Non-reportable Transactions: Antitrust Risk

A Lexis Practice Advisor® Practice Note by
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This practice note discusses antitrust issues specific to non-reportable transactions, including transactions that the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) challenge post-consummation (post-closing). Non-reportable transactions—those that do not require an HSR notification be submitted to the antitrust agencies—can present antitrust risk nonetheless. This practice note explains the antitrust agencies' authority to investigate non-reportable transactions, describes the agencies' enforcement activities in this area, and provides strategies for addressing antitrust risk in deal negotiations and before the antitrust agencies.

For general background on the merger review process, see the practice note Merger Review Antitrust Fundamentals. For background on how merger investigations proceed, see the practice note DOJ/FTC Merger Investigation Process. For background on how to analyze horizontal and vertical issues in mergers, see the practice notes Horizontal Merger Analysis and Vertical Merger Analysis.

FTC AND DOJ AUTHORITY TO INVESTIGATE AND CHALLENGE NON-REPORTABLE TRANSACTIONS

The antitrust agencies' authority to investigate and to challenge mergers and acquisitions extends beyond transactions covered by the Hart-Scott-Rodino (HSR) Act. 15 U.S.C. § 18a. The HSR Act and corresponding regulations are procedural in nature and establish requirements for when parties must notify the agencies of a transaction and receive clearance prior to closing. Section 7 of the Clayton Act, 15 U.S.C. § 18, however, prohibits acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly," regardless of whether or not the transaction requires notification under the HSR Act or has already been consummated. In addition, Section 5 of the FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. 15 U.S.C. § 45.

FTC and DOJ Tools to Investigate Non-reportable Transactions

The FTC and the DOJ can investigate non-reportable transactions under their general authority to investigate violations of the antitrust laws. For reportable transactions, the HSR Act provides a set of tools to the FTC and DOJ that allows the agencies to obtain information from the parties to evaluate whether the transaction substantially lessens competition, including the Request for Additional Information and Documentary Materials (commonly referred to as a "Second Request"). When investigating non-reportable transactions, whether consummated or not, the agencies must rely on different investigative tools:

- For the FTC, Section 6 of the FTC Act, 15 U.S.C. § 46, permits the agency to investigate violations of the FTC Act and violations of other antitrust statutes. Under Section 9 of the FTC Act, 15 U.S.C. § 49, the FTC may use subpoenas to compel the production of documents and witness testimony "relating to any matter under investigation." Under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, the FTC also may use civil investigative demands (CIDs) to investigate antitrust violations. Unlike subpoenas, CIDs permit the FTC to compel the filing of written reports and answers to interrogatories in addition to the production of documents and witness testimony. Regulations included within Part 2 of the FTC's Rules of Practice (governing nonadjudicative procedures) establish additional requirements for subpoenas and CIDs issued by the FTC as well as procedures for parties to petition to limit or quash subpoenas and CIDs. 16 C.F.R. § 2.1 et seq.
- Similarly, 15 U.S.C. § 1312 permits the DOJ to issue CIDs requiring the production of documents, answers to interrogatories, and oral testimony from anyone who may have information relevant to an "antitrust investigation." An antitrust investigation is defined as "any inquiry conducted . . . [to ascertain] whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation." 15 U.S.C. § 1311. 15 U.S.C. § 1312 includes specific requirements for CIDs issued by the DOJ and describes the ability to object to interrogatories and the rights of witnesses giving oral testimony. 15 U.S.C. § 1314 establishes provisions for a party to move to limit or set aside a CID.

FTC and DOJ Options to Take Remedial Action

Where the FTC or DOJ believes a non-reportable transaction violates the antitrust laws, the agency can take action to enjoin the transaction if the parties have not yet consummated it, or to unwind the transaction if the parties have already consummated:

- The FTC usually challenges mergers by filing a complaint before the FTC's administrative law judge. 15 U.S.C. § 45(b); 15 U.S.C. § 21. When necessary, the FTC also seeks a temporary restraining order (TRO) or preliminary injunction in federal court to preserve the status quo—such as preventing closing or requiring the parties to hold assets separate—while the administrative proceeding moves forward. 15 U.S.C. § 53(b). While the FTC usually does not challenge mergers solely in federal court and in lieu of the administrative process, Section 13(b) of the FTC Act permits the FTC to seek a permanent injunction in court "in proper cases" 15 U.S.C. § 53(b)(2) and the FTC has exercised this authority recently. See Compl., FTC v. St. Luke's Health Sys. Ltd., Case No. 13-cv-116 (D. Idaho Mar. 12, 2013) (seeking permanent injunction against consummated transaction).
- Unlike the FTC, the DOJ does not have an internal administrative procedure with which to pursue complaints. When the DOJ believes a non-reportable transaction violates the antitrust laws, it files a lawsuit in court to enjoin or unwind the transaction. 15 U.S.C. § 25.

