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FTC Changes Course on Debt Payoff, Casts Doubt on Past HSR Act Guidance

By [Michael Wise](#)

An August blog post by the Acting Director of the Federal Trade Commission Bureau of Competition contains sweeping statements suggesting changes in two key aspects of HSR Act compliance.¹ First, the post suggests that the Federal Trade Commission (the “FTC”) is narrowing the circumstances in which money used to retire debt of the target company can be deducted from the total “Size of Transaction” calculation. Second, and perhaps more significantly in the larger context of HSR practice, the FTC suggested that reliance on past informal guidance from the FTC’s Premerger Notification Office (the “PNO”) may be misplaced, stating that this guidance, which is posted on the FTC’s website, “may not reflect modern market realities or the policy position of the Commission.” In the current enforcement environment, the FTC’s post reinforces the need for parties to be cautious in assessing HSR Act compliance—an area where missteps can be costly (including fines of up to \$43,792 per day).

Background

The HSR Act requires certain mergers and acquisitions to be notified to the FTC and the Antitrust Division of the Department of Justice. It further provides a mandatory waiting period for the agencies to review a deal before it can be consummated. The question of whether a given transaction is subject to pre-notification requirements is often complex, and the PNO has historically aided parties by providing informal interpretations of the HSR Act’s requirements on a “no-names” basis. These informal interpretations, which are often provided within 1-2 days, provide clarification as to how, at least in the agency’s view, those requirements apply in the context of a given set of facts. The PNO has posted several thousand of these informal interpretations on its website, allowing parties to search for guidance on similar facts and draw conclusions about whether future transactions require HSR Act notification.

The FTC’s website encourages parties to review these informal interpretations. For example, it notes that “[m]any of the questions [regarding applicability of the HSR Act] can be answered by reference to the statute, rules and information contained on this web site. Given the high volume of inquiries, we recommend that you review these online materials before contacting the PNO.”² While each transaction is different, an informal interpretation on a prior deal may be sufficiently similar to a new set of facts that it is reasonable to conclude that the agency’s approach would remain the same. This sort of predictability aids parties and their counsel in assessing their legal obligations.

What has changed on the treatment of debt?

In acquisitions of voting securities and non-corporate interests, the determination of a transaction’s value for purposes of the HSR Act has, in the past, not included money that is being used to retire the

debt of the target company. As the FTC acknowledged, “up until now, the [FTC Bureau of Competition] advised that the retirement of debt should never be included in this calculation.”³ However, the revised statement from the FTC indicates that debt payoff should be included in the Size of Transaction “in any instance where selling shareholder(s) benefit from the retirement of that debt.”

The FTC’s language is challenging because of its lack of clarity—in some sense, an argument could be made that debt payoff always has some benefit to the selling shareholders. In past blog posts the PNO has addressed debt payoff in the leveraged buyout scenario, advising that new debt used to finance LBOs is always included in the size of transaction calculation.¹ Pending further FTC guidance, however, it seems that the following additional categories of debt payoff may fall outside the debt payoff exclusion:

- Debt taken on immediately prior to the transaction;
- Debt owed to shareholders of the target;
- Debt that is guaranteed by a selling shareholder; and
- Any other debt that is not “ordinary course.”

Future transactions involving debt payoff falling into any of these categories should be evaluated carefully to determine whether HSR Act reporting obligations are triggered. The FTC’s announcement states that it will begin enforcing this new interpretation for deals closing after September 27, 2021.

Broader Implications

Perhaps more importantly in the long run, the Acting Bureau Director’s post casts doubt on its long-standing practice of providing informal guidance to merging parties regarding their obligations under the HSR Act. While the debt retirement issue noted above is cited as one example of “where the informal interpretation program missed the mark,” the FTC is engaging in a broader effort to revisit its guidance to the public. This initiative is expected to eventually include revisions to the HSR Act’s implementing regulations—something that the FTC has been working on since an Advanced Notice of Proposed Rulemaking was issued in September 2020. However, in the meantime, an erosion of certainty with respect to HSR Act compliance obligations appears inevitable.

Practically speaking, these statements appear to be a warning shot for merging parties and their counsel. Even before the revisions to the HSR Act rules are completed or become effective, the FTC is seeking ways to modify its existing positions on the current rules to increase scrutiny of mergers and acquisitions—particularly smaller ones that are closer to the Size of Transaction threshold (currently \$92 million). In this environment, reliance on past interpretations may not shield the parties from scrutiny or enforcement in future deals presenting analogous facts. Indeed, the FTC’s post chastises parties that have relied on informal guidance from the PNO as a “supplement for their own legal analysis.” The messaging appears to be to err on the side of filing, even where prior guidance might have provided an exemption.

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¹ <https://www.ftc.gov/news-events/blogs/competition-matters/2016/10/lbos-size-transaction-test>

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¹ <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering>

² <https://www.ftc.gov/enforcement/premerger-notification-program/contact-information>

³ <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/treatment-debt-consideration>

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