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FTC continues shake-up of merger review process

Dealmakers take note: the unprecedented volume of merger filings over the last several months combined with continued changes at the Federal Trade Commission (FTC) concerning merger filings translates into increased uncertainty and potential for delay prior to closing.

In February, citing the increased number of merger filings, the FTC [suspended](#) the practice of early termination. Early termination allows certain reportable deals that pose little risk of competitive harm to close before the end of the standard 30-day window after filing a notification under the Hart-Scott-Rodino (HSR) Act. While the suspension was described as temporary, and the FTC's website published two early terminations in July, it remains in effect today. Until the suspension is formally lifted, transacting parties should expect to wait at least 30 days after an HSR filing before closing.

What's more, recent developments also call into question whether planning for just a 30-day waiting period is enough. If the reviewing agency is unable to complete its HSR review within the 30-day waiting period, parties have been asked to pull and refile their HSR forms, restarting the 30-day clock. Parties have agreed to the request to pull and refile to avoid a formal second request, which can extend the waiting period for several months until the parties have substantially complied with numerous requests for additional information and documents.

Likewise, on Aug. 3, 2021, the FTC [announced](#) that due to "a tidal wave of merger filings" this year, it has been unable to complete antitrust investigations before the end of the HSR waiting period, sometimes even after a pull and refile. The FTC has begun issuing warning letters alerting companies that choose to close before completion of the FTC's investigation do so at their own risk. The FTC appears to be issuing warning letters only to parties who already are on notice of an ongoing investigation of potential competitive harm.

While the pull-and-refile option has long been a part of merger practice, there have been reports that the frequency of these requests from the FTC is increasing. Considering the Biden administration's July 9, 2021 [Executive Order](#) calling for increased review of proposed transactions, especially in the labor, agricultural, healthcare and technology sectors, it is particularly important for parties to consider the possibility of a pull-and-refile request early in deal negotiations.

In late August, the FTC further illustrated its willingness to depart from past practice, [announcing](#) it intends to scrutinize its voluminous log of informal interpretations of the HSR reporting rules. The FTC's informal interpretations of its highly technical rules are not binding, but have long provided an important source of guidance in determining whether a filing is required. In making this

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announcement, the FTC highlighted “one initial example of where the informal interpretation program missed the mark.” As such, beginning Sept. 27, 2021, [retirement of debt](#) now must be counted in determining reportability if it benefits the selling shareholders. The FTC has yet to provide meaningful guidance on how parties are to make this determination.

Companies should expect additional changes from the federal antitrust agencies going forward. In addition to the FTC’s promise to continue its review of its informal interpretations, the Biden administration’s July 2021 Executive Order urged the FTC to review the existing horizontal and vertical merger guidelines and revise them as necessary. In accordance with that directive, on Sept. 15, 2021, the FTC rescinded the Vertical Merger Guidelines, which it issued jointly with the U.S. Department of Justice Antitrust Division (DOJ) just last year. Following the FTC’s announcement, the DOJ issued a statement that while the Vertical Merger Guidelines remain in place at the DOJ, the agency is “conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers.”

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