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# Top Five Antitrust Trends to Watch in 2011

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The year 2010 brought significant changes in U.S. antitrust policy: the Horizontal Merger Guidelines received their first substantial revision since 1992; the Federal Trade Commission prepared to roll out new Hart-Scott-Rodino premerger reporting requirements; and the Obama Administration continued its effort to reinvigorate dominant firm enforcement, particularly in high-tech markets. In the coming year, boards of companies that possess dominant market share or expect to be active in the M&A markets should be particularly attentive to at least five trends.

**1. There will be significant changes to the HSR premerger notification process.**
At the end of 2010 or in early 2011, the Federal Trade Commission ("FTC") will issue a substantially revised Hart-Scott-Rodino ("HSR") premerger notification form and accompanying rules. While the substantive reporting requirements (i.e., who must file) will not change, the burden of compliance could increase markedly for some filing parties. A proposal issued by the FTC in August, which contained substantial new document production and "associated entities" reporting requirements, met with sharp criticism from the ABA's Antitrust Law Section, the U.S. Chamber of Commerce, and others. Nonetheless, the FTC is expected to implement its proposal substantially as written. Compliance with the new document production requirements could result in filing delays, potentially creating a bottleneck for time-sensitive transactions such as tender offers. Boards of companies that will be active in the M&A markets in the coming year should prepare for the new rules as soon as is practicable.

**2. There will be an increased focus on protecting innovation.**
Industrial economists now largely agree that innovation is a greater source of consumer surplus than price and output competition, particularly in New Economy markets. Antitrust enforcement policy arguably has been slow to respond to this reality. The new Horizontal Merger Guidelines, however, contain an expanded discussion of how innovation effects figure into merger analysis, and top officials of the Federal Trade Commission and the Department of Justice have begun to emphasize innovation concerns in their speeches and congressional testimony. These agencies are likely to be more active in the coming year in blocking transactions that they believe have the potential to harm innovation, especially in high-tech and pharmaceuticals markets.

**3. Dominant firm enforcement is likely to be a significant priority at the DOJ.**
The Department of Justice and the Michigan Attorney General recently filed a complaint against Blue Cross Blue Shield of Michigan ("BCBS") asserting that BCBS has used "most-favored nation" ("MFN") clauses in its contracts with health care providers to unlawfully maintain its dominant share of the local commercial health insurance market. Prolonged litigation in this matter could shed light on how the Obama DOJ proposes to assess a wide variety of other ambiguous dominant firm practices, including loyalty rebates, bundled discounts, and predatory pricing. Board members of companies with substantial market power should be aware of the potential for increased government enforcement in this area.

**4. Google and other high-tech firms will remain in the antitrust crosshairs.**
Like AT&T, IBM, Microsoft, and Intel before it, Google is in the midst of a treacherous rite of passage: focused attention from antitrust regulators. The European Commission recently announced an investigation into Google's alleged use of its search algorithms to disadvantage competitors in adjacent markets. Google also faces DOJ review of its proposed merger with travel data processor ITA, a transaction competitors believe could leverage Google's market power into on-line travel search. With regulators determined to ensure that market power born of innovation does not harden into monopoly protected by strategies of predation and exclusion, other successful high-tech firms are likely to become targets. Directors of such companies should also be conscious of a recent increase in enforcement of Section 8 of the Clayton Act, which prohibits interlocking directorates between horizontal competitors; several recent high-profile Section 8 cases have targeted Silicon Valley boards, including those of Google, Apple, and Amazon.

**5. The FTC will continue to explore the scope of its powers under Section 5 of the FTC Act.**
The Federal Trade Commission has recently employed Section 5 of the FTC Act to bring claims of unfair competition involving practices that are probably not illegal under current Sherman Act doctrine. A prominent example is its recently-settled case against Intel, which resulted in Intel agreeing to significant changes in its contracting practices and agreeing to pay for an FTC monitor to ensure its compliance. Directors of companies with high market share should be aware that their company's contracting practices may likewise be vulnerable to challenge under Section 5. In addition, board members and corporate officers should keep company lawyers close when sharing data with trade associations and their members; the FTC has also employed Section 5 to halt the sharing of data among horizontal competitors that may facilitate coordination of price and output decisions.

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