

a few things you should know ...

Antitrust and Competition Law Concerns in M&A Transactions

This edition of *A Few Things You Should Know* addresses potential antitrust and competition law issues that may arise in mergers and acquisitions. In addition to the HSR filing requirements and foreign merger control laws addressed in an October 2016 edition of *A Few Things You Should Know*, there are several substantive antitrust and competition law issues that can arise during negotiation and due diligence in M&A transactions. These include the types of information that can be shared between the parties during negotiations, agreements that may restrict competition (such as non-compete covenants and customer allocation agreements), and certain employment and HR issues.

- **SHARING SENSITIVE INFORMATION**

Disclosing or exchanging competitively sensitive information during due diligence can raise significant antitrust concerns, particularly when such disclosures are not ancillary to a lawful purpose. The types of sensitive information that can raise antitrust concerns include details on pricing, costs, compensation, and other information that would either advantage a competitor if the deal does not close or enable competitors to engage in anticompetitive behavior. Having detailed information on a competitor's prices, costs, customer contracts, wages, and other such sensitive data can enable a company to restrain competition by fixing prices or restricting output. Although the actual act of exchanging information is not illegal, it can potentially raise an inference of an illegal agreement to restrain competition.

Illegal conspiracies to restrain competition (through fixing prices, restricting output, and the like) need not be formal or overt. Tacit agreements are sufficient to violate the Sherman Act. Exchanging or divulging sensitive information may be seen as evidence of such a tacit agreement if the parties later raise prices, restrict output, or engage in other anticompetitive conduct. Historical or aggregated data is less competitively sensitive, and thus poses less risk. Restricting access to any sensitive information to a very small subset of officers or employees directly working on integration planning or diligence tasks is recommended as a precautionary measure.

- **CUSTOMER AND TERRITORIAL/GEOGRAPHIC ALLOCATION AGREEMENTS**

Dividing customers or geographic territories such that one company agrees not to compete for business within those parameters violates the antitrust laws. Such allocations are ordinarily treated as per se unlawful, meaning that no actual harm to competition need be shown. Companies generally cannot agree to restrict or eliminate competition, although there are certain limited scenarios in which such agreements may be permissible if they are ancillary to a separate pro-competitive economic integration (i.e., joint production agreements or shared facilities). Any agreements of this type disclosed during due diligence need to be very carefully considered to determine whether they are ancillary to a lawful arrangement such as a joint venture. If not, they may pose substantial legal risk.

- **NON-COMPETE COVENANTS**

Non-compete covenants are often included in deals at the request of the buyer to protect the value of the buyer's investment and allow the buyer to establish and successfully operate the acquired business. Depending on the scope of the specific restrictions, these covenants may or may not be benign from an antitrust perspective.

- Traditional Non-Compete Covenants – Generally, traditional non-compete covenants protect the buyer's investment in the acquired business by barring the seller from competing with that business. Such agreements are legal if they are reasonable in terms of scope and do not exceed the basic requirements necessary for the stated purposes of protecting the buyer's investment in the acquired business. The non-

compete covenants should be clearly limited to a reasonable period of time and should not extend into other lines of business that are unrelated to the focus of the business being acquired. The legality and enforceability of such non-compete covenants also should be reviewed under both federal and applicable state laws.

- **Non-Traditional Non-Compete Covenants** – Non-traditional non-compete covenants extend the restrictions on competition in ways that exceed the narrow purpose of promoting the acquired business. Non-compete covenants that impose restrictions on the buyer, restrain competition in businesses or product lines other than the one being transferred, or seek to eliminate competition for an indeterminate or unduly long period of time, are likely to violate the antitrust laws as unreasonable restraints on trade. Covenants such as these are not narrowly tailored to achieve the lawful purpose of preserving or promoting the acquired business, but rather constitute an agreement between the parties to restrain competition in a manner that is not ancillary to the lawful purpose of the acquisition in question—and are therefore quite possibly illegal.

- **EMPLOYMENT LAW ISSUES**

Companies cannot agree to eliminate competition between themselves for the recruitment or compensation of employees. Agreements to fix compensation (including wages, benefits, and perks) or to cap wage growth are treated the same as agreements to fix prices. The U.S. Department of Justice recently announced that it intends to criminally prosecute such cases.

Similarly, agreements to not recruit, or “poach,” employees from rival companies may be an illegal restraint on competition for employees. Such agreements may be permissible when they are ancillary to a lawful purpose, however, such as a joint venture or shared use of a facility. In such cases the parties may not be willing to enter into a joint arrangement unless they are protected from “poaching” of key employees by the other party.

Although sharing of sensitive employment information may raise antitrust concerns, the normal business needs attendant to M&A activity often make sharing such information necessary. Thus, disclosing the compensation of specific employees (a) to determine who will be retained post-merger or (b) to understand the implications of benefit packages for senior management are legitimate (and lawful) exchanges of sensitive information. These exchanges or disclosures usually can be managed appropriately to avoid any antitrust issues.

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A FEW THINGS YOU SHOULD KNOW is a periodic publication of the Mergers & Acquisitions practice group of Perkins Coie LLP. Each edition covers a discrete topic related to M&A, including identifying key issues to be addressed and related market trends. We also share our experience-based insight into current approaches to resolving common deal issues. *A Few Things You Should Know* is intended as a high-level issue spotting guide and quick-reference resource for buyers, sellers and their professional advisors. Please contact the Perkins Coie LLP attorneys listed above for more information.