FTC Warning: Don't Overshare in Pending Deals

The Federal Trade Commission (FTC) has recently re-emphasized the potential risks of antitrust violations stemming from the exchange of competitively sensitive information during pre-merger negotiations and due diligence. Although the FTC recognizes the legitimate need for sharing and accessing detailed information about a company for the purposes of an M&A transaction, they cautioned that the exchange of competitively sensitive information such as pricing information, strategic plans and costs has to follow appropriate procedural safeguards, and noted enforcement actions when the parties did not comply with them.

Background

It is well-established that exchanging information (including in connection with M&A due diligence) is not automatically unlawful under the U.S. antitrust laws but may be found unlawful to the extent that doing so is likely to have an anticompetitive effect. Exchanging information also may constitute evidence of an unlawful agreement (e.g., to fix prices).

In addition, information sharing during due diligence and integration planning may contribute to a violation of the HSR Act's "gun jumping" rules if it results in the buyer effectively gaining beneficial ownership of the seller prior to the closing of a transaction (and prior to expiration of the HSR review period). For example, in United States v. Computer Assocs. Int'l, Inc. (2002), the FTC found a violation in a merger agreement requiring the buyer to approve any discount of over 20% that the seller wished to offer its customers during the period between signing and closing of the proposed transaction.

In this case, the fact that the buyer had reviewed competitively sensitive information about the seller's customers and business strategy was used as evidence that the buyer had gained beneficial ownership of the seller prior to closing and during the HSR review period.

Our View

The FTC's ongoing attention in this area should serve as a reminder to dealmakers about safeguards they need to follow in making competitively sensitive information available to counterparties in a sale process. Setting up clean teams, creating aggregated customer information, redacting documents and placing other restrictions on the type of information that can ultimately be shared between principals is critical. These arrangements should be memorialized in consultation with outside antitrust counsel, who will be able to develop specific strategies to deal with any potentially problematic information sharing. The FTC places the burden on the parties and their antitrust counsel to ensure that such established protocols are followed.

If you have any questions about these matters, please do not hesitate to reach out to us – we would be happy to discuss with you in further detail.

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