

CLIENT ALERT

Navigating M&A Deals Through Antitrust Uncertainty at the Agencies

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New antitrust merger developments, particularly at the Federal Trade Commission (“FTC” or “Commission”), have added hurdles to obtaining Hart-Scott-Rodino (“HSR”) clearance and completing divestitures. They also place a premium on antitrust risk assessment and careful drafting of regulatory covenants and termination provisions in purchase agreements.

Lina Khan, Chair of the FTC, has initiated the changes noted below.¹ The October 2021 announcement regarding prior approval orders may be of particular interest to private equity firms. Jonathan Kanter, just confirmed as head of the Antitrust Division of the Department of Justice (“DOJ”), seems inclined to adopt a number of the FTC’s policies.²

- **Prior Approval Orders:** In **October 2021**, the FTC reinstated a practice that it had followed until the mid-1990s of routinely seeking “prior approval rights,” which will have a duration of at least ten years, in all settlement agreements with merging parties and parties purchasing divested assets.³ The prior approval policy is complex and may be relevant to private equity investors that specialize in particular sectors.

¹ See Memorandum from Lina M. Khan, Chair, Fed. Trade Comm’n, to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021), [here](#).

² Matthew Perlman, *DOJ Antitrust Chief Says Expect More Collaboration With FTC*, LAW360 (December 6, 2021), [here](#).

³ *Statement of the Commission on Use of Prior Approval Provisions in Merger Orders*, FEDERAL TRADE COMMISSION (Oct. 25, 2021), [here](#).

Navigating M&A Deals Through Antitrust Uncertainty at the Agencies

- The Commission will require “prior approval provisions in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years.”⁴
- “[I]n matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction, the agency will engage in a case-specific determination as to whether to pursue a prior approval order.”⁵
- “In some situations where stronger relief is needed, the Commission may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger.”⁶
- “The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request.”⁷
- “The Commission will also require buyers of divested assets in Commission merger consent orders to agree to a prior approval for any future sale of the assets they acquire in divestiture orders, for a minimum of ten years.”⁸

Earlier in the year, the FTC announced the following additional changes.

- **Suspension of Early Termination:** In **February 2021**, the FTC suspended all grants of early termination of the HSR initial waiting period indefinitely.⁹ The Commission did not explain why early termination would not be granted or how the early clearance of transactions with no antitrust concerns adds to the agencies’ burden. At the time of this alert, this suspension is still in effect.
- **Open-Investigation Letters:** In **August 2021**, the FTC began to issue open-investigation letters on transactions for which it has not completed review within the HSR waiting period.¹⁰ Such letters, typically issued near the end of the waiting period, advise parties that the FTC’s investigation remains open and that, if they close the

⁴ *Id.* at 2.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination*, FEDERAL TRADE COMMISSION (Feb. 4, 2021), [here](#).

¹⁰ *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FEDERAL TRADE COMMISSION (Aug. 13, 2021), [here](#); see also Client Alert, Willkie Farr & Gallagher LLC, *FTC to Issue Open-Investigation HSR Letters, Presenting Post-Closing Antitrust Risk and Raising Possible Contractual Issues*, [here](#).

Navigating M&A Deals Through Antitrust Uncertainty at the Agencies

transaction, they do so “at their own risk.”¹¹ Parties may wish to consider whether receipt of such a letter would constitute a failure of the HSR clearance closing condition under a purchase agreement.

- **HSR Rule Regarding Including Debt in the Purchase Price:** Also in **August 2021**, the FTC issued a blog post withdrawing its long-standing advice that the retirement of debt “should never be included in” the transaction price for the purpose of determining whether the transaction meets the “size of transaction” test under the HSR rules.¹² The FTC now states that, “while ... not all debt retired as a part of a proposed transaction is consideration, the full or partial retirement of debt should be included in calculating the [a]cquisition [p]rice in any instance where selling shareholder(s) benefit from the retirement of that debt.”¹³

Although the FTC has not issued guidance to clarify when “the selling shareholder(s) benefit from the retirement” of debt, effective September 27, 2021, the FTC will “recommend enforcement action for companies that fail to file when retirement of debt is part of the consideration for the deal.”¹⁴ In the same blog post, the FTC advised that it is reviewing other informal interpretations for possible clarification or correction.¹⁵