While rare, the FTC and DOJ could seek monetary relief in addition to a court order enjoining the transaction. The FTC has noted its authority to seek disgorgement or restitution in "appropriate case[s]" under Section 13(b) of the FTC Act. Fed. Trade Comm'n, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority. The DOJ has also stated that it "may consider seeking disgorgement in consummated merger challenges either instead of or in addition to unwinding the transaction." U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies at 6 n.9 (June 2011).

Frequently, the parties and the investigating agency reach a settlement following an agency challenge to a non-reportable transaction:

- For FTC matters, the settlement is made public and notice of the settlement is posted in the Federal Register to allow 30 days for public comment prior to the Commission approving the final order. 15 U.S.C. § 46(f); 16 C.F.R. § 2.34.
- For DOJ matters, pursuant to the Tunney Act, the settlement is made public along with a Competitive Impact Statement prepared by the DOJ, both of which are published in the Federal Register to allow public comment. After 60 days, the DOJ must file with the court any comments it receives and its responses to the comments and it may ask the court to enter the final judgement. 15 U.S.C. § 16(b)–(h).

ANTITRUST AGENCY ENFORCEMENT ACTIVITY AGAINST NON-REPORTABLE TRANSACTIONS

Enforcement of non-reportable transactions represents a substantial percentage of the DOJ's and FTC's merger enforcement. From 2009 to 2013, almost 20% of the DOJ's merger investigations were of non-reportable transactions; over 25% of those investigations resulted in a challenge. Leslie C. Overton, Non-Reportable Transactions and Antitrust Enforcement, Remarks as Prepared for the 14th Annual Loyola Antitrust Colloquium, Institute for Consumer Antitrust Studies (Apr. 25, 2014). From 2013 to 2016, almost 12% of the FTC's merger challenges (settled and litigated) involved non-reportable transactions.

The consequences of a challenge to a non-reportable transaction are often severe, especially for the buyer if the transaction has already closed. In most cases, the parties and the agencies settle the matter, frequently with the buyer divesting a significant portion of the assets it acquired in the transaction. In some instances, a divestiture in a post-consummation enforcement action may be more severe than what would have been required in a pre-consummation investigation, for example, because the buyer integrated the acquired assets but the agency requires that the divestiture buyer have assets necessary to restore lost competition.

In limited instances, however, the FTC has agreed to behavioral remedies where the parties met the failing firm defense, or because, due to passage of time, the buyer could not feasibly separate the acquired assets. In *In re CentraCare Health*, the FTC agreed to a behavioral remedy because the seller was failing financially and no alternative buyer was available. Analysis of Agreement Containing Consent Order To Aid Public Comment, Docket No. C-4594 (F.T.C., Oct. 5, 2016). In *In re Graco, Inc.*, the FTC accepted a consent decree that required IP licensing to facilitate a competitor's entry and expansion and other measures to reduce barriers to entry. Analysis of Agreement Containing Consent Order To Aid Public Comment, Docket No. C-4399 (F.T.C., Apr. 17, 2013).

For more information on the failing firm defense, see the "Failing Firm" discussion in the practice note Horizontal Merger Analysis.

Prominent Litigated Challenges

Significant litigated matters in recent years highlight that both agencies, sometimes joined by state attorneys general, are active in challenging non-reportable and consummated transactions:

- In 2015, in *U.S. v. Twin America, LLC*, the DOJ and State of New York settled a matter after years of litigation with two hop-on hop-off bus tour operators in New York City who had combined their businesses in a joint venture. The two companies were each other's main competition, and after they established the joint venture they significantly raised bus tour prices. Competitive Impact Statement, U.S. v. Twin America, LLC, Civ. Action

No. 12-cv-8989 (Mar. 16, 2015). As part of the settlement, the parties agreed to divest one of the companies' bus stop authorizations to allow other companies to receive them and they paid $7.5 million in disgorgement for the "illegal profits" earned from the joint venture. Id.

