Friday, August 27, 2021

Yesterday, the FTC announced certain changes in response to the continuing “massive surge” in HSR filings. See Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt | Federal Trade Commission (ftc.gov).

First, although providing no specifics, the FTC announced that it and DOJ are working together to update the formal HSR rules: “The FTC is currently in the process of working with the DOJ to update its existing merger filing rules.”

Second, the FTC is reviewing its “voluminous” published database of informal interpretations out of a concern that some of them “may not reflect modern market
realities or the policy position of the Commission.” The FTC has historically provided informal HSR interpretations by email in response to anonymous inquiries, and then published some of those on FTC’s website to provide general, informal guidance. However, the announcement cautioned: “These interpretations are not reviewed or authorized by the Commission and do not carry the force of law.’ The FTC will review these and then “determine the best path forward.”

Third, the FTC changed its treatment of debt in situations where the payoff of debt “benefit[s]” a selling shareholder. Previously, funds used to payoff target debt at closing could be excluded from the size of transaction in equity deals. The FTC expressed concern that parties were abusing its informal interpretations on this point and “sidestepping” HSR reporting requirements: “Target companies may be incentivized to take on debt just before an acquisition, so that the acquiring company can retire the debt as part of the deal. These deals then are not being reported to the FTC and the DOJ, which means that merging parties are effectively sidestepping the law and avoiding accountability.”

The FTC’s announcement did not provide a precise definition or list of examples of what types of debt payoff “benefit” a shareholder and fall under the new treatment. Parties should carefully analyze what type of debt can be deducted. It appears that at a minimum, payoff of the following two types of debt should now be included when determining the HSR size of transaction in light of FTC’s new guidance: (1) payoff of debt owed to a selling shareholder or (2) payoff of debt incurred by the target in order to make a distribution to a selling shareholder.

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