

FTC uses “study authority” to review past non-HSR acquisitions

12 February 2020

On 11 February 2020 Federal Trade Commission (FTC) announced that it has issued Special Orders to five large technology firms requiring them to “provide information about prior acquisitions not reported to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act.”¹ Two FTC Commissioners – one Republican and one Democrat – issued a separate statement calling for similar studies of non-HSR transactions in healthcare and other industries.²

The agency could use its learnings from the study to modify HSR reporting thresholds, to open law enforcement investigations, or for other research purposes.

The agency issued the Special Orders pursuant to Section 6(b) of the FTC Act, which “authorizes the Commission to conduct wide-ranging studies that do not have a specific law enforcement purpose.”³ The Special Orders require the technology companies to provide information to the FTC about transactions between 1 January 2010 and 31 December 2019 that were not reportable under the HSR Act.⁴ The information “will help the FTC deepen its understanding of large technology firms’ acquisition activity, including . . . whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors.”⁵ The FTC specifically requested information outlining the terms, scope, structure, and purpose of these transactions, including documents related to corporate 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.

A separate joint statement by Commissioners Christine Wilson and Rohit Chopra called for the Commission to analyze non-reportable deals in the healthcare industry as well, pointing to what

¹ Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020) available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies?utm_source=govdelivery. The orders were sent to Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft, Corp.

² Federal Trade Commission, Statement of Commissioners Christine S. Wilson and Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (11 February 2020), available at https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_o.pdf.

³ Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020).

⁴ Under the HSR Act, certain acquisitions of assets, voting securities, or interests in noncorporate entities are subject to preclosing filing (with the U.S. antitrust agencies) and waiting period requirements if the applicable jurisdictional thresholds are satisfied and no exemption applies. The HSR jurisdictional thresholds are revised based on changes to the U.S. gross national product. The latest HSR threshold adjustments published in January 2020 are summarized [here](#).

⁵ Federal Trade Commission press release, FTC to Examine Past Acquisitions by Large Technology Companies (11 February 2020).

they termed “stealth consolidation” in dialysis facilities, pharmaceuticals, and hospitals.⁶ Wilson and Chopra also reiterated their request that the Commission prioritize 6(b) studies that explore consumer protection issues related to the privacy and data security practices of technology companies, specifically with respect to “how content curation and targeted advertising practices impact data collection, use, and sharing, and how the monetization of data impacts the creation and refinement of algorithms that drive content curation and targeted advertising practices.”⁷

⁶ Federal Trade Commission, Statement of Commissioners Christine S. Wilson and Rohit Chopra Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (11 February 2020), available at https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_o.pdf.

⁷ *Id.*

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