of unilateral effects from a merger. Unilateral effects means that "[a] merger can enhance market power simply by eliminating competition between the merging parties. The effect can arise even if the merger causes no changes in the way other firms behave." In practice, unilateral effects analysis has eclipsed coordinated effects as the principal basis on which the Agencies challenge mergers. The new Guidelines delineate four ways in which a merger can result in anticompetitive effects based solely on the post-merger actions of the merging firms:

- *Pricing of Differentiated Products*: Where the products of the merging firms are "differentiated" (i.e., unlike commodities, the products have different characteristics that

affect consumer choice), a merger may allow the merging parties to raise prices if consumers consider the merging parties' products to be the closest substitutes for one another.

- *Bargaining and Auctions*: Where buyers use bids, auctions and/or negotiations to procure products and the merging firms' products frequently end up being the first and second choice, a merger may prevent buyers from playing the firms against each other, resulting in diminished competition and higher prices.

- *Capacity and Output for Homogeneous Products*: A merger between competitors with relatively undifferentiated products and significant market shares may allow the merged firm to profit from unilaterally suppressing output.

- *Innovation and Product Variety*: A merger may diminish innovation where, for example, one of the merging firms has been developing a product that would have taken sales from the other firm. Under these circumstances, the merger could result in the abandonment of the product development effort.

Coordinated Effects

The Agencies have traditionally challenged mergers based on the theory that when a merger substantially increases market concentration, there is a greater likelihood that the remaining competitors can and will coordinate their behavior. Like the 1992 Guidelines, the new Guidelines recognize that the actual ability to coordinate behavior depends on a host of market-specific factors.

The new Guidelines, like the 1992 Guidelines, use the Herfindahl-Hirschman Index (HHI) to delineate certain levels of market concentration where mergers are likely to draw closer scrutiny. However, the new Guidelines have increased the HHI levels at which competitive harm will be presumed. These changes are intended to comport with actual Agency practice. Under the new Guidelines, markets are classified as follows:

Markets	HHI	Standards
Unconcentrated	Below 1500 (previously below 1000)	Mergers are unlikely to have adverse competitive effects and ordinarily require no further analysis.
Moderately Concentrated	Between 1500 and 2500 (previously between 1000 and 1800)	Mergers that result in an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
Highly Concentrated	Above 2500 (previously above 1800)	Mergers that result in an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers that result in an increase in the HHI of more than 200 points will be presumed likely to enhance market power.

Powerful Buyers

The 2010 Guidelines introduce a new section on “powerful buyers.” At times, merging parties will contend that they cannot exercise market power because the buyers have so much countervailing power. The Agencies have generally been hostile to this argument. In the new Guidelines, the Agencies make clear that this defense will only be recognized where the buyers have the ability to (i) integrate vertically and produce the product made by the merging firms, (ii) induce new entrants into the merging firms’ market, or (iii) disrupt any coordination efforts.

Mergers Between Competing Buyers

The Agencies have occasionally challenged mergers on the grounds that the firms would have too much market power as buyers of products or services. The 2010 Guidelines introduce a new section on these transactions. The Agencies will use the same analytical framework to ascertain whether a

particular merger will result in too much market power on the buyer side. The key question is whether sellers will have sufficient outlets for their goods or services to obtain competitive prices.

Partial Acquisitions

The 2010 Guidelines also introduce a new section on partial acquisitions. The Guidelines provide that a partial acquisition that gives the buyer control over the target company will be evaluated like a full merger. Where control is not obtained, the Guidelines warn that anticompetitive effects can still arise in three ways. First, the buyer may still be able to influence the actions of the target firm in order to lessen competition between the buyer and the target. Second, the buyer may compete less aggressively against the target company because the buyer would share in any losses suffered by the target. Third, the buyer may have access to competitively sensitive information concerning the target company that could enhance the ability of the firms to coordinate their behavior.

The 2010 Horizontal Merger Guidelines represent an effort to bring the Guidelines into conformity with actual Agency practice. Any company contemplating an acquisition or merger will need to understand how the new Guidelines may impact the antitrust analysis of the transaction.

Proposed Amendments to the Hart-Scott-Rodino Act Rules and Form

On August 13, 2010, the FTC proposed revisions to the Premerger Notification Rules, the Premerger Notification and Report Form and the Instructions under the Hart-Scott-Rodino Improvements Act of 1976 ("HSR"), as amended. The amendments are intended to give the Agencies a more complete and accurate picture of the competitive impact of mergers, acquisitions and other transactions.

