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FTC Merger Warning Letters Seen As Largely Superficial

By **Matthew Perlman**

Law360 (August 18, 2021, 5:05 PM EDT) -- The Federal Trade Commission's recent revision to merger review procedures threatens companies with post-closing challenges, but the move may lack the teeth needed to have a practical impact, experts say.

The FTC said earlier this month that officials would start sending letters warning some merging parties that the agency's probe of their deal had not finished despite a statutory deadline and that if they close the transaction before the review is complete, they do so "at their own risk." The move comes as the Biden administration ramps up what is expected to be an aggressive push on antitrust and competition issues.

However, the warning letters may have little practical impact as antitrust agencies have always had the ability to challenge transactions that have already closed, meaning they serve more as a reminder of the current law than any sort of significant shift.

Harry T. Robins, a partner with Morgan Lewis & Bockius LLP, said he sees the move to start issuing the warnings as either political messaging, a genuine acknowledgement of the agency's constrained resources or a combination of both.

When announcing the change, commission officials cited a "tidal wave of merger filings" they said have strained the agency's ability to fully investigate deals ahead of the deadlines. But whatever the motivation, Robins said, the letters are not likely to keep parties from closing their deals.

"I have confidence in the staff and the agencies to reach fair results, and I think that these letters should largely be ignored," Robins told Law360. "You can investigate all you want, but you also have to get in front of a federal district court judge to block a deal."

Robins also noted that the FTC has other ways of preventing transactions from moving ahead, including issuing information requests, and said the agency could have asked parties not to close at all, rather than saying they can close "at their own risk."

"A letter with more teeth would have been a letter that says we're asking you not to close during the pendency of our investigation. That's a big thing to thumb your nose at," Robins said. "They have the power to do that, and they didn't do it by issuing these letters."

The Merger Review Framework

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, merging companies have to notify the FTC and U.S. Department of Justice ahead of time about mergers that reach certain thresholds. The agencies then have 30 days to review most deals and either let them through or request additional information from the parties, triggering a second 30-day waiting period after the companies comply.

When the waiting periods expire, companies are free to close their deals absent a challenge from enforcers.

Joel Mitnick, a partner at Cadwalader Wickersham & Taft LLP and a former FTC trial attorney, told Law360 the framework involves a bargain that gives the agencies a chance to challenge deals before they close while providing certainty to the business community about whether enforcers see transactions as problematic.

The letters being sent by the commission now appear to go out before requests for additional information and simply remind the parties that their deals can be challenged after the fact.

"This policy of issuing these letters does nothing to give the agency a greater opportunity to review transactions, but it does great violence to the notion of giving certainty to the business community," Mitnick said.

The FTC's announcement sparked a sharp response from Republican FTC Commissioner Christine S. Wilson, who said she was "gravely concerned" that the current merger review framework is "suffering death by a thousand cuts."

Wilson referred to the Hart-Scott-Rodino bargain in her statement about the changes, saying that before the statute, companies were free to merge without any notification requirements, but they also "bore the burden of uncertainty: would the government subsequently conclude the deal was anticompetitive and seek to unwind it?"

The HSR framework addresses these issues in a sensible compromise, she said, but to send letters saying investigations will continue indefinitely "every time there is a surge in filings" diminishes the purpose of the pre-merger notification and defies the will of Congress.

But Cadwalader's Mitnick also said that while the commission has the authority, it rarely challenges consummated deals in practice, partly because those are extremely difficult cases to win. This means the threats the letters make would be very difficult to follow through on, he said.

"When you have the commission issuing these letters, it's almost like a federal agency is issuing an empty blanket threat," he said. "That is not a good posture."

1,000 Cuts

Commissioner Wilson's statement about the changes also noted a **decision in February** to "temporarily" stop the common practice of ending reviews for many mergers ahead of the deadlines, a practice called early termination. The FTC and DOJ said at the time they needed to institute the suspension in order to review the procedure, citing the transition to a new administration and the "unprecedented volume" of recent merger filings.

Wilson also criticized the agency's handling of 7-Eleven Inc.'s \$21 billion purchase of the Speedway chain, a deal the companies closed despite an ongoing investigation when they declined to extend a timing agreement that had already been extended several times.

In addition, she pointed to a July move to start requiring more companies that settle merger challenges with the commission to provide prior notice for subsequent transactions, even if they don't meet the HSR thresholds, a move she said opens the door for "vindictive and wasteful enforcement."

"Collectively, these actions raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike," Wilson said.

Arman Oruc, a partner in Goodwin Procter LLP's complex litigation and antitrust practices, told Law360 the recent moves should be viewed in the context of a new administration that he said has a mandate from the public for more aggressive antitrust enforcement.

President Joe Biden has nominated enforcers known for a progressive approach to lead the antitrust agencies. He also issued an executive order in July that laid out in sweeping rhetoric a view that decades of corporate consolidation have led to a dearth in competition across large swaths of the economy, calling for a change in course after what he said was a 40-year "failed" experiment in lax antitrust enforcement.

"Given that, it's no surprise that we're going to see some action from the agencies," Oruc said. "The reality is deals have a lot of complexity to them and HSR is one part of that. It's always nicer to have a cleaner process, a clear-cut process."

"But this is the kind of thing that antitrust lawyers can handle," he said.

The Impact

The lack of practical impact from the commission's warning letters can be seen in a securities disclosure from food distributor Performance Food Group Co. earlier this month that said it was planning to move ahead with its purchase of convenience store supplier Core-Mark Holding Co. despite having received one of the FTC letters.

"Core-Mark and PFG believe that the letters they received do not change or expand the FTC's ability under U.S. law to investigate and challenge the mergers after expiration of the HSR Act waiting period and after consummation of the mergers," the filing said.

Mitnick said he expects this result to be common since the letters do nothing to change how difficult a post-closing challenge would be for the commission. He said the letters should have "near zero effect on the merging parties."

"Certainly, I would not advise, absent extraordinary circumstances, merging parties not to close just because of this letter," Mitnick said.

The letters may, however, factor into the contractual conditions of future deals, said Robins of Morgan Lewis. Attorneys should ensure parties are committed to fully complying with second requests for information from the antitrust agencies, he said, since the commission has signaled there will be more of those in addition to the warning letters.

He said attorneys also have to make sure that an open investigation will not be used as an excuse to delay closing.

"If you're representing the seller, you want to make sure that if the HSR waiting period expires, that the buyer has to close, even if they receive one of these 'nastygrams,'" Robins said.

--Editing by Jill Coffey.

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