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Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence

Client Advisories

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The Federal Trade Commission's (FTC) Bureau of Competition has recently issued new guidance on how to avoid antitrust pitfalls during pre-merger negotiations and due diligence. In it, the FTC details what it views as best practices — and worst practices — for companies that must exchange competitively sensitive information in the course of due diligence for an acquisition, merger, or joint venture. The FTC guidance describes "competitively sensitive information" as including current and future price information, strategic plans, and costs, as well as information regarding future product offerings, expansion plans, pricing strategy, and non-aggregate customer-specific information.

The FTC guidance begins by reminding antitrust practitioners and their clients that while information sharing during due diligence may be necessary to evaluate a proposed transaction, the exchange of competitively sensitive information without adequate safeguards can sometimes violate the antitrust laws either under Section 1 of the Sherman Act, in cases where the parties are actual or potential competitors, or under the HSR Act even if they are not. A violation of the HSR Act can subject a company to a maximum civil penalty of $40,000 per day, which can often result in total penalties well in excess of $1 million. An information exchange that is found to violate Section 1 can be prosecuted either civilly or criminally and can also expose a company to treble damages in follow-on private actions. These concerns are not just theoretical; such exchanges are the subject of active enforcement by both the FTC and the Department of Justice (DOJ) Antitrust Division.

The FTC guidance both recommends procedural safeguards to protect against improper sharing of competitively sensitive information and highlights the role of antitrust counsel in shepherding this process. As set forth in more detail in the FTC's blog post, the FTC's recommendations include:

- **Put in place a "Clean Team":** Limit access to competitively sensitive information to a small set of individuals, who review information in a data room, under strong prohibitions against exporting or sharing that information. The individuals on the clean team must not have decision-making roles in the business that could

be contaminated by the information they review in the clean room, either while the transaction is pending or after the transaction is dropped. Outside counsel should vet members of the clean team who receive information from other parties.

- **Redact and aggregate customer-level information:** The FTC recommends engaging a third party to collect and aggregate such information, so that it is not revealed even to the members of the clean team.
- **Be mindful of the entirety of the information exchange:** A document that, on its face, does not reveal any particular customer information may nonetheless be pieced together as part of the puzzle on customer-level information.
- **Avoid any possibility of disclosure:** Ensure data is actually destroyed following the conclusion of due diligence by providing clear instructions for deleting data, with penalties for failure to comply, and by following up to ensure data was deleted.
- **Engage antitrust outside counsel:** Outside counsel may review information before it is submitted to the clean room, as well as before it is submitted to the broader cohort of decision-makers for the business. When in doubt, ask antitrust counsel.

Antitrust outside counsel, in addition to the roles noted above, serve a key role in guarding against troubling information exchanges. The FTC expects antitrust counsel to report any "improper" or "sloppy" information exchanges to the antitrust agencies and cautions that a failure to report, if uncovered by FTC staff, could lead to the time and expense of a separate investigation. Better, however, is for antitrust counsel to stop improper exchanges before they occur, which they can do if they are included on email exchanges, in attendance at pre-merger integration planning discussions, and otherwise included in the discussions.

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