

FTC UNANIMOUSLY VOTES FOR BROAD REVIEW OF PRIOR ACQUISITIONS IN DIGITAL MARKETS

On February 11, 2020, the Federal Trade Commission ("FTC") issued "Special Orders" under Section 6(b) of the FTC Act (15 U.S. Code § 46) to Alphabet, Amazon, Apple, Facebook, and Microsoft, (the "Special Orders") requiring them to provide information related to certain prior transactions. Specifically, the Special Orders focus on transactions consummated between January 1, 2010 and December 31, 2019, that were not subject to reporting requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). The Special Orders announced today are a continuation of the FTC's ongoing efforts to examine competitive concerns in digital markets. Importantly, though the purpose of the Special Orders is to "study" the non-reportable transactions, the FTC made clear that the information it receives could lead to enforcement actions if the FTC determines any of the acquisitions were anticompetitive.

BACKGROUND

FTC Act Section 6(b) gives the FTC broad authority to conduct extensive industry studies outside of the context of an enforcement action. The statute permits the FTC to require parties to file "annual or special . . . reports or answers in writing to specific questions" to provide information about an entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals." 15 U.S.C. Sec. 46(b). Studies under Section 6(b) authority do not necessarily need a specific law enforcement purpose. In recent years, the FTC has used its authority under 6(b) to conduct investigations in

various industries, including: health insurance,¹ broadband providers,² mobile device manufacturers,³ data security auditing,⁴ and patent assertion entities.⁵

THE TECHNOLOGY PLATFORM SPECIAL ORDERS

The Special Orders announced today require each company to identify prior acquisitions that were not reportable under the HSR Act, either because they fell below the HSR Act's transaction valuation threshold or because they qualified for one of numerous exemptions to the HSR Act's filing requirements. The Special Orders request that the companies provide information similar to that requested in a pre-merger notification form under the HSR Act, as well as significant additional information, including materials related to (1) the company's decision to make an acquisition; (2) the company's internal analyses of the competitive effects of a transaction; (3) materials regarding the valuation of the transaction; and (4) details for two years post-transaction regarding how the acquired assets were to be integrated into the acquiring company's business. The Special Orders also request detail regarding the companies' respective acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies, post-employment covenants not to compete, and information related to post-acquisition product development and pricing. The recipients of the Special Orders may attempt to quash or negotiate the terms of these orders. Yet, whether they will do so remains to be seen.

A template Special Order made public by the FTC broadly defines "acquisitions" to include: acquisitions of more than 10% of the voting securities of a corporation; acquisitions of assets that represented at least 10% of the assets of the target, a division of the target, an office of the target, or a research and development group; acquiring assets that constitute a business, including an "app;" obtaining exclusive agreements or contractual rights, such as exclusive licenses or exclusive distribution agreements; or obtaining exclusive or non-exclusive rights to specifically defined types of data or databases.

The Special Orders are the latest step by this FTC to examine competition in the digital markets. In a media call announcing the Special Orders, FTC Chairman Joseph Simons explained that one impetus for the Special Orders was the FTC's 2019 Hearings on Competition and Consumer Protection in the 21st Century, during which the FTC learned that digital platform companies had conducted "hundreds" of transactions in recent years that had fallen below the HSR reporting thresholds, and so were not disclosed to U.S. antitrust authorities for pre-clearance. Chairman Simons noted that the Special Orders "will enable the Commission to take a closer look at acquisitions in this important sector, and also to evaluate whether the federal agencies are getting adequate notice of transactions that might harm competition." The FTC reportedly plans to use the

¹ See Press Release, Fed. Trade Comm'n, FTC to Study the Impact of COPAs (Oct. 21, 2019) <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas>.

² See Press Release, Fed. Trade Comm'n, FTC Seeks to Examine the Privacy Practices of Broadband Providers (Mar. 26, 2019) <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers>.

³ See Press Release, Fed. Trade Comm'n, FTC To Study Mobile Device Industry's Security Update Practices (May 9, 2016) <https://www.ftc.gov/news-events/press-releases/2016/05/ftc-study-mobile-device-industrys-security-update-practices>.

⁴ See Press Release, Fed. Trade Comm'n, FTC To Study Credit Card Industry Data Security Auditing (Mar. 7, 2016) <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-study-credit-card-industry-data-security-auditing>.

⁵ See Press Release, Fed. Trade Comm'n, FTC Report Sheds New Light on How Patent Assertion Entities Operate; Recommends Patent Litigation Reforms (Oct. 6, 2016) <https://www.ftc.gov/news-events/press-releases/2016/10/ftc-report-sheds-new-light-how-patent-assertion-entities-operate>.

information obtained from this "study" to gain a deeper understanding of the large technology firms, including whether they are making potentially anticompetitive acquisitions of nascent or potential competitors, and whether additional transactions should be subject to premerger notification requirements. Chairman Simons also stated that the study will be conducted through the Office of Policy and Planning and the results could lead to amending the HSR Act or issuing prospective Special Orders requiring targeted companies to report all transactions for a specified duration. Finally, while the Special Orders are only focused on non-reportable transactions, Chairman Simons acknowledged during a media call that the overall study would look at both reportable and non-reportable transactions.

The Special Orders are distinct from the on-going investigations by the FTC, U.S. Department of Justice ("DOJ"), and State Attorneys General into the online digital platforms. However, during his media call, Chairman Simons stressed that if information received pursuant to the Special Orders indicates a prior acquisition was anticompetitive, "all options are on the table," including unwinding the transaction, divestitures, or imposing behavioral remedies.

The FTC voted unanimously to approve issuing the Special Orders. Notably, Commissioners Christine S. Wilson and Rohit Chopra issued a joint supporting statement further questioning the "sufficiency of the HSR notification process" and advocating that the FTC conduct similar 6(b) studies into the healthcare sector, including dialysis providers, pharmaceuticals, and hospitals. Regarding the Special Orders issued today, Commissioners Wilson and Chopra emphasized the need to better understand the data privacy and protection practices of the companies; "how targeted advertising practices impact data collection;" and, how data is monetized to drive content and advertising.

LOOKING AHEAD

It is clear the FTC is interested in studying concerns regarding nascent competition and so-called "stealth consolidation," in which a dominant market player maintains its position by acquiring would-be competitors. However, the Special Orders raise many interesting questions. These include: How will this FTC study compare to the European Union's investigations into the same large tech players? Will the FTC's study inform any investigations being conducted by the DOJ and State Attorneys General? Should companies in other industries, particularly in the health care sector, be concerned that they could soon face similar 6(b) Special Orders?

These questions and more will be answered as this effort continues. One thing for sure is the U.S. Antitrust enforcement agencies are putting significant resources and efforts into better understanding the digital marketplace, which increases the likelihood of more enforcement actions in this sector.

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