- In *Bazaarvoice, Inc. v. PowerReviews, Inc.*, in 2014, the DOJ won its suit in the District Court for the Northern District of California challenging the consummated merger of two companies that offered competing product rating and review platforms (R&R platforms) and the court ordered Bazaarvoice to divest PowerReviews. 2014 U.S. Dist. LEXIS 3284, No. 13-cv-133 (N.D. Cal., Jan. 8, 2014). The transaction closed in June 2012, and the DOJ filed suit to undo the transaction in January 2013. The court's opinion focused on internal Bazaarvoice documents suggesting that the intent of the transaction was to eliminate a key competitor in addition to the fact that the deal significantly increased industry concentration because Bazaarvoice and PowerReviews were the two main competitors in the market.

  Following the court's judgement, Bazaarvoice settled with the DOJ and agreed to divest all of the assets it acquired from PowerReviews. It also had to license patents for R&R platforms to the divestiture buyer, to license the right to sell certain of Bazaarvoice's services to the divestiture buyer's customers, remove trade secret restrictions on Bazaarvoice employees who are hired by the divestiture buyer, and permit customers to switch from a Bazaarvoice R&R platform to one provided by the divestiture buyer. Competitive Impact Statement, U.S. v. Bazaarvoice, Inc., Case No. 13-cv-133 (May 8, 2014).

- In 2017, a federal court approved the divestiture of Saltzer Medical Group from St. Luke's Health System in a case that began in 2013 and resulted in an appeal to the U.S. Court of Appeals for the Ninth Circuit. Order Approving the Divestiture of the Saltzer Assets and Business, FTC v. St. Luke's Health Sys. Ltd., Case No. 13-cv-116 (D. Idaho Apr. 27, 2017). The Ninth Circuit affirmed the holding of the U.S. District Court for the District of Idaho—that the transaction was unlawful because of the high market concentration resulting from the merger, high barriers to entry, and actions by the merging parties that suggested St. Luke's would raise rates. Saint Alphonsus Med. Ctr. – Nampa Inc. v. St. Luke's Health Sys. Ltd., 778 F.3d 775 (9th Cir. 2015).

STRATEGIES FOR COUNSEL ADVISING ON NON-REPORTABLE TRANSACTIONS

Even if you have determined that your client's transaction is not HSR-reportable, your role as antitrust counsel should not end there. Given the potential for an antitrust investigation of a non-reportable deal, explained above, you should still analyze whether your client's transaction presents any antitrust risk and, if so, you may want to address that risk in the deal documents and consider a proactive regulatory strategy.

Analyzing Antitrust Risk

Even if a transaction is small or otherwise exempt from an HSR filing, the deal can harm competition. When your client undertakes a transaction, you should perform an analysis to gauge potential risk. The analysis may be brief or more extensive depending on the initial information you are able to obtain and the extent of analysis you believe necessary. As with any potential transaction, you should gather information about each party's lines of business, what portions of those businesses are part of the transaction, and whether the parties are horizontal competitors or have any vertical supplier-customer relationship. If the parties do not compete or have any vertical relationship, antitrust risk highly unlikely.

The following is a non-exhaustive list of the types of questions you should ask to make this assessment:

- Do the parties compete, and if so, for what products or services?
- What are the parties' respective shares of sales for their overlapping products or services?

- Are there many other suppliers for the parties' overlapping products or services, just a few, or none?
- Are any other companies poised to enter the marketplace and compete with the parties?
- Do the parties view each other as their closest competitor?
- Are there sub-segments within each product or service for which the parties are particularly close competitors?
- Do the parties have any common customers?
- Would any of the parties' respective customers have concerns about the transaction, and if so, what types of concerns?
- Are there particular customers for whom the parties are the only two or best two options, and if so, why?
- Are any customers likely to complain affirmatively about the transaction to the antitrust agencies?
- Is entering the marketplace to make and sell the parties' overlapping goods or services difficult and time-consuming?
- Do the parties have a supplier-customer relationship?
- Would the supplier in the transaction have an incentive to supply only its counterparty to the deal when they become one company, or to continue supplying other customers but at a higher price?
- Would other customers in the marketplace have other suppliers they could turn to easily?
- Would the customer in the transaction have an incentive to purchase only from its counterparty to the deal when they become one company?
- Could other suppliers in the marketplace easily find other customers to purchase their products or services?