Although the proposed amendments recommend eliminating several items that the Agencies did not find useful (such as company revenues reported in a base year and balance sheets), the proposed amendments also require filers to provide additional Item 4(c) documents and revenue and ownership information. The proposed modifications to the Rules, together with the proposed changes to the Premerger Notification and Report Form and Instructions, are discussed below.

The FTC is seeking comments on the proposed amendments to the Rules, the Form and the Instructions. Comments must be received on or before October 18, 2010.

Highlights of the Proposed HSR Changes

New Reporting Requirements Regarding "Associates" of Acquiring Persons

One of the most significant proposed amendments is the introduction of the concept of an "associate" of an acquiring person. An "associate" is defined as:

> an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a "managing entity"); or (B) has its affairs and/or investments, directly or indirectly, managed,

directed or overseen by the acquiring person; or (C) directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.

Examples of "associates" provided by the FTC include "general partners of a limited partnership, other partnerships with the same general partner, other investment funds whose investments are managed by a common entity or under a common investment management agreement, and investment advisors of a fund."

The "associate" concept will primarily impact investment funds and private equity groups. Under a proposed new Item 6(c)(iii) of the HSR form, an acquiring person will be required to report all of its associates' holdings of voting securities and non-corporate interests of 5% or more but less than 50% in entities with North American Industry Classification System ("NAICS") industry codes that overlap with the codes of the acquired entity or assets. This is intended to assist the Agencies in discovering potential competitive overlaps that would not be apparent in the current HSR form. In addition, proposed changes to Item 7 of the HSR form would require the identification of specific product overlaps between the acquired person and associates of the acquiring person.

Clarification of Item 4(c) Documents That Must Be Submitted with the HSR Filing

The proposed amendments clarify that certain types of documents must be treated as Item 4(c) documents and included in the Premerger Notification and Report Form filing. Many filers have included these documents as part of their filings in the past based on informal interpretations and advice from legal counsel.

- *Item 4(d)(i) - Offering Memoranda:* Offering Memoranda will need to be submitted regardless of whether they were prepared by or for officers or directors of the filing company for the purpose of evaluating the transaction with respect to markets, market shares, competition, competitors or potential for sales growth or expansion into product or geographic markets. Offering memoranda prepared up to two years prior to the date of the filing must be submitted if they reference the acquired entity or assets.

- *Item 4(d)(ii) - Materials Prepared by Investment Bankers, Consultants or Other Third Party Advisors:* Studies, surveys, analyses and reports prepared by investment bankers, consultants or other third-party advisors will now need to be included as part of the filing. The proposed amendments require that all such studies, analyses and reports must be produced if they (i) were prepared within two years prior to the date of the filing, (ii) reference the acquired entity or assets, and (iii) were prepared by or for officers or directors for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

- *Item 4(d)(iii) - Documents Discussing Synergies and/or Efficiencies:* Studies, surveys, analyses and reports that evaluate or analyze synergies and/or efficiencies likely to result

from the transaction will also need to be included in the filing if they were reviewed by officers or directors for the purpose of evaluating or analyzing the transaction. The FTC notes that financial models without stated assumptions would not need to be included in the filing under this new section.

Revenue Reporting Requirement Changes

Filers would no longer be required to report revenues in a base year (currently 2002). However, the FTC is also proposing that filers would be required to identify revenues for each product they manufacture outside the United States and sell into the United States. Filers are currently only required to report revenues "with respect to operations conducted within the United States." Also, revenue information for manufactured products in the filer's most recent year would need to be reported at the 10-digit NAICS product code level (currently, this information is reported at the broader 7-digit product class code level).

For More Information

For more information on the 2010 Horizontal Merger Guidelines and the proposed changes in the HSR Rules and Form, please contact:

Washington, D.C.

Charles L. Freed	202.973.2755	**Chuck.Freed@ThompsonHine.com**
Rachel G. Talay	202.263.4147	**Rachel.Talay@ThompsonHine.com**

Cleveland

Leslie W. Jacobs	216.566.5675	**Les.Jacobs@ThompsonHine.com**

Dayton

Barry M. Block	937.443.6964	**Barry.Block@ThompsonHine.com**

If you do not wish to receive future communications by email, please send an email with "unsubscribe" in the subject line to **Georgene.Davison@ThompsonHine.com**.

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2010 THOMPSON HINE LLP. ALL RIGHTS RESERVED.