



DEPARTMENT OF JUSTICE

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DEVELOPMENTS AT THE ANTITRUST DIVISION
&
THE 2010 HORIZONTAL MERGER GUIDELINES—ONE YEAR LATER

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Good morning. I always enjoy the opportunity the Fall Forum provides to see so many fellow antitrust attorneys and economists from around the country and from around the world.

I was appointed Acting Assistant Attorney General just over three months ago, and it has been a busy and exciting time to be at the division. As just one example, last month the U.S. District Court for the District of Columbia ruled in favor of the division in our challenge to the proposed acquisition by H&R Block Inc. of TaxACT, a digital do-it-yourself tax-preparation software provider.¹ I will talk about this case in more detail later in my remarks, but I highlight it now as an important success for our enforcement efforts and in keeping with the priorities that have characterized our approach for more than two-and-a-half years. When the Attorney General announced that he had selected me to serve as Acting Assistant Attorney General, he stated it would be a seamless transition.² That is what I am working to deliver—vigorous enforcement of the antitrust laws, as well as transparency and certainty for consumers and business.

¹ See Memorandum Opinion, *United States v. H&R Block, Inc.*, No. 1:11-cv-00948 (D.D.C. Nov. 10, 2011), available at <http://www.justice.gov/atr/cases/f277200/277287.pdf>.

² Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Appoints Sharis Arnold Pozen as Acting Assistant Attorney General, Antitrust Division, (Aug. 4, 2011), available at <http://www.justice.gov/opa/pr/2011/August/11-at-1012.html>.

I. Overview

I look at our work at the division as an extraordinary effort by an extraordinary staff to seek the truth about whether conduct or a merger is anticompetitive and thus, violates the law. To do this work requires certain essential building blocks. We start with a foundation, articulated by a President, who from the early days of his campaign, spoke of the importance of ensuring competitive markets and vigorous enforcement of the Sherman and Clayton Acts.³ And, with an Attorney General, who, at the first agriculture workshop held in Ankeny, Iowa, described the division as “open for business.”

Critical to this effort is the right structure. Currently, Division management includes the Deputy Assistant Attorneys General and the Special Advisors Joseph Wayland, Fiona Scott Morton, Scott Hammond, Leslie Overton, Rachel Brandenburger, and Gene Kimmelman.

Our Operations team also is critical to our work. Patty Brink, the Director for Civil Enforcement; John Terzaken, the Director for Criminal Enforcement; and Bob Majure, the Director of the division’s Economic Analysis Group (EAG) make up this team. We soon will be adding a

³ See, e.g., Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available at http://www.antitrustinstitute.org/files/aa-20Presidential20campaign%20-%20Obama%209-07_092720071759.pdf.

Director of Litigation, who will build on the division's institutional litigation expertise and be a part of the Operations team. These seasoned, career directors ensure that both the substance and the quality of our work are rock-solid. They also ensure that each and every investigation has the resources it needs so that we can reach a decision point efficiently and effectively.

Our Office of General Counsel, led by Bob Kramer, has been in place for about a year and is fully active, serving as the institutional repository of legal issues and standards that cut across both the civil and criminal program, as well as ensuring consent decree compliance. The office now has two Deputy General Counsels—Belinda Barnett for criminal matters and Nancy Olson for civil matters—and an Order Compliance Coordinator, who assists with the ongoing oversight some recent division consent decrees have required.

With this foundation, our civil merger and non-merger enforcement, criminal enforcement, competition advocacy and international initiatives have thrived. We have been active in all these areas and will continue to be.

Vigilant antitrust enforcement protects competition and gives American consumers lower prices, higher quality goods, and more innovation. I will update you today on our activities in each of these areas

as well as focus on one of our significant foundational projects, the revised Horizontal Merger Guidelines—one year later.

II. Merger Enforcement

Merger enforcement represents a large portion of the civil program, and our work in this area has increased over the last two years as more proposed transactions have come before the division. In Fiscal Year 2011, merging parties submitted 1,450 Hart-Scott-Rodino filings to the antitrust agencies, an increase from Fiscal Year 2010, in which parties made 1,166 filings.

Many proposed transactions do not pose a threat to competition and the division is able to determine quickly that no further action is currently warranted. Fiscal Year 2011 was no different in that regard; the division allowed 98 percent of the transactions it reviewed to clear its process without requesting any further information from the parties. In the remaining two percent of matters, the division identified potential competitive concerns and requested additional information from the parties to determine if the transaction posed a threat to competition.