- **Vertical Merger Guidelines:** In **September 2021**, the FTC withdrew its adherence to the joint DOJ-FTC Vertical Merger Guidelines that had been issued only in June 2020.¹⁶ The Commission apparently concluded that the guidelines were not sufficiently strict and is drafting new guidelines. In the meantime, the FTC “will consider all relevant facts” when reviewing vertical transactions.¹⁷ Although the DOJ has not yet formally withdrawn from the Vertical Merger Guidelines, it has said that it will review them “to ensure they are appropriately skeptical of harmful mergers.”¹⁸
- **New Merger Review Considerations:** Also in **September 2021**, the FTC announced that it will broaden its merger review inquiry to include, among other things, labor issues and the presence of private equity purchasing

¹¹ Unlike the Federal Trade Commission, the Department of Justice has not yet adopted the use of open-investigation letters in its investigation process.

¹² *Reforming the Pre-Filing Process for Companies Considering Consolidation and Change in the Treatment of Debt*, FEDERAL TRADE COMMISSION (Aug. 26, 2021), [here](#); and *The Treatment of Debt as Consideration*, FEDERAL TRADE COMMISSION (Aug. 26, 2021), [here](#).

¹³ *The Treatment of Debt as Consideration*, FEDERAL TRADE COMMISSION (Aug. 26, 2021), [here](#).

¹⁴ *Reforming the Pre-Filing Process for Companies Considering Consolidation and Change in the Treatment of Debt*, FEDERAL TRADE COMMISSION (Aug. 26, 2021), [here](#).

¹⁵ *Id.*

¹⁶ *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FEDERAL TRADE COMMISSION (Sept. 15, 2021), [here](#).

¹⁷ *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guideline*, FEDERAL TRADE COMMISSION (Sept. 15, 2021), [here](#).

¹⁸ *Department of Justice Issues Statement on the Vertical Merger Guidelines*, DEPARTMENT OF JUSTICE (Sept. 15, 2021), [here](#).

Navigating M&A Deals Through Antitrust Uncertainty at the Agencies

interests.¹⁹ With respect to labor issues, the FTC has required in some cases that merging parties agree to limit the use of non-compete clauses in merger settlement agreements with the FTC.²⁰

In addition, the FTC reportedly has asked transaction parties about such other issues as unionization, environmental risks, wages, franchising, and corporate governance practices.²¹ How those factors affect clearance or challenge decisions remains unclear.

In light of the foregoing, transactional parties may wish to:

- **Assess the likelihood that HSR clearance would require a remedy**: An early antitrust analysis could provide guidance on whether a remedy is likely to be required for HSR clearance. Each party can then assess the impact that a prior approval order would have on its acquisition strategy over the coming decade.
- **Monitor the generation of transaction analyses**: Investment banker “pitch decks” (even by bankers that are not retained), confidential information memoranda, and, in many instances, internal investment memoranda concerning a proposed transaction must be filed with the HSR form. Imprudent drafting could draw agency scrutiny.
- **Scrutinize regulatory covenants and termination provisions in contracts**: Stricter merger enforcement may affect divestiture obligations in regulatory covenants and contractual termination dates. Early consideration of such issues may assist in developing a negotiating strategy.

We would be happy to advise on the specific facts of your transactions in the new regulatory environment.

¹⁹ *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FEDERAL TRADE COMMISSION (Sept. 28, 2021), [here](#).

²⁰ Curtis Eichelberger, *US FTC expanding push to protect labor through probes, scrutiny of employment contracts, Khan says*, MLEX (Dec. 6, 2021), [here](#).

²¹ Bryan Koenig, *Nontraditional Questions Appearing In FTC Merger Probes*, LAW360 (Sept. 24, 2021), [here](#); see also Lina Khan, Chair, Fed. Trade Comm'n, FTC Open Commission Meeting (Sept. 15, 2021), [here](#).

Navigating M&A Deals Through Antitrust Uncertainty at the Agencies

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