

FTC to issue “Warning Letters” that deals remain subject to antitrust review post-closing

August 5, 2021 | Client Update | 3-minute read

The Federal Trade Commission has announced that a “tidal wave” of HSR filings has strained its capacity to review mergers, and that, for transactions the FTC is not able to investigate fully during the HSR Act waiting period, it will issue “Warning Letters” that investigations “remain open,” and parties who close their transaction risk having the transaction challenged post-closing.

The Federal Trade Commission (FTC) [announced](#) on August 3 that it has received an “astounding” “tidal wave” of HSR filings that has “strain[ed] the agency’s capacity” to review mergers during the statutorily prescribed 30-day Hart-Scott-Rodino Act (HSR) waiting period. As a result, the agency says that it “cannot fully investigate” some mergers within the applicable time period. Accordingly, for such transactions, the FTC has started sending letters to parties stating that its investigation “remains open” and, if the parties close their transaction, they do so at the risk of the antitrust agencies (the FTC and Department of Justice (DOJ)) challenging the transaction post-closing.¹

In its announcement, the FTC cautions that, when the HSR waiting period expires, it does not constitute “approval” or “clearance” of the transaction. On one level, this is nothing new. The antitrust agencies have always had the ability to review an HSR-reportable deal after the HSR waiting period expires. Nevertheless, such reviews have been exceptionally rare in the past. The FTC’s announcement reflects an enhanced risk of post-closing investigations and challenges. For this reason, the announcement may have implications for the language used in drafting the risk-shifting and closing conditions in transaction agreements.

In particular, some transaction agreements include “receipt of requisite government approvals” (or similar language) as a stated closing condition. But the expiration of the HSR waiting period has never constituted an affirmative “approval.” This is now made especially clear by the FTC’s announcement. In addition, buyers have sometimes sought a closing condition to the effect that there are “no pending investigations” of the transaction. Going forward, the FTC’s announcement may provide buyers a greater ability to invoke such a condition to delay closing, and so sellers will likely want to resist such a condition. The bottom line is that buyers and sellers may want to anticipate and address in closing conditions a scenario in which the HSR waiting period has expired, but they have received a letter from the FTC stating that the investigation of the transaction remains “open and ongoing.”

As always, the risk of a post-closing investigation rests primarily (or exclusively) with the buyer. Buyers may want to consider seeking additional protections against such investigations, although we would expect sellers to resist such protections even more vigorously. At the end of the day, this may simply be another risk that buyers need to bear in the current enforcement environment.

It is notable that this announcement marks the second action taken so far this year to address the “unprecedented volume” of HSR filings the agencies are seeing. In February, the FTC and DOJ [announced](#) that they were “temporarily” suspending the practice of granting early termination of the 30-day waiting period under the HSR Act. Although the FTC and DOJ indicated that the temporary suspension would be brief, it remains in effect after more than six months.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Arthur J. Burke

+1 212 450 4352
+1 650 752 2005
arthur.burke@davispolk.com

Ronan P. Harty

+1 212 450 4870
ronan.harty@davispolk.com

Howard Shelanski

+1 202 962 7060
howard.shelanski@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

¹ With respect to the volume of HSR filings, the FTC website shows that, as of July 2021, the agency has received 2,067 filings during calendar year 2021. This is compared to the 815 filings the agency received during the same period last year (during the height of early COVID), and already surpasses the 2,023 total filings the agency received in calendar year 2020.