From this limited group of transactions, the division identified those transactions that it determined required enforcement action. In many of these matters, the parties proposed remedies that the division agreed would

solve the competitive problem it had identified. In those cases, the division entered into a consent decree with the parties that will effectively preserve competition in the relevant markets while allowing the transaction to proceed.⁴ In other cases, in which the parties did not propose remedies that would effectively preserve competition, the division went to court to block the transaction. Our successful challenge to the H&R Block/TaxACT merger was one such case; our ongoing suit to block AT&T's proposed acquisition of T-Mobile is another.⁵

We also reviewed many non-reportable transactions, including in industries important to American consumers, such as the health care and agriculture sectors. For example, earlier this month, the division settled a challenge to an agreement between Blue Cross Blue Shield of Montana and five of six Montana hospitals that own New West Health Services, a health insurer that competes with Blue Cross in Montana.⁶ Under the agreement, Blue Cross agreed to pay \$26 million to the hospital defendants in exchange for those hospitals agreeing collectively to stop purchasing health insurance

⁴ For example, the division entered into consent decrees resolving its competitive concerns with the Comcast/NBC Universal Merger, *see* Final Judgment, United States v. Comcast Corp., No. 1:11-cv-106 (D.D.C. Sept. 1, 2011), *available at* <http://www.justice.gov/atr/cases/f274700/274713.pdf>, and Google's acquisition of ITA software, *see* Final Judgment, United States v. Google Inc., No. 1:11-cv-688 (D.D.C. October 5, 2011), *available at* <http://www.justice.gov/atr/cases/f275800/275897.pdf>.

⁵ *See* Second Amended Complaint, United States v. AT&T Inc., No. 1:11-cv-1560-ESH (D.D.C. Sept. 30, 2011), *available at* <http://www.justice.gov/atr/cases/f275700/275756.pdf>.

⁶ *See* [Proposed] Final Judgment, United States v. Blue Cross and Blue Shield of Montana, Inc., No. 1:11-cv-00123-RFC (D. Mont. Nov. 8, 2011), *available at* <http://www.justice.gov/atr/cases/f277100/277165.pdf>.

from New West for their own employees and to purchase it instead exclusively from Blue Cross for a period of six years.⁷ The division determined that this agreement would substantially reduce, and perhaps eliminate, New West's ability to compete in the sale of commercial health insurance by signaling that New West was likely to exit the market.⁸ The consent decree permits the defendants to proceed with their agreement, but requires both the divestiture of New West's commercial health-insurance business and that the defendant hospitals contract with the buyer of the divested insurance business, as well as other injunctive relief.⁹ The division determined that this remedy will preserve competition in the sale of commercial health insurance in the affected Montana markets.

We also have updated our Merger Remedies Guide, which is the subject of a panel later in today's program.¹⁰ This update shifts the focus to what is the best remedy to resolve the competitive concerns raised by a particular transaction. The approach, as articulated by then-Assistant Attorney General Christine Varney, reflects "an environment of increasing transnational mergers and complex vertical transactions" in which "the

⁷ See Competitive Impact Statement, *Blue Cross and Blue Shield of Montana, Inc.*, No. 1:11-cv-00123-RFC (D. Mont. Nov. 8, 2011), available at <http://www.justice.gov/atr/cases/f277100/277173.pdf>.

⁸ *Id.*

⁹ See [Proposed] Final Judgment, *Blue Cross and Blue Shield of Montana, Inc.*, No. 1:11-cv-00123-RFC (D. Mont. Nov. 8, 2011).

¹⁰ U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (rev. ed. 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

Antitrust Division must be . . . nimble in its efforts to ensure that any remedies effectively preserve competition, promote innovation and protect consumers.”¹¹

III. Civil Non-Merger Enforcement

The division’s civil non-merger enforcement work completes our civil enforcement program as a means through which the division vigilantly polices the nation’s markets against conduct that threatens competition and harms American consumers. The past Fiscal Year has been active in that regard as well. We remain committed to our ongoing challenge against American Express,¹² having settled with Master Card and Visa,¹³ to eliminate anticompetitive merchant rules used by the major credit card companies. We also have an ongoing lawsuit against Blue Cross Blue Shield of Michigan for its use and enforcement of “most favored nations” clauses in its contracts with Michigan hospitals.¹⁴ This year also brought

¹¹ Press Release, U.S. Dep’t of Justice, Antitrust Division Issues Updated Merger Remedies Guide (June 17, 2011), *available at* <http://www.justice.gov/opa/pr/2011/June/11-at-788.html>.

