

CLIENT ALERT

FTC to Issue Open-Investigation HSR Letters, Presenting Post-Closing Antitrust Risk and Raising Possible Contractual Issues

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The Federal Trade Commission (“FTC”) recently announced that it will begin to issue “open-investigation” letters on transactions for which it has not completed review within the statutory time periods.¹ Such letters advise transactional parties that the FTC’s investigation remains open and ongoing and that, if the parties close the transaction, they do so “at their own risk.” The letters thus communicate the presence of an indefinite level of post-closing antitrust risk. Transactional parties should consider addressing the possible receipt of such open-investigation letters in drafting the closing conditions, regulatory covenants, and termination provisions of their contracts.

On August 3, 2021, the FTC issued the following notice:

For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk.²

¹ *Adjusting Merger Review to Deal with the Surge in Merger Filings*, FEDERAL TRADE COMMISSION (Aug. 13, 2021), [here](#).

² *Id.*

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The FTC justified the issuance of open-investigation letters, a sample of which is available [here](#), by the increased number of Hart-Scott-Rodino (“HSR”) Act filings in 2021 as compared to 2019 and 2020. A monthly chart of 2019-2021 HSR filings is available [here](#).³

The FTC stated that the “astounding” number of merger filings “is straining the agency’s capacity to rigorously investigate deals ahead of the statutory deadlines.”⁴ The Antitrust Division of the Department of Justice may follow suit with a similar announcement once the nominated head of the Antitrust Division (Jonathan Kanter) is confirmed by the Senate. Grants of early termination of the HSR statutory waiting period remain suspended, also purportedly because of the increased number of HSR filings.

Pursuant to the HSR Act, the FTC typically has 30 calendar days to initially review a filed transaction and determine whether a more extensive investigation is necessary. If the initial waiting period expires without the FTC’s seeking additional information (a “second request”), the parties may close the transaction.

As a practical matter, the FTC is likely to issue an open-investigation letter at or near the end of the initial 30-day waiting period. Contrary to past practice in which the expiration of the HSR waiting period concluded the government’s investigation, open-investigation letters alert the parties that antitrust risk remains even after the waiting period expires and the transaction can be closed under the HSR Act. Transaction parties may wish to address such post-closing antitrust risk in the closing conditions, regulatory covenants, and termination provisions of their contracts.

Willkie’s corporate and antitrust teams are available to assist with transactional strategies in response to the new FTC announcement.

³ *Id.*

⁴ *Id.*

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