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BLOG

Big Tech, Small Deals: FTC Initiates Probes of Done Deals Below HSR Reporting Thresholds—Other Industries Take Note!

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On February 11, 2020, the Federal Trade Commission ordered some of the world's largest technology companies—Google (and its parent, Alphabet), Amazon, Apple, Facebook, and Microsoft—to produce data and information on transactions from the past decade that did not meet the Hart-Scott-Rodino Act's notification thresholds at the time of the transactions. The FTC's decision to examine these already-consummated deals comes amid concerns about these technology companies' size and power, and complaints by some about their strategies of buying out smaller rivals in order to maintain dominance and prevent potential rivals from growing and becoming a competitive threat, often referred to as "killer acquisitions."

The companies that have received these orders will have to produce the same kind of information and data that they would have provided as part of their HSR filing, had they been required to file. But that is not all. The sample 6(b) orders (which look and read very much like the Second Requests that the FTC ordinarily issues when reviewing a proposed transaction) will also solicit information about the companies' acquisition strategies, their agreements related to board appointments and voting, their agreements and policies related to hiring and employment (*e.g.*, non-competes) as part of the acquisitions, and detailed post-acquisition information, including price changes.[1]

The FTC is relying on its authority under Section 6(b) of the FTC Act—which allows it to order companies to produce reports and information from companies without having a particular law enforcement purpose[2]—to gather information as part of a "study" to "deepen its understanding of large technology firms' acquisition activity, including how these firms report their transactions to the federal antitrust agencies, and whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds."[3]

The FTC may be using its research authority, but it is not shy about calling this what it is: it has confirmed that a key purpose for gathering this information, among others, is to determine whether these acquisitions that were not subject to HSR notification requirements "might have raised competitive concerns, and the nature and extent of other agreements that may restrict competition."[4] And while the FTC is restricted from directly using, or sharing with other state and federal antitrust enforcement authorities, the information produced by the companies in response to these 6(b) orders, the FTC may still use what it learns to initiate separate enforcement actions and investigations based on what it learns.

The FTC has also suggested that may use the information it learns to revise its premerger notification requirements, by either changing the HSR rules, or issuing additional 6(b) orders requiring technology companies to report certain kinds of transactions even if they do not require reporting under the current HSR rules.

Companies, both within the technology space and in other industries, should be cognizant of potential anticompetitive effects even in cases where a transaction is small enough to not meet HSR filing requirements. While the FTC is currently focused on the big technology companies, others could be next—like the healthcare industry, which was specifically mentioned in the joint statement released by Commissioners Wilson and Chopra. Commissioners Wilson and Chopra took aim at the healthcare industry, urging the FTC to make it the next target, and pointed specifically to (i) the shrinking share of independent dialysis facilities with two national chains now owning the majority of dialysis facilities and earning "nearly all of the industry's revenue, with most acquisitions occurring below the HSR thresholds," and (ii) "patterns of 'stealth consolidation'" in pharmaceutical and hospital markets.[5]

It is increasingly important for companies who are contemplating a merger or acquisition of a rival—no matter how big or small of a transaction—to engage antitrust counsel early to analyze potential claims of anticompetitive conduct or effects so that they can be at least preliminarily prepared if antitrust regulators come knocking.

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[1] *See generally* Fed. Trade Comm'n, Order to File a Special Report (Sample), File No. P201201 (Feb. 11, 2020).

[2] *See* 15 U.S.C. § 46(b).

[3] *See* Fed. Trade Comm'n, Press Release, "FTC to Examine Past Acquisitions by Large Technology Companies" (Feb. 11, 2020), *accessible at* https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[4] *Id.*

[5] Comm'r Christine S. Wilson & Comm'r Rohit Chopra, Fed. Trade Comm'n, Statement Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020).

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