¹² *See* Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, United States v. American Express Co., No. 1:10-cv-4496 (E.D.N.Y. Oct. 4, 2010), *available at* <http://www.justice.gov/atr/cases/f262800/262864.pdf>.

¹³ *See* Final Judgment as to Defendants MasterCard Int’l Inc. and Visa Inc., *American Express Co.*, No. 1:10-cv-4496 (E.D.N.Y. July 20, 2011), *available at* <http://www.justice.gov/atr/cases/f262800/262864.pdf>.

¹⁴ *See* Complaint, United States v. Blue Cross Blue Shield of Mich., No. 2:10-cv-15155-DPH-MKM (E.D. Mich. Oct. 18, 2010), *available at* <http://www.justice.gov/atr/cases/f263200/263235.pdf>.

our Section 2 challenge to a dominant hospital's use of exclusionary contracts with its health insurers.¹⁵

In Fiscal Year 2012, we already have reached a settlement in another civil non-merger challenge, which, if approved, will require financial services company Morgan Stanley to disgorge \$4.8 million to settle charges that it entered into an anticompetitive agreement with KeySpan Corporation that restrained competition in the New York City electricity capacity market.¹⁶ You may recall that KeySpan paid \$12 million in disgorgement in an earlier settlement with the division that was approved by the court and established that disgorgement is available as a remedy under the Sherman Act.¹⁷

The division continues to carefully monitor business conduct across a range of critical industries and, when we discover anticompetitive conduct, we are ready and willing to go to court to put a stop to it. These civil enforcement activities all are critical to ensuring that markets remain competitive—they send the clear message that we can and will take action.

¹⁵ See Final Judgment, *United States v. United Reg'l Health Care Sys*, No. 7:11-cv-30-O (N.D. Tex. Sept. 29, 2011), available at <http://www.justice.gov/atr/cases/f276000/276027.pdf>.

¹⁶ See [Proposed] Final Judgment, *United States v. Morgan Stanley*, No. 1:11-cv-6875 (S.D.N.Y. Oct. 3, 2011), available at <http://www.justice.gov/atr/cases/f275800/275867.pdf>.

¹⁷ See Memorandum and Order, *United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. Feb. 2, 2011), available at <http://www.justice.gov/atr/cases/f266700/266778.pdf>.

IV. Criminal Enforcement

Another important priority is the division's criminal enforcement work. Through these efforts the division has successfully thwarted anticompetitive conduct in a variety of industries important to American consumers.

Overall, in Fiscal Year 2011, the division filed 90 criminal cases—the highest number of criminal cases the division filed in the last 20 years, including in FY 2010 when we filed 60 criminal cases. We also agreed to more than \$520 million in criminal fines, roughly the same dollar figure as Fiscal Year 2010. In these cases, we charged 27 corporations and 82 individuals, and courts imposed 21 separate jail terms totaling 10,544 days of jail time. These cases were brought in a range of industries, including real estate, optical disk drives, auto parts, air cargo, and financial services. All of these criminal investigations have put a stop to conduct that harmed competition in some of our most important industries and that hurt American consumers.

For example, the division has been conducting an international cartel investigation into price fixing and bid rigging in the auto parts industry. This investigation, which is ongoing, already has resulted in one corporate and three individual guilty pleas, \$200 million in fines, and three separate

jail terms for executives involved in a conspiracy to rig bids and fix prices for automotive parts.¹⁸ As described in the information filed in the Furukawa case, this was hard core, pernicious price fixing that can only mean inflated prices on the parts that are found on all of our cars.¹⁹

In the real estate industry, the division continues its investigations into bid rigging conspiracies at public real estate foreclosure auctions and tax lien auctions. With the help of the FBI, we have ferreted out the ways participants were coordinating their bids in these auctions. As a result of our investigations, to date, 32 defendants have pleaded guilty to conspiracies that suppress and restrain competition in ways that harm our communities and already-financially distressed homeowners.²⁰

The division also remains focused on criminal activity in the financial services sector. During the past year, the division, along with other federal agencies, has been investigating a criminal conspiracy involving bid rigging in the municipal bond investments market. That case already has resulted in nine pleas of individual executives involved in the conspiracy. As a result of that investigation, JPMorgan Chase entered into an agreement to resolve its

¹⁸ See Press Release, U.S. Dep't of Justice, Furukawa Electric Co. Ltd. and Three Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy (Sept. 29, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/275503.pdf.