For more information on conducting a horizontal or vertical merger analysis, see the practice notes Horizontal Merger Analysis and Vertical Merger Analysis. For more background on information requests to assess risk, including a form you can tailor and send to a client, see Horizontal Merger Analysis Information Request Checklist, Vertical Merger Analysis Information Request Checklist, and Information Request to Assess Substantive Antitrust Risk.

Allocating Antitrust Risk in the Transaction Agreement

Where you find that a client's transaction poses moderate to considerable antitrust risk, you should discuss with the client whether and how to address that risk in the transaction agreement. If a non-reportable transaction results in an antitrust investigation or challenge, absent provisions addressing those possibilities in the deal documents, the buyer could bear most of the costs of those actions as well as the costs of unwinding the transaction. While the seller may prefer not to raise antitrust risk affirmatively with the buyer to avoid conditions that might delay closing the deal and receipt of the purchase price, the seller would be involved in any pre-consummation investigation or challenge and would likely want to know the buyer's plan for dealing with the antitrust agencies. If the seller believes that the time between signing and closing will be brief or nonexistent (e.g., a simultaneous sign and close transaction), the seller might prefer the contract to stay silent on the antitrust risk. However, where the risk of a pre-closing antitrust investigation or challenge is significant (and possibly even when it is not), the parties likely will discuss the allocation of this risk. The following are the main issues the parties typically negotiate, all of which are intertwined.

Making Closing Conditional on Antitrust Conditions and Choosing an End Date

A key question is whether to make closing conditional on the nonexistence of an antitrust investigation or challenge to the transaction. The buyer may prefer to include a provision stating that it does not have to close in the event of an antitrust investigation, but the seller may prefer to close regardless of an investigation. Including such a provision in the transaction documents, however, gives up some leverage the parties may otherwise have over the antitrust agencies in negotiating the timing of an investigation, responses to discovery requests, or compelling the FTC or DOJ to make a quick decision on the transaction. If the parties agree to include such a provision, the details will be important.

The parties should consider how long they want to delay closing to see if an antitrust agency investigates, or if an investigation does occur, how long the parties want to proceed with such an investigation. Antitrust merger investigations can frequently take at least four to six months where the parties are on a path to settlement with the agency and over a year or longer in the event of a challenge. Increasingly, the antitrust agencies are conducting detailed investigations of the divestiture assets and divestiture buyers, extending investigation timelines. Business realities may exist for one or both parties that make a protracted investigation and lengthy waiting period to closing unworkable. In notifiable transactions, parties typically include an end date by which the deal must receive antitrust clearance or else the parties can walk away. The parties can include the same type of provision in a non-reportable transaction as well.

When considering the details of closing conditions and timing, remember that in non-reportable transactions, the antitrust review process is less structured. The antitrust agency is not under the timing obligations of the HSR Act for deciding whether to investigate or to challenge a transaction. The parties would therefore need to specify what would be needed to close. For example, the parties could condition closing on a certain number of months passing without an antitrust agency commencing an investigation, or they could require a specific communication from the antitrust agency that it will not challenge the deal.

Engaging with the FTC or DOJ

The parties also would need agree on whether to contact the FTC or DOJ affirmatively or whether to wait and see if either agency chooses to investigate the transaction. In advising your client in making this decision, you should consider the transaction's antitrust risk, how much certainty each side wants in proceeding with the deal, and the likelihood of an investigation if the parties do not affirmatively contact the agencies. The "Proactive Regulatory Strategy" discussion below sets out the advantages and disadvantages to consider in making this decision.

Regardless of whether the parties approach the FTC or DOJ, they should determine their willingness to comply with an antitrust investigation or defend a challenge. For instance, would the parties want to require that each side comply with a subpoena or CID to produce documents and provide witness testimony, or would they prefer to walk away from the deal if an agency makes any voluntary requests for information or issues formal process? Would the parties want to require that they litigate a challenge to the transaction, or would they want the ability to abandon the deal were an agency to sue? In the deal documents, the parties can require that they go through the full regulatory and litigation process, they can agree to walk away at the beginning of any investigation, or something in between. In addition, the parties should consider the possibility of divestitures to resolve competitive concerns. The buyer may not want to agree to any divestitures while the seller may want to require the buyer to pursue divestitures to enable the transaction to close.

In addition, the buyer should consider a provision requiring the seller to cooperate in defending the transaction if the FTC or DOJ opens a post-consummation investigation or challenges the transaction. If the seller still exists in some form post-transaction, it would be subject to compulsory discovery from the investigating agency, but the buyer would want to know what the seller is providing to the government and ensure consistency in any submissions and defense approach.

