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New FTC Guidance on Information Exchange Highlights Need for Safeguards During Due Diligence and Integration Planning

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On March 20, 2018, the Federal Trade Commission ("FTC") issued guidance[1] reiterating that companies considering mergers, acquisitions, and joint ventures must implement safeguards to prevent inappropriate information sharing during due diligence and integration planning. Failure to implement appropriate safeguards can result in costly and time-consuming investigations and may lead to enforcement actions.

While companies considering transactions frequently have legitimate business needs to access information for valuation, negotiation, and integration planning purposes, the sharing of competitively sensitive information creates a risk of anticompetitive harm – either in the long term if the transaction does not close or in the short term between due diligence and consummation. The exchange of competitively sensitive information can facilitate collusion, and accordingly can be used as evidence from which a court or regulator could infer an anticompetitive agreement in violation of Section 1 of the Sherman Act,[2] or an unfair method of competition under Section 5 of the FTC Act. [3] Further, in transactions reportable under Hart-Scott-Rodino ("HSR"), information exchanges can be used to support charges of gun-jumping. [4]

The FTC's latest guidance on this topic serves as an important reminder of the steps companies should take to comply with the antitrust laws and a warning that the FTC is prepared to act where parties to a transaction fail to implement appropriate safeguards.

Information Sharing Safeguards Should Be Implemented in All Transactions

The FTC's latest guidance clearly demonstrates that risks raised by improper information sharing are present regardless of whether a transaction is HSR-reportable. Indeed, the agency has challenged information exchanges between two competing parties to a non-reportable merger in the welded-seam aluminum tube market.[5] This enforcement action and its inclusion in the FTC's guidance highlight that safeguards should be implemented regardless of whether the transaction requires an HSR Act filing.

One risk unique to reportable transactions, however, is that it will be considered a factor in "gun jumping" violations of the HSR Act. In *Computer Associates,* the Antitrust Division of the Department of Justice ("DOJ") alleged that an acquirer violated the HSR Act by "collecting and disseminating within [the acquirer] competitively sensitive information" from the target.[6]

The FTC's latest guidance notes, "[u]nlawful gun jumping may include the exchange of competitively sensitive information, but it typically also involves actual coordination of business activities" prior to HSR Act clearance.[7] Although this suggests that information exchange alone *may* not violate the HSR Act, companies should implement appropriate safeguards to avoid a situation where information exchange leads to a protracted investigation of other potential gun-jumping activities.

Types of Information That Increase Risk of Competitive Harm

Exchanges of so-called "competitively sensitive information" are most likely to run afoul of the antitrust laws. There is no clear definition of competitively sensitive information, but the FTC specifically called out several examples in the new guidance, including: current and future price information, strategic plans, cost information, information about future product offerings, expansion plans, and customer-specific information. The DOJ and FTC have also previously issued guidance for human resources professionals suggesting that employee-specific information about wages and terms of employment is competitively sensitive.[8] When in doubt about whether information is competitively sensitive, the prudent approach is to seek advice from antitrust counsel.

Key Safeguards to Reduce Antitrust Risk

Companies can take several steps during due diligence and integration planning to reduce the risk that information exchange will create antitrust risk. These include:

- Ensuring the information shared serves a documented **legitimate business purpose** and is the least amount of information necessary to serve that purpose.
- **Redacting or masking** competitively sensitive information, including any customer-specific information.
- Using **third-party aggregators** or other independent agents to collect and disseminate information in an aggregated form that masks competitively sensitive information.
- Requiring anyone with access to information to sign a **non-disclosure agreement (NDA)** that (1) permits the information to be used only in connection with the transaction, (2) requires destruction of the information at the conclusion of the process, (3) prohibits further dissemination of the information even within the company, and (4) includes clear penalties for violations.
- Implementing a **clean team agreement** that limits access to competitively sensitive information to clean team members and prohibits clean team members from sharing the information more widely within the company. Clean team membership should be limited to company employees whose business roles do not allow them to misuse information for anticompetitive purposes. Antitrust counsel should vet membership of the clean team to ensure it is limited to appropriate personnel before any information sharing. The clean team should also be prohibited from downloading competitively sensitive information onto company-shared drives.

[1] Fed. Trade Comm'n, "Avoiding antitrust pitfalls during pre-merger negotiations and due diligence," (March 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger?utm_source=govdelivery.

[2] *See, e.g.,* United States v. Flakeboard America Ltd., Competitive Impact Statement, Case No. 3:14-cv-4949 (N.D. Cal. 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/flakeboard_cis.pdf (discussing the sharing of competitively sensitive information as evidence of an agreement to reduce output in violation of Section 1); United States v. Gemstar-TV Guide Int'l, Inc., Competitive Impact Statement 2003-2 Trade Cas. (CCH) ¶ 74,082 (D.D.C. 2003) (No. 03-00198), https://www.justice.gov/atr/case-document/file/497061/download (alleging sharing of detailed and specific information about offers, negotiations, and contact with customers as evidence of an illegal agreement to fix prices under Section 1).

[3] *See, e.g.*, Bosley, Inc., Docket No. C-4404 (FTC 2013), https://www.ftc.gov/enforcement/cases-proceedings/1210184/bosley-inc-aderans-america-holdings-inc-aderans-co-ltd, (alleging exchange of detailed information about future product plans, price floors, discounting, expansion plans, and operations and performance violated Section 5 of the FTC Act); Insilco Corp., 125 F.T.C. 293 (1998), https://www.ftc.gov/enforcement/cases-proceedings/9610106/insilco-corporation-matter (challenging the exchange of customer-specific information including descriptions of customer negotiations, detailed price quotes, and current and future pricing policies and strategies as unfair methods of competition under Section 5).

[4] *See, e.g., Flakeboard*, Complaint at ¶ 33, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/11/07/flakeboard_complaint.pdf (noting a shared customer list which included contact information and types and volume of products purchased as one factor in an HSR Act violation); United States v. Computer Assocs. Int'l, Inc., Complaint 2002-2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (No. 01-02062), https://www.justice.gov/atr/case-document/file/492466/download (alleging the exchange of customer-specific prices, discounts, and contract terms as a factor in premature acquisition of beneficial ownership in violation of the HSR Act); *Gemstar-TV Guide Int'l*, Competitive Impact Statement (noting the sharing of confidential business information as a factor showing a pre-merger acquisition of assets in violation of the HSR Act).

[5] *Insilco Corp.*, Complaint at ¶ 21.

[6] *Computer Assocs.,* Complaint at ¶ 37.

[7] Fed. Trade Comm'n, *supra* note 1.

[8] U.S. Dep't. of Justice & Fed. Trade. Comm'n, Antitrust Guidance for Human Resources Professionals, at 5 (Oct. 20, 2016), https://www.justice.gov/atr/file/903511/download; *see also*, Carrie Mahan & Daniel Antalics, "The Gloves Are Off: Antitrust Enforcers Could Criminally Prosecute Human Resource Professionals," (Nov. 16, 2016), https://www.weil.com/articles/the-gloves-are-off-antitrust-enforcers-could-criminally-prosecute-human-resource-professionals.

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