¹⁹ See Information, United States v. Furukawa Elec. Co., Ltd., No. 2:11-cr-20612 (E.D. Mich., Sept. 29, 2011), *available at* <http://www.justice.gov/atr/cases/furukawa.html>.

²⁰ See, e.g., Press Release, U.S. Department of Justice, Eight Northern California Real Estate Investors Agree to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (Oct. 27, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/276724.pdf.

role in the conspiracy, and it agreed to pay a total of \$228 million in restitution, penalties, and disgorgement to federal and state agencies.²¹ Earlier in the year, UBS AG also agreed to pay a total of \$160 million in restitution, penalties, and disgorgement,²² and Bank of America previously agreed to pay \$137.3 million.²³ The investigation, which is ongoing, is being conducted by the Antitrust Division, the FBI, and the IRS Criminal Investigation division, in coordination with the Securities and Exchange Commission (SEC), the Office of the Comptroller of the Currency, and the Federal Reserve Bank of New York.²⁴ Ending this anticompetitive activity means aiding communities across the United States, so they have more money available for their municipal projects—such as roads, bridges, and school improvements.

²¹ See Press Release, U.S. Dep't of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies (July 7, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/272815.pdf.

²² See Press Release, U.S. Dep't of Justice, UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies (May 4, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/270720.pdf.

²³ See Press Release, U.S. Dep't of Justice, Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program (Dec. 7, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/264827.pdf.

²⁴ See Press Release, U.S. Dep't of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies (July 7, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/272815.pdf.

V. Competition Advocacy

The enforcement efforts I have described here today are critical to stopping and preventing anticompetitive conduct, but also important are our competition advocacy efforts through which we promote competition principles. Our competition advocacy program increases awareness and understanding of the importance of competition and healthy markets among federal and state governments and regulators, the courts, the antitrust bar, the business community, and international jurisdictions. It is through this work that we extend the reach of our learning and knowledge of markets gained through our enforcement programs.

In the health-care arena, the division worked closely with the Federal Trade Commission (FTC), the U.S. Department of Health and Human Services, and other federal agencies to ensure that sound competition principles will help guide reform, encouraging innovation in health-care delivery systems and preserving competitive markets. As part of this effort, the division is working with the Center for Medicare and Medicaid Innovation and its parent entity, the Centers for Medicare and Medicaid Services, to ensure that the creation of Accountable Care Organizations (ACOs) or other innovative health care delivery systems does not result in

price fixing or anticompetitive consolidation among providers. The division and the FTC recently released a joint Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, which provides valuable guidance to healthcare providers interested in forming procompetitive ACOs that participate in the Medicare and commercial markets.²⁵

In the financial services sector, the division filed comments in December 2010 on rules proposed by the SEC and the Commodity Futures Trading Commission regarding implementation of the derivatives title of the Dodd-Frank financial reform law to ensure that governance restrictions were sufficiently robust so as to help safeguard competition in this sector.²⁶

VI. International

The division also has been active internationally, particularly with respect to enhancing case cooperation across jurisdictions; developing new and deeper relationships with emerging economies such as China and India; and promoting concepts of procedural fairness and transparency. We

²⁵ FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, STATEMENT OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM (2011), *available at* http://www.justice.gov/atr/public/health_care/276458.pdf.

²⁶ U.S. Dep't of Justice, Comments on Proposed Rules Limiting Ownership and Regulating Governance for Security-Based Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges Under Regulation MC, Before the U.S. Sec. and Exch. Comm'n, Washington, D.C., *In re* RIN 3235-AK47 (Dec. 28, 2010), *available at* <http://www.justice.gov/atr/public/comments/265620.pdf>; U.S. Dep't of Justice, Comments on Proposed Rules Limiting Ownership and Regulating Governance for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities, Before the U.S. Commodity Futures Trading Comm'n, Washington, D.C., *In re* RIN 3038-AD01 (Dec. 28, 2010), *available at* <http://www.justice.gov/atr/public/comments/265618.pdf>.

already have made significant strides in these areas, and I commend to you the recently updated international developments section of our website, which highlights our work in this regard.²⁷ However, as I have stated before, in our global world, where corporate activity and transactions have an international impact, there is always more to be done.