For more background on antitrust issues that arise in transaction agreement negotiation and drafting, including those that arise regardless of whether a deal is reportable or non-reportable, see the practice note Transaction Agreements: Antitrust Issues.

Reverse Termination Fee (Reverse Breakup Fee)

Finally, the parties should determine whether the buyer will pay the seller a reverse termination fee should any antitrust closing conditions not occur. The seller may consider a fee that incents the buyer to meet the antitrust conditions, and if the conditions are not met, compensates the seller for the time, effort, and cost of trying to complete the transaction, including the opportunity cost of choosing another buyer. The buyer, in contrast, would prefer to pay no termination fee at all or the smallest fee possible. There are many possibilities for structuring a termination fee and precedent from past transactions to consult. Ultimately, the termination fee, if any, is a business decision of the parties. For a reverse termination fee clause, you can tailor and use in your transaction agreement, see Reverse Break-up Fee and Termination Clause.

Proactive Regulatory Strategy

Deciding Whether to Inform the Agencies

When deciding whether to inform the FTC or DOJ about a non-reportable transaction prior to closing and to seek their guidance on the potential for an investigation or challenge, you should consider a number of factors. If harm to competition appears low and the deal is unlikely to have a high profile, it might be best not to contact the agency and wait to see whether an investigation occurs. Factors that can give a transaction a high profile include complaining customers, press reports, an industry that is particularly important to consumers, or an industry that the DOJ or FTC have scrutinized in the past. For example, the FTC keeps a close watch on transactions in the healthcare space. Where potential harm to competition could be viewed as substantial, customers are likely to complain, or the deal will have a high profile, you might consider reaching out to the agency prior to closing.

The following are some of the main disadvantages and advantages of a proactive regulatory strategy:

Disadvantages	Advantages
• Bringing attention to a transaction that might not otherwise receive scrutiny	• More certainty regarding the transaction
• Delay in closing the transaction	• No need to unwind the transaction post-closing
• Time and cost in responding to document requests, interrogatories, and providing witness testimony	• Potential for saving discovery costs by working affirmatively with the antitrust agency
• Potential for customers to learn about the transaction before the parties would like them to	

Implementing the Proactive Strategy

If the parties decide to approach the antitrust agency regarding their deal, you should work with your client and counsel for the other side to prepare as much as possible in advance. Typically, counsel make a presentation to the agency explaining the transaction, any products or services that might be of concern, and why the transaction presents no substantive antitrust concerns. You should also consider having a packet of materials ready to provide the agency, including company documents evaluating the transaction that would be submitted were an HSR filing required, and documents the agencies frequently ask the parties to provide voluntarily in the initial 30-day waiting period such as top customer lists, business strategy documents, and industry reports. Where competition concerns are significant, the parties may even want to offer the agency a remedy proposal at the outset or have one ready should the agency indicate that it has concerns about the transaction.

Note that even if you decide not to proactively approach the FTC or DOJ, you should consider outlining what your defense of the transaction would be if an agency did investigate and collecting some of the materials above (while being mindful of your client's resources and competing demands on its time).

Once they learn of the transaction, the FTC or DOJ would customarily contact other industry participants and the parties' customers to learn about the industry and its competitive dynamics. If the parties have not made their deal public, they might not want customers or others to know about the transaction. While the existence of a notifiable transaction is protected from disclosure under the HSR Act, a deal voluntarily disclosed to the agencies lacks such protection. However, the parties may request confidentiality from the FTC or DOJ, and staff is usually sensitive to confidentiality concerns and will agree to conduct third-party interviews without divulging the parties to the transaction. Nevertheless, if the industry is small, it may be easy for third parties to surmise the parties to the deal from the agency's questions.

For any documents, answers to interrogatories, or testimony or interviews given voluntarily to the FTC or DOJ, the parties should have the same or similar confidentiality protections as they would if complying with formal process. Confidentiality protections for such materials provided voluntarily to the DOJ outside of the HSR or CID process are less absolute, but DOJ staff may provide written assurances of confidentiality. See U.S. Dep't of Justice, Antitrust Division, Antitrust Division Manual, at III-19 (5th ed. Apr. 2018). In contrast, information provided to the FTC voluntarily is protected from disclosure under 15 U.S.C. § 57b-2(f) and 16 C.F.R. § 4.10.

