

Drowning Under Merger Filings, FTC Cautions Certain Companies to Close at Their Own Risk

AUGUST 6, 2021

Citing capacity constraints related to what the Federal Trade Commission (FTC) called a “tidal wave of merger filings that is straining [its] capacity to investigate deals ahead of the statutory deadlines,” [the FTC announced in a blog post](#) on August 3 that it has begun to send [letters](#) to some merging parties stating that its merger investigation is continuing beyond the statutory 30-day HSR waiting period even if the FTC has not issued a Second Request, and warning that, if the parties close the transaction while the investigation continues, they do so “at their own risk.”

Under the HSR Act, companies are required to report mergers and acquisitions exceeding certain size thresholds to allow the FTC and the Department of Justice (DOJ) time to review the transaction before the parties close. Once both parties have submitted their HSR filings, the reported transaction cannot close for up to 30 days while the enforcement agencies decide whether to seek additional information—a process commonly known as a “Second Request.” When a Second Request is issued, the 30-day HSR waiting period stops and restarts only after the parties substantially comply with the Second Request. Only after the 30-day HSR waiting period expires or is terminated may the parties close the notified transaction.

Although the FTC and DOJ have always had the authority to review and challenge transactions after the expiration of the 30-day HSR waiting period—or even after a transaction closes—such challenges have been rare.¹ Under the FTC’s newly announced approach, if the FTC is the investigating agency, the FTC may issue such a [warning letter](#) to the merging parties when the agency believes that it has not had sufficient time or resources to “fully investigate” the transaction prior to the expiration of the 30-day HSR waiting period.

The FTC tied its announcement to the “tidal wave” of merger filings that have been made this year. Indeed, according to the FTC’s [statistics](#) regarding HSR filings, the agencies are on pace to review almost twice as many filings this year as in 2020. It remains to be seen how frequently these warning letters will be issued and whether their issuance is a harbinger of increased post-consummation challenges.

This announcement from the FTC comes in the wake of the agencies’ suspension of the early-termination grants earlier this year. For more on that action, please refer to our Competition Corner post [here](#).

Notably, not all FTC commissioners agreed with this decision. Commissioner Noah Phillips expressed in a [written statement](#) that, historically, “the FTC has issued these warning letters only in extreme cases, when parties threatened to consummate a problematic merger while review suggesting illegality was ongoing.” He further argued

that “issuing letters on a blanket basis, even if [the FTC doesn’t] have reason to believe that the transaction is illegal, is intended to chill legal M&A across the board.” Similarly, FTC Commissioner Christine Wilson tweeted, “For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings.”²¹ And previously she tweeted, “I am gravely concerned that the carefully crafted HSR framework is suffering death by a thousand cuts.”²²

At this time there has been no corresponding announcement from the DOJ, which has concurrent jurisdiction with the FTC to review HSR-reportable and nonreportable mergers and acquisitions. Nonetheless, businesses considering transactions should consider how this development might affect their planned transactions. In particular, businesses should now evaluate closing conditions involving antitrust review and consider whether to specify that closing depends on the expiration of the waiting period or the close of any ongoing or threatened investigation. In particular, buyers should keep in mind the threat of post-closing divestitures when evaluating antitrust risk.

Businesses considering transactions that may trigger HSR-filing thresholds should reach out to the Winston & Strawn antitrust group to discuss how these developments might affect their planned transactions.

For further information or questions about Hart–Scott–Rodino filing obligations, please contact the Winston partners listed below or your Winston relationship attorney.

²¹ Since 2001 there have only been seven post-consummation challenges to transactions that were confirmed to be HSR reportable. See Practical Law Antitrust, Consummated Mergers Antitrust Enforcement Chart, Practical Law, available at [https://1.next.westlaw.com/Link/Document/Blob/19615139e81c211e598dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=d4c3c668-3f29-4abd-a002-636fab4ff943&contextData=\(sc.DocLink\)](https://1.next.westlaw.com/Link/Document/Blob/19615139e81c211e598dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=d4c3c668-3f29-4abd-a002-636fab4ff943&contextData=(sc.DocLink)).

²² Christine S. Wilson, (@CSWilsonFTC), Twitter (Aug. 5, 2021, 9:00 A.M.), <https://twitter.com/CSWilsonFTC/status/1423267556220149763>.

²³ Christine S. Wilson, (@CSWilsonFTC), Twitter (Aug. 5, 2021, 9:00 A.M.), <https://twitter.com/CSWilsonFTC/status/1423267550641721348>.

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