A prime example of our commitment to increased enforcement cooperation is our relationship with the European Commission (EC). Just last month we celebrated the 20th anniversary of our bilateral cooperation agreement with the EC, an ongoing success story marked by consistent enforcement policies directed at the goal of promoting consumer welfare.²⁸ During the past year, we held a series of productive discussions with the EC and FTC to review our recent experience with international cooperation in mergers, and we have just released an update of our U.S./EU merger best practices.²⁹ The best practices, originally issued in 2002, provide an advisory framework for interagency cooperation when one of the U.S. agencies and the EC's Competition Directorate review the same merger. I encourage you to study these revised best practices.

²⁷ <http://www.justice.gov/atr/public/international/index.html>.

²⁸ Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,504, and OJ L 95/45 (Apr. 27, 1995), *corrected at* OJ L 131/38 (June 15, 1995), *available at* <http://www.justice.gov/atr/public/international/docs/0525.pdf>.

²⁹ US-EU Merger Working Group: Best Practices on Cooperation in Merger Investigations (Oct. 2011), *available at* <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

In our experience, agency cooperation in matters being investigated by more than one jurisdiction produces the benefits of shared learning and expertise, and the parties gain from a more efficient review. Unfortunately, not all merging parties have supported our cooperative approach and instead have attempted to leverage one country's investigation against another's. That is their choice, but these tactics often unnecessarily complicate our investigations and may extend our reviews.

We also continue to look for new opportunities for collaboration, including through our continued emphasis on working with emerging economies. In the summer, we, along with the FTC, signed a Memorandum of Understanding (MOU) with the three antimonopoly agencies in China, and we also expect to sign an MOU with India within the next year. These MOUs are vehicles that better ensure engagement and cooperation among our agencies and are particularly important given these countries' place in the global economy.

We also continue to work in a variety of forums—such as the Organization for Economic Co-operation and Development (OECD) Competition Committee and Trans-Pacific Partnership negotiations—urging antitrust enforcers to ensure procedural fairness and transparency in their enforcement proceedings. And, in an effort to enhance our relations with

international competition authorities, Dorothy Fountain, Assistant Chief of the division's Litigation II section, is completing two weeks working in the Directorate-General (DG) for Competition, and we will be hosting a DG Comp attorney at the division in December. The exchange is part of our new Visiting International Enforcers Program, which we call VIEP. This program, along with our other international efforts, is an enduring legacy and recognition of the ever-smaller world in which we live.

VII. The 2010 Horizontal Merger Guidelines: An Update

As we reflect on the past year at the division, it is worth noting that it has been just over a year since the division and the FTC released our revised 2010 Horizontal Merger Guidelines.³⁰ For our merger enforcement program, these guidelines were a building block to create ever more clarity and certainty for businesses as they contemplate mergers. As then-Assistant Attorney General Varney stated when the guidelines were released, “the revised guidelines better reflect the agencies’ actual practices.”³¹

After the agencies released the Guidelines, some observers predicted that the revisions would lead to an array of problems in merger review. This

³⁰ U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

³¹ Press Release, U.S. Dep’t of Justice, Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/261642.htm.

one-year-plus anniversary provides a good opportunity to see if any of the critics' fears have been realized.

These predictions generally were of three types: first, that the revisions to the Guidelines would mean that the agencies no longer would define product markets in some cases and would proceed instead on hazy theories of actual competitive harm; second, that the revised Guidelines would provide the agencies with too much flexibility in how they run their investigations and reach their conclusions, potentially leading to confusion among parties; and third, that reliance on the upward pricing pressure (UPP) metric would lead the agencies to challenge a much higher percentage of mergers than they have in the past. Let us consider these assertions.

The 2010 Guidelines stated that merger analysis “need not start with market definition.”³² This is not a new idea. The 2006 Commentary to the Merger Guidelines similarly states that “the market definition process is not isolated from the other analytical components in the Guidelines” and “the agencies do not settle on a relevant market definition before proceeding to address other issues.”³³ This flexibility is a matter of efficiency. In some cases, the facts the division gathers may include direct evidence of competitive effects, which might raise a red flag before the outlines of the

³² U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010).

