# FTC OFFERS ADVICE ON AVOIDING VIOLATIONS IN PRE-MERGER NEGOTIATIONS AND DUE DILIGENCE

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**Antitrust, Competition & Trade Regulation Alert**

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The Federal Trade Commission ("FTC") recently published advice to businesses on avoiding violating the antitrust laws during merger negotiations and due diligence. Businesses engaging in mergers, acquisitions, and joint venture discussions need to be cognizant of antitrust issues in addition to whether the deal would significantly impair competition and therefore prompt a challenge to the consummation of the deal under Section 7 of the Clayton Act. They also need to assure that they do not either violate Section 1 of the Sherman Act through the disclosure between competitors of competitively sensitive information or violate the Hart-Scott-Rodino Act by effectively transferring *de facto* control before the expiration or termination of the mandatory waiting period under the Hart-Scott-Rodino Act.

## CONTROLLING THE FLOW OF COMPETITIVELY SENSITIVE INFORMATION

Section 1 of the Sherman Act, which prohibits agreements in restraint of trade, can be violated by the disclosure between competitors of information that is likely to affect prices or otherwise restrain competition by restricting output, allocating the market or restraining innovation ("Competitively Sensitive Information"). Since the identification of what is Competitively Sensitive Information is dependent upon the facts of a particular market, it is highly advisable for parties engaging in merger discussions to review due diligence lists and other information exchanges with knowledgeable antitrust counsel before exchanging such information. However, Competitively Sensitive Information generally includes product-specific current and future price information, cost information, product volumes, customer information, and strategic plans. Pre-merger activities that frequently implicate such concerns include pre-merger negotiations, due diligence, and planning for post-closing integration.

The FTC pointed out in its advice that challenges to pre-merger information sharing can occur even in connection with acquisitions that do not involve competitors with large enough market shares that the merger itself violates Section 7 of the Clayton Act.

The classic methods for avoiding illegal disclosures of Competitively Sensitive Information are (1) to limit disclosure of Competitively Sensitive Information to a Clean Team composed of company personnel who have no involvement in competitive activities like pricing, sales, customer selection, or product development; or (2) hiring an outside consultant to analyze the detailed competitive information and provide to company personnel an analysis that aggregates data across products and across customers to avoid the potential for competitive effects.

Clean Teams, the FTC emphasized, "should not include any personnel responsible for competitive planning, pricing or strategy" in the markets in which the merging firms compete with one another.

The FTC's advice on information sharing included the following specific steps:

- Establish a protocol for handling Competitively Sensitive Information and ensure that it is strictly followed.
- Share the least amount of information needed for effective due diligence, or integration planning, and tailor the amount of information to the specific stage of the process.
- Mask or redact customer identities and aggregate all competitive information.
- Ensure that instructions for document destruction at the end of the due diligence period are clear at the outset, with penalties or consequences for a breach.
- Ensure all members of a Clean Team understand their confidentiality and nondisclosure obligations.
- Any reports from outside consultants or Clean Teams to other company personnel that are prepared using Competitively Sensitive Information must include such information only in blended or aggregated form and should be reviewed by counsel before dissemination to other business personnel.

## AVOIDING GUN JUMPING

"Gun jumping" consists of the acquiring company's prematurely exercising de facto control or beneficial ownership over the acquired company. In a transaction in which a pre-merger filing under the Hart-Scott-Rodino Act is required, such gun jumping prior to the expiration or termination of the Hart-Scott-Rodino Act's waiting period constitutes a violation of the act and is punishable by daily civil penalties. If discovered, gun jumping may, as a practical matter, also delay the closing of the transaction. Conduct that the FTC has ruled to constitute gun jumping includes:

- the acquiring company's exercising control over the target's pricing discounts;
- the pre-closing allocation of customers between the acquiring and the acquired firms; and
- the acquirer's pre-closing payment of the full acquisition price so that the acquired company operates the business prior to the closing date only as a caretaker for the acquiring company.

The acquiring company's pre-closing control over the activities of the acquired firm may also involve a coordination of the respective firm's competitive business activities in violation of Section 1 of the Sherman Act.

Avoiding the risks of improper sharing of Competitively Sensitive Information and gun jumping can be managed through careful coordination between business personnel and counsel. It also requires carefully identifying what Competitively Sensitive Information needs to be shared, carefully establishing appropriate protocols for the handling of such information, and monitoring to ensure that such protocols are, in fact, implemented.

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