

Client Alert

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FTC Issues Advice Regarding Premerger Information Sharing

In a blog post published March 20, the Federal Trade Commission (FTC) [cautioned against anticompetitive information sharing](#) in the lead-up to closing a transaction.

The FTC has long held that information sharing between competitors can harm competition in violation of the antitrust laws. This is true even when two companies are in the process of merging. The FTC blog post offers a clear reminder that the obligation to act as competitors does not end until the transaction has actually closed. Even if the applicable waiting period under the Hart-Scott-Rodino Act has expired, premerger information exchanges can raise antitrust risks under Section 1 of the Sherman Act. Until consummation, the parties are separate entities and generally should not share competitively sensitive information.

The FTC recognizes that certain competitively sensitive information must be shared in order to conduct due diligence or to otherwise prepare for the closing of the transaction. To avoid anticompetitive information sharing prior to closing a merger or acquisition, deal parties should:

- Prepare and follow an information-sharing protocol to ensure the information will not be misused, including confidentiality/nondisclosure/clean team agreements;
- Use third parties or “clean teams” to review sensitive information;
- Ensure clean team members do not serve in roles that would be able to take advantage of any competitively sensitive information they may receive in the diligence or merger planning process;
- Share the least amount of information needed for effective due diligence;
- Redact documents to hide customer identities or other sensitive information;
- Aggregate competitive information (such as only show the final total bid price rather than the itemized bid); and
- Ensure that any third parties involved in the process comply with document destruction requests once the merger is complete.

Of course, every transaction is different, and the specific information-sharing protocols should be tailored to meet the needs of a specific deal. But the FTC blog post highlights the ongoing obligations that merging parties have to maintain confidentiality until the deal finally closes.

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