³³ U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES § 1 (2006), *available at* <http://www.justice.gov/atr/public/guidelines/215247.pdf>.

relevant market become clear. Or, to take another example, when staff is investigating a unilateral effects theory of harm, evidence that consumers do not view the relevant products as especially close substitutes might obviate the need to work toward defining a market.

Still, the division continues to define relevant markets in its merger complaints. The experience of the past year has borne this out: the division has defined relevant markets in all its public cases since the 2010 Guidelines were released, including our successful challenge to the H&R Block/TaxACT merger.³⁴ In fact, as I will discuss later, product definition and substitutability in a digital software environment was a central focus of Court's decision in H&R Block/TaxACT. The 2010 Guidelines merely state explicitly what has been division practice for some time—market definition is not always the very first analytical step in our investigations. But you can be assured that market definition retains the key role it has always played in division investigations and litigations.

The 2010 Guidelines provide flexibility to the agencies in what they consider in their analyses and the order in which they consider it. I believe businesses and their counsel now have certainty about how to make their

³⁴ See Complaint at 5-10, U.S. v. H&R Block, Inc., No. 1:11-cv-00948 (D.D.C. May 23, 2011) (alleging relevant product and geographic markets), *available at* <http://www.justice.gov/atr/cases/f271500/271579.pdf>.

cases to the agencies, even without the “cookbook” approach found in earlier Guidelines.

As the division’s cases over the past year show, we continue to apply traditional merger analysis techniques to our matters. Just as we always have done, we define relevant markets, look at measures of market power, analyze barriers to entry, consider coordinated and unilateral effects, and review any transaction efficiencies. There is nothing new in this approach. Indeed, the 2010 Guidelines do not represent a departure from the division’s established practices over the past 10 years or more. Rather, they provide a more accurate and transparent description of what the division does and has been doing for many years.

Further, from the outset of every matter we are open with the parties about our theories of competitive harm and are always willing to listen to the parties’ theories about why a transaction should pass muster. Different cases pose different challenges, and the division’s concerns with one merger may very well differ from the division’s concerns with another merger. But we always inform parties of our concerns so that there are no surprises.

Finally, the use of the upward pricing pressure metric has not led the agencies to over-enforce the merger laws. The 2010 Guidelines state that “[i]n some cases, where sufficient information is available, the agencies

assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger.”³⁵ It is well known in the antitrust community that economists, both those within the agencies and those working with merging parties, have for some time used the value of diverted sales in their merger analyses. The Guidelines make the agencies’ use of this technique transparent. Further, the 2010 Guidelines also state that “if the value of the diverted sales is proportionally small, significant unilateral price effects are unlikely.”³⁶ This means that the use of this tool will not, as some have feared, result in the agencies over-enforcing the merger control laws.

The past year’s merger statistics bear this out. As I noted, in Fiscal Year 2011 the division issued a second request in just about two percent of the transactions it reviewed. This number is in line with recent years of practice at the division. Of the matters in which it issued a second request, the division ultimately challenged only the limited number of transactions that presented competitive concerns. These figures demonstrate that the mention of upward pricing pressure analysis in the 2010 Guidelines did not signal a lowering of the bar for division merger challenges.

³⁵ U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

³⁶ *Id.*

Our recent merger challenges provide an even clearer picture of the impact of the 2010 Guidelines and our reliance on them. As I mentioned, in the division's successful challenge to the proposed merger between H&R Block and TaxACT, the court focused on product market definition. We alleged that the relevant market in this case was digital do-it-yourself (DDIY) tax-preparation products and that TaxACT had competed aggressively with H&R Block, disrupting the relevant market through low pricing and product innovation. The transaction would have left American taxpayers with only two major DDIY tax-preparation providers, likely leading to higher prices, lower quality products, and less innovation in this industry.

In its opinion enjoining the merger, the district court relied on and cited extensively to the 2010 Guidelines. For example, the court applied the hypothetical monopolist test to the transaction and reaffirmed the Guidelines principle that the relevant market typically should be defined as the smallest product market that will satisfy the hypothetical monopolist test.³⁷ On the basis of this test and other evidence, including the defendants' own

³⁷ Memorandum Opinion at 18-30, U.S. v. H&R Block, Inc., No. 1:11-cv-00948 (D.D.C. Nov. 10, 2011), available at <http://www.justice.gov/atr/cases/f277200/277287.pdf>.

documents and testimony at trial, the district court concluded that the division's proposed market definition was correct.³⁸