Because notifying the FTC or DOJ about a non-reportable transaction is voluntary, the timing provisions of the HSR Act do not apply. The government has no obligation to decide whether to investigate the transaction within 30 days of notification or to block the transaction within 30 days after the parties comply with any information requests. The agency may be willing to commit to a certain time by which it would inform the parties of its intention to investigate the transaction, provided the parties submit requested documents and information to the agency within a specified time period.

You should also consider how to advise your client if the agency requests that the parties not close the transaction and/or hold the acquired assets separate for a specified period of time (i.e., a timing agreement or hold separate agreement), which the agency is likely to do. The parties may want to consider these requests in light of how they have already allocated risk in the transaction agreement. They also should consider the risks of consummating despite the agency's request, such as the loss of goodwill with the agency or the agency seeking a TRO to block the closing. One possibility to consider is trying to negotiate an agreement with the agency where the parties agree not to close for a certain time period in return for the agency's agreement to conclude its investigation by a date certain.

Other Actions to Minimize Risk

Regardless of whether the parties engage the antitrust agencies proactively, there are steps they can take to mitigate the risk of an antitrust investigation and challenge.

Be Careful in Creating Documents about the Transaction

Contemporaneous evidence from the parties' own documents is often the most powerful evidence that a transaction may substantially lessen competition. As demonstrated in the *Bazaarvoice* complaint and decision, which both cited harmful statements in the buyer's documents, the antitrust agencies and the courts place substantial weight on such materials. Thus, when creating documents about a transaction, even if non-reportable, avoid statements that suggest or could be misconstrued as a lack of competition in the industry or an anticompetitive intent for the transaction.

Try to Reduce Potential Customer Complaints

Where the parties are not concerned about customers learning of the transaction, they should consider affirmatively reaching out to customers to explain how the deal benefits them (e.g., highlighting efficiencies from the transaction, the ability to receive greater volume discounts by purchasing from a single supplier, or the ability of the combined company to offer more innovative products and services going forward). If possible, assure customers that they will not experience any supply disruptions or changes in service, and that their contracts will be assumed and fulfilled. And where customers raise concerns about the transaction, the relevant party should explore commercial options to alleviate those concerns such as offering a supply contract with favorable terms for a period of time. You should be mindful, however, that your client's actions do not cross the line into pressuring customers to support the transaction or engaging in any conduct that the FTC or DOJ would consider witness tampering. As counsel in the transaction, you should work with the client to manage the customer outreach process to ensure that it is handled appropriately and also to use customer feedback in preparing a defense of the transaction.

Consider Delaying Integration

In certain cases, if the parties decide to consummate the transaction without engaging with the antitrust agencies, the buyer should consider delaying integration in the event of a post-closing investigation. The FTC or DOJ may not credit the argument that it is too difficult for the buyer to unscramble the eggs and divest the assets it acquired if the agency believes the transaction harms competition. As described above, while there are cases in which the parties have kept the assets acquired because the antitrust agencies determined it was too difficult to unwind a transaction, there is also risk that integrating assets could result in divestitures more substantial than would have been necessary to solve the competitive problem if the assets were separate. Holding assets separate for a reasonable time following closing may relieve costs and headaches down the road should an investigation ensue, but such a course may be at odds with tangible business benefits from integration such as cost savings or other synergies.

Do Not Engage in Post-closing Conduct That Could Suggest a Loss of Competition Flowing from the Transaction

Similarly, if the parties decide to consummate the transaction, the buyer must be careful in its post-closing conduct. To minimize the risk of a post-closing investigation, for some period of time following closing, the buyer should not take any action that could be seen as harm to competition enabled by the transaction. Raising prices or reducing output following the closing of the transaction in particular could raise concerns about the deal's impact on competition. The buyer should also take care not to upset customers of the seller by trying to alter existing contracts, eliminating products or services, or otherwise reduce the quality of their experience, as that could lead to the customers contacting the antitrust agencies about the transaction.

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Erin Shencopp counsels and defends clients in all antitrust aspects of their strategic transactions and significant business decisions. She has defended multibillion dollar mergers in investigations by the U.S. Department of Justice and Federal Trade Commission, litigated merger cases in federal court, and defended clients in government investigations and private litigation alleging price-fixing, monopolization, tying, and other anticompetitive conduct. In 2017, Erin was named to Who's Who Legal: Competition — Future Leaders.

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Recommended by The Legal 500 US for antitrust civil litigation/class actions and merger control

"Rising Star," Illinois Super Lawyers (2012)