

Avoiding Gun-Jumping in Corporate Transactions

US Antitrust Risk Guidance

LOWEST RISK

Always Permitted

- Sharing publicly available or not competitively sensitive information between the merging parties.
- Requiring the target to continue to operate in the ordinary course of business until the transaction closes.
- Planning for integration, but not actually integrating the companies.

MODERATE RISK

Consult with Legal Department

- Exchanging competitively sensitive information as part of due diligence or integration planning, with safeguards including:
 - approval by counsel;
 - being reasonably necessary in both time and scope;
 - limiting the scope of disclosure within the companies;
 - implementing firewalls; and
 - exchanging historical, redacted, or aggregated information.
- Including interim covenants to govern the target's conduct between signing and closing that do not confer operational control.
- Jointly meeting for:
 - integration planning; or
 - town halls and other internal meetings to explain the transaction to employees.
- Unilaterally contacting customers and suppliers to explain the transaction and its benefits.

HIGHER RISK

Consult with Legal Department

- Jointly bidding for new business.
- Entering commercial agreements with one another.
- Exchanging current or future competitively sensitive information without additional safeguards designed and closely overseen by counsel. For example, information relating to:
 - pricing, pricing plans or formulas, discounts, bids, or costs;
 - wages, salaries, or employee benefits;
 - customers to the extent that information is confidential; or
 - plans or policies relating to competition, such as marketing or strategic plans.

HIGHEST RISK

Prohibited Before Closing

- Buyer taking control of the target's equity or assets or exercising operational control of the target, including taking control of:
 - ordinary course of business decisions;
 - ability to set prices, determine output, or launch new products;
 - advertising and marketing programs; or
 - ability to manage and maintain customer relationships.
- Coordinating the merging parties' business activities, for example by:
 - fixing prices or terms of customer contracts;
 - allocating markets and customers between themselves; or
 - stopping or suspending sales efforts for customer contracts up for renewal before closing, called slow rolling.
- Holding out to the public that the parties are one entity or giving the appearance of having combined their operations, including by:
 - answering phones using the name of the merged entity; or
 - allowing the target's employees to use email addresses and business cards of the merged entity.
- Integrating operations, for example by:
 - relocating or integrating physical operations;
 - posting employees at the other party's offices; or
 - appointing individuals of one party to manage or operate the other's divisions.