Having settled on a market definition, the court performed a market-concentration analysis using the Herfindahl-Hirschman Index (HHI). Citing to the Guidelines and case law, the court found that the HHI levels and change in concentration that the merger would have resulted in were high enough to create a presumption of anticompetitive effect.³⁹ The court also relied on the Guidelines in considering entry and expansion, applying the Guidelines test that, to overcome anticompetitive effects, entry or expansion must be "timely, likely, and sufficient."⁴⁰

The court determined that the proposed transaction would have resulted in a likelihood of both coordinated and unilateral effects. In its coordinated effects analysis, the court noted that the merger would result in the elimination of a particularly aggressive competitor.⁴¹ Citing to the Guidelines' discussion of the importance of "maverick" competitors, the court found that TaxACT plays "a special role in this market that constrains

³⁸ *Id.* at 15-50.

³⁹ *Id.* at 50-52.

⁴⁰ *Id.* at 53.

⁴¹ *Id.* at 63.

prices” and that therefore its elimination as a separate competitor would make coordinated effects more likely.⁴²

The H&R Block case reinforces a number of important points about the Guidelines and division practice. First, the court relied heavily on the Guidelines in all stages of its analysis, citing to them and the 2006 Commentary repeatedly. This reliance demonstrates the Guidelines’ significance and influence. Second, the division’s case (which also relied on the Guidelines) and the court’s decision rested on traditional antitrust analysis. The court defined a relevant market, measured the concentration in that market and the change in concentration that would be caused by the merger, considered barriers to entry, analyzed coordinated and unilateral effects, and evaluated claimed efficiencies. For those who were concerned that the 2010 Guidelines would result in a radical new approach to merger law in the United States, I hope the division’s case and this court’s decision will go some ways towards allaying those fears.

There are many other merger challenges the division brought this year that demonstrate principles articulated in the revised Guidelines, a few of which I will highlight today. In May, the division filed suit to block George’s Incorporated’s acquisition of a Tyson Foods poultry processing

⁴² *Id.* at 65.

plant in Harrisonburg, Virginia.⁴³ The division determined that the transaction would have had the anticompetitive effect of reducing the prices paid to Shenandoah Valley area farmers who raise chickens for processors such as George's and Tyson. The 2010 Guidelines include a new section on the potential for mergers between competing buyers to enhance market power on the buying side of the market.⁴⁴ This case demonstrates that the division is concerned about monopsony harm and is willing to go to court to prevent such harm. After the division filed suit, George's consented to an acceptable settlement agreement, which will require George's to make capital improvements to the Harrisonburg plant that the division expects will lead to a significant increase in the number of chickens processed at the facility.⁴⁵

In April, the division entered into a consent decree with Stericycle, the nation's largest provider of infectious waste treatment services, which required Stericycle to divest an important asset in order to proceed with its proposed acquisition of Healthcare Waste Solutions (HWS).⁴⁶ As proposed, this merger would have reduced competition in the provision of infectious

⁴³ See Complaint, *United States v. George's Foods, LLC*, No. 5:11-cv-00043-gec (W.D. Va. May 10, 2011), available at <http://www.justice.gov/atr/cases/f270900/270983.pdf>.

⁴⁴ U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

⁴⁵ See Proposed Final Judgment, *George's Foods, LLC*, No. 5:11-cv-00043-gec (W.D. Va. June 23, 2011), available at <http://www.justice.gov/atr/cases/f272400/272495.pdf>.

⁴⁶ See Final Judgment, *United States v. Stericycle, Inc.*, No. 1:11-cv-00689-BAH (D.D.C. June 24, 2011), available at <http://www.justice.gov/atr/cases/f272600/272632.pdf>.

waste treatment services to hospitals and other health care facilities in the New York City metropolitan area, resulting in higher prices and reduced service.⁴⁷ This case underlines the importance of barriers to entry in merger analysis. Infectious waste treatment providers rely on local transfer stations, where waste collected by daily route trucks is transferred onto tractor trailers for efficient shipment to distant treatment facilities.⁴⁸ This transaction would have reduced the number of competitors with local transfer stations in the New York metropolitan area from three to two, leaving Stericycle and HWS with about 90 percent of the local infectious waste treatment market.⁴⁹ The division concluded that, without a local waste transfer station, successful entry into the local market was unlikely.⁵⁰ The settlement therefore requires Stericycle and HWS to divest HWS' Bronx, New York, transfer station to a viable purchaser approved by the division.⁵¹ This remedy will solve the entry problem and create a new, independent, and economically viable competitor, thereby preserving competition in this market.

