

# Client Alert

Antitrust &amp; Litigation Practice Group

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## DOJ Antitrust Division Wins Major Victory in H&R Block Case

On November 10, 2011, Judge Beryl A. Howell of the District Court for the District of Columbia handed the Antitrust Division of the Department of Justice (DOJ) a significant victory when she enjoined the proposed merger of H&R Block and 2SS Holdings, Inc. (TaxACT). The case, *United States v. H&R Block, Inc.*, No. 11-cv-00948, is the first time that DOJ has gone to trial since 2004, when it failed to block Oracle's acquisition of PeopleSoft, and is the first victory for DOJ in a tried merger case since 2003. It is also the first merger case litigated by DOJ since FTC's and DOJ's new Horizontal Merger Guidelines that were issued in 2010. The court granted a permanent injunction on October 31 but only released its memorandum opinion after the parties redacted confidential business information. The opinion is available for download [here](#).

H&R Block had planned to combine TaxACT with its own digital do-it-yourself (DDIY) tax preparation business, while still offering both products on the market. DOJ argued that the proposed deal would substantially lessen competition in the growing U.S. DDIY tax preparation software market by combining the second- and third-largest providers of DDIY tax preparation products. H&R Block countered that, among other things, the likelihood of expansion by existing DDIY companies other than Intuit, H&R Block and TaxACT would offset any potential anticompetitive effects from the merger. The court dismissed H&R Block's arguments, finding that, though 18 companies offer DDIY tax preparation services, "most of these companies are very small-time operators." DOJ lawyers argued that, of these companies, the closest two competitors "are not in the same league as the 'Big 3.'"

The crux of the case, however, turned on the definition of the relevant product market. As the court noted, there are three methods for preparing a tax return: (1) the "pen and paper" or manual method; (2) the assisted method, which involves hiring a tax professional; and (3) the DDIY method, which involves using a software product like TurboTax. Although the court accepted that "all methods of tax preparation are, to some degree, in competition," the court rejected H&R Block's argument that the relevant product market included assisted and manual tax preparation. Based partially on ordinary course business documents provided by the companies, the court agreed with DOJ that the definition of the relevant product market was DDIY tax preparation. The court found that DDIY products involve "technology, price, convenience level, time investment, mental effort and type of

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interaction by the consumer” that are different from those involved in either assisted or manual tax preparation. The court noted that DDIY preparation is becoming increasingly popular, with an estimated 35 to 40 million taxpayers using the DDIY method in 2010, and that H&R Block, Intuit, and TaxACT accounted for almost all of the DDIY-prepared federal rules filed last year.

Once the court accepted DOJ’s proposed market definition, it determined that the parties’ market shares were high enough to create a presumption of anticompetitive effects, even though a combined H&R Block and TaxACT would have only 30 percent share in a market otherwise dominated by Intuit. The court proceeded to find that the “totality of the evidence” confirmed that anticompetitive effects would be a likely result of the merger, “which would give H&R Block and Intuit control over 90 percent” of the DDIY tax preparation products market. H&R Block has abandoned the transaction and stated that they will not appeal the decision.

The decision is a big victory for DOJ. For one, the court accepted a common DOJ (and FTC) argument that the parties’ ordinary course documents are the key source in market definition, and it rejected the survey data and other econometric arguments put forth by the parties. The decision is also an important reminder for companies to be careful when creating documents. For example, having a document in your files similar to the H&R Block document that was quoted in DOJ’s complaint—H&R Block allegedly described a benefit of the TaxACT transaction as allowing it to “regain control of industry pricing and avoid further price erosion”—will almost certainly invite significant scrutiny from government. In addition, for any transaction where there is overlap between the parties, it will be important that your ordinary course documents characterize competitors as viable and effective alternatives and that customers support these views strongly.

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