FTC Guidance on Pre-Merger Information Exchange

The Federal Trade Commission ("FTC") recently reiterated its views[1] on the risks of sharing information with competitors before and during merger negotiations—a concern that remains until the merger closes. The FTC recognizes that in a merger or acquisition, companies often need to share information for due diligence purposes and to plan for a smooth transition immediately after closing. However, information exchanges and other pre-merger collaborative efforts may in some cases raise antitrust risks because parties must continue to act as independent companies until the deal closes, and, for competitors and potential competitors, the exchange of competitively sensitive information (such as current and future prices, customer lists, and strategic plans) could lead to improper coordination. The FTC stated that illegal information sharing can cause harm to competition similar to the harm caused by an anticompetitive merger. The FTC will look carefully at pre-merger information sharing to ensure that there has been no inappropriate dissemination or use of competitively sensitive information for anti-competitive purposes.[2] Additionally, if the merger is subject to the HSR Act,[3] pre-merger information sharing may also constitute a violation of the HSR Act and related rules if it results in the buyer effectively gaining beneficial ownership of the target before the HSR waiting period terminates or expires (sometimes referred to as "gun jumping").

Although specific advice should be sought on a case-by-case basis, companies can substantially reduce these concerns by adhering to two general principles:

1. Any discussion or exchange of information should be solely for the purpose of diligence or planning post-closing integration and the appropriate safeguards should be implemented prior to the exchange of any competitively sensitive information, and

2. There should be no coordination of the parties' potentially competing business operations prior to closing. The parties should continue to act independently in every way until the acquisition is closed.

Guidelines for Information Exchange

The FTC emphasized that companies should, with the advice of antitrust counsel, implement procedural safeguards for the exchange of competitively sensitive information between rivals during pre-merger negotiations and due diligence. When competitively sensitive information needs to be exchanged, companies should employ third-party consultants, clean teams, or other mechanisms to limit its dissemination and use. Clean teams should not include personnel responsible for sales, competitive planning, pricing, or strategy. Finally, antitrust counsel should also ensure that the merging companies are following these protocols.

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[1] Holly Vedova, Keitha Clopper, and Clarke Edwards, Federal Trade Commission, Bureau of Competition, *Avoiding antitrust pitfalls during pre-merger negotiations and due diligence* (Mar. 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger.

[2] For example, the FTC settled allegations that a hair transplant services company violated the FTC Act after discovering during the FTC's review of a proposed merger that the merging firms' CEOs exchanged company specific information about future product offerings, price floors, discounting practices, expansion plans, and operations and performance. *In re: Bosley, Inc. et al.*, Dkt. No. C-4404 (FTC June 5, 2013), https://www.ftc.gov/enforcement/cases-proceedings/1210184/bosley-inc-aderans-america-holdings-inc-aderans-co-ltd. The FTC did not challenge the merger.

[3] Hart-Scott-Rodino Antitrust Improvements Act, as amended ("HSR Act"), 15 U.S.C. § 18a.

The FTC recommends that merging competitors or potential competitors should take these steps from pre-merger negotiations through closing:

- *Do not exchange competitively sensitive information, except with the approval of antitrust counsel.* Examples of competitively sensitive information include:
  - current or future pricing,
  - vendor costs,
  - marketing plans or sales strategies,
  - detailed cost information,
  - strategic personnel decisions such as future hires,
  - customer lists, and
  - profit margins.

- *Use an outside consultant, third party integration specialist, or clean team to gather and synthesize the competitively sensitive information.* If parties use a clean team comprised of a select group of key employees, no personnel responsible for sales, competitive planning, pricing, strategy, or marketing should be on the clean team.

- *Limit access to sensitive information to those directly involved in due diligence and integration-planning and avoid sharing with those involved primarily in making day-to-day business decisions.* Any information obtained from target should be used for the purposes of due diligence and planning for post-closing integration, and not for any other purpose. To this end, the information should be accessible only to the selected individuals involved in these activities. Individuals involved in setting prices or day-to-day competitive operations should have limited or no access to any sensitive information exchanged.

- *Modify data to remove any competitively sensitive information.* Redact and do not share any customer identifying information or competitively sensitive information with either of the parties without first consulting counsel. Aggregate data where possible so that it is not specific to any individual customer and shields competitively sensitive information.

- *Monitor the competitively sensitive information after its dissemination.* Track who continues to have access to the information. Ensure adherence to confidentiality agreements and clean team agreements in place to protect the information. Make sure competitively sensitive materials are not generally accessible. Destroy competitively sensitive materials afterwards, in accordance with any applicable agreements.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.