⁴⁷ See Competitive Impact Statement, *Stericycle, Inc.*, No. 1:11-cv-00689-BAH (D.D.C. Apr. 8, 2011), available at <http://www.justice.gov/atr/cases/f269600/269614.pdf>.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 6-7.

⁵⁰ *Id.* at 7-8.

⁵¹ See Final Judgment at 4-7, *Stericycle, Inc.*, No. 1:11-cv-00689-BAH (D.D.C. June 24, 2011), available at <http://www.justice.gov/atr/cases/f272600/272632.pdf>.

The third example is the acquisition of Sara Lee’s North American Fresh Bakery business by Grupo Bimbo and BBU. The division concluded that, as proposed, this transaction would have substantially reduced competition in the market for sliced-bread in eight local geographic markets in the United States.⁵² The division relied on a price-discrimination market based on the location of the customers—as we did in our merger challenge to Dean’s acquisition of Foremost, which settled after a year of litigation.⁵³ As explained in the Guidelines “[f]or price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.”⁵⁴ We found that sliced-bread suppliers can charge different prices for the same product (net of transportation costs) in different metropolitan areas and arbitrage would be costly and unlikely to occur or to eliminate disparities in wholesale prices between metropolitan areas. We further found that the proposed acquisition would result in the relevant markets being highly concentrated, giving the acquiring company a dominant share of the sliced-bread market. To resolve the competitive problems raised by this transaction, the division entered into a consent

⁵² See Competitive Impact Statement, *United States v. Grupo Bimbo, S.A.B. de C.V.*, No. 1:11-cv-01857 (D.D.C. Oct. 21, 2011), available at <http://www.justice.gov/atr/cases/f276500/276543.pdf>.

⁵³ See Complaint, *United States v. Dean Foods Co.*, No. 10-CV-59 (E.D. Wis. Jan. 22, 2010), available at <http://www.justice.gov/atr/cases/f254400/254455.pdf>; Final Judgment, *Dean Foods*, No. 10-CV-59 (E.D. Wis. July 29, 2011), available at <http://www.justice.gov/atr/cases/f273400/273469.pdf>.

⁵⁴ U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 3 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

decree with the parties which requires significant divestitures of brands and associated assets to an acquirer or acquirers that have the intent and the capability to compete effectively in the manufacture and sale of sliced bread in each of the affected local markets.⁵⁵ This outcome will protect consumers of sliced bread, a staple for many Americans, in a number of localities, including Los Angeles, San Francisco, Kansas City, Oklahoma City, Omaha, Nebraska, and Harrisburg, Pennsylvania.

I would also commend to you our settlement in Alberto-Culver/Unilever as an example of the use of data and UPP as a part of the division's analysis.⁵⁶ Our analysis showed that the acquisition, absent divestiture, would have enabled the combined firm to profit by unilaterally raising hairspray and shampoo prices above the pre-merger price level. Based on our data we concluded that pre-merger margins on the parties' products were sufficiently high that the amount of recaptured lost sales would make the price increase profitable even though such price increases would not have been profitable prior to the merger.

The division approached its merger work in Fiscal Year 2011 much as it has done for many years, applying sound legal and economic analysis to

⁵⁵ See [Proposed] Final Judgment, *Grupo Bimbo*, No. 1:11-cv-01857 (D.D.C. Oct. 21, 2011), available at <http://www.justice.gov/atr/cases/f276500/276547.pdf>.

⁵⁶ See Competitive Impact Statement, *United States v. Unilever N.V.*, No. 1:11-cv-00858 (D.D.C. May 6, 2011), available at <http://www.justice.gov/atr/cases/f270800/270864.pdf>.

proposed mergers and keeping parties informed about the division's theories and concerns. The 2010 Guidelines are a great help in making our processes more transparent for the benefit of merging parties, the antitrust community, and the general public.

* * *

The curtain is down on Fiscal Year 2011 and I feel confident in saying that the division continued to vigilantly safeguard the nation's markets from anticompetitive transactions and conduct. We have spent now almost three years building on the President's call for vigorous antitrust enforcement, and implementing structural changes at the division to support that call. We look forward to continuing to fulfill this mission in the years to come.

Thank you.