

Bureau of Competition Reminds Merger Parties that When It Comes to Ongoing Antitrust Probes, “There Are No Blinders”

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As the Bureau of Competition of the Federal Trade Commission (FTC) continues to enforce the nation’s antitrust laws amid the ongoing pandemic, this week it offered a useful reminder to those involved in proposed mergers. On July 20, senior staffers in the Bureau published a blog post reminding merger parties and potential divestiture buyers that ongoing antitrust investigations or litigations involving the parties or the industry are relevant to the Bureau’s review of proposed mergers, and may impact the Bureau’s ultimate determination. The blog—titled “[Eyes Wide Open: There are no blinders in merger reviews](#)”—notes that even non-public matters will likely be uncovered by the Bureau during its own investigation of a proposed merger, so it behooves parties to volunteer that information before it is otherwise discovered.

The FTC blog post makes clear that the mere existence of an ongoing antitrust probe “does not necessarily signal that a merger is anticompetitive,” and the Bureau will consider mitigating factors. But the Bureau notes that the existence of a pending antitrust investigation is a relevant factor that could “undermine parties’ arguments about the adequacy of the number of players in the market, the possibility of tacit coordination, or a party’s market position of lack of monopoly power.” This is particularly true when the allegations relate to collusion or coordinated behavior. The FTC’s blog post further warns that the Bureau’s focus in this regard is not limited to the merger parties themselves, but also extends to its vetting of proposed divestiture buyers.

The blog post serves as an important reminder to merger parties and potential divestiture purchasers to be fully forthcoming with respect to any information that implicates them in ongoing antitrust probes. This transparency allows the Bureau to analyze the implications of the merger with “eyes wide open.” For this reason, the [Bureau’s model Second Request](#) now includes a question (Specification 26) specifically soliciting information about prior and ongoing antitrust investigations. And as the FTC cautions, “[h]iding the ball on such allegations potentially undermines credibility and can prolong the antitrust review.” While this sound advice certainly applied pre-pandemic, such transparency is especially advisable in this COVID-churned environment, in which the review process may already be facing delays.

The FTC signaled early in the pandemic that it is making every effort to “[stay the course,](#)” and to [continue to apply its “usual rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief, even in the face of uncertainty.”](#)^[1] Merger parties would do well to take a similarly rigorous approach in disclosing all relevant information, including with respect to ongoing antitrust probes, as they participate in the review process.

[1] FTC Competition Matters Blog, *Antitrust review at the FTC: staying the course during uncertain times* (Apr. 6, 2020).

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Author

[Martin Geagan](#)

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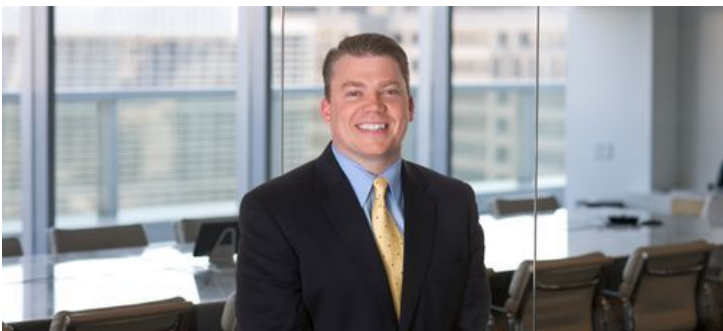
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