# Preparing for the New FTC Warning-Letter Process in M&A

**Law360** on **November 4, 2021**

With a rash of changes since Chair Lina Khan took command, the Federal Trade Commission is proving the maxim that the only certainty is uncertainty.

Its new policy of issuing warning letters to deals that have successfully navigated the Hart-Scott-Rodino premerger review process — announced in an FTC "Competition Matters" blog post Aug. 3 — is injecting new and unnecessary uncertainty on parties just trying to get the deal done.

A look behind and into the FTC's new practice and its early and likely impacts on mergers and acquisitions reveals some potentially unintended consequences.

This article discusses those consequences and offers several practice tips for M&A lawyers on how to manage new levels of risk and uncertainty in the merger review process.

In 1976, Congress established a merger control system that has become the envy of the world: Parties to transactions above certain thresholds must provide advance notice to the Federal Trade Commission and the U.S. Department of Justice, and cannot close the deal until expiration of the statutory waiting period.

While the delay imposes a burden on the merging parties, the parties receive something in return. If the deal is approved, they can proceed to closing knowing that the federal government will not come knocking at a later date.

The FTC, of course, always reserved the right to challenge deals if anti- competitive effects later manifest, but the risk of a post-clearance challenge was historically negligible. In fact, of the 60,000-some HSR filings over the last 40 years, the FTC only challenged one reportable transaction after allowing it to close at the end of the waiting period.

That's less than 0.0002% of deals. Given that, buyers could comfortably assume that risk without much ado.

The FTC upended this carefully calibrated balance with a new practice of issuing warning letters regarding deals it has allowed to close and threatening the parties with the specter of further action if they actually do close. As the FTC's director of the Bureau of Competition warned, "companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk."

Every involved party — especially those most at risk of receiving a warning letter and being tagged with a future enforcement action — must think about how to handle this new uncertainty and risk, and the questions the changes raise, including:

- Whether or not the threat is credible;
- Whether or not the parties that receive a letter will stop a transaction in its tracks;
- Whether or not the buyer has the right to walk away from the deal, if the buyer believes the FTC's threat is real; or
- Whether or not the buyer's hands are tied by contractual commitments to

**Evaluating the Risk**

By telling recipients of warning letters they close at their own risk, the FTC is effectively seeking a de facto extension of deadlines that Congress did not see fit to give it.

It is a strange practice that sparked the Republican commissioners to strongly dissent. The added uncertainty created by the FTC's new policy, said Commissioner Christine Wilson, will "raise the costs of doing mergers and threaten[s] to chill harmful and beneficial deals alike."

Still, the warning letters will likely impact relatively few deals. For small deals with no competitive overlap, the FTC does not appear to be sending warning letters. For large deals with obvious problems, the FTC is continuing its standard practice of issuing second requests, precluding the immediate expiration of the statutory waiting period.

Therefore, the warning letters appear to target those deals where the FTC is concerned about a transaction but not sufficiently so address the issue.

So far, merging parties and the antitrust bar generally have taken the FTC's new warning letters with a grain of salt. Mere saber-rattling, they say, claiming that the warning letters are largely superficial because — ultimately — the FTC needs to go to court to challenge a deal.

Viewed logically, the risk of litigation over a deal the FTC does not even want to fully investigate, let alone challenge, during the statutory period — which can extend a year or longer — must be small.

If the FTC is serious about its warning letters, though, it will need to bring a post-closing case just to prove it can and will. And the agency has a fairly good track record in the merger cases it brings, especially since any challenge will be heard in the first instance by an administrative law judge employed by the FTC, and whose decisions will be reviewed de novo by the same commissioners who voted to bring the case.

Even if the FTC were not successful, the costs of litigating a merger are significant and can easily eat away all the expected synergies of a mid-sized deal. So, the fact that the FTC ultimately needs to litigate to unwind a closed transaction may not offer much solace.

**Practice Tips**

***Build it into deal documents.***

For deals on the cusp, buyers may want to consider making the absence of a warning letter a condition precedent to closing.

Alternatively, parties could agree upfront that, if they receive a warning letter, they will allow the FTC more time to finish its investigation before closing, effectively giving the FTC what it wants.

There are downsides to this, of course, particularly on the seller, so it should not be expected that such provisions will come cheap or would be easily agreed to.

***Evaluate the risk.***

Not every deal gets a warning letter. Divining which are most likely to receive a letter can help parties build in better and more precise risk shifting provisions.

This requires a thorough assessment of potential antitrust risk, along with a good read on the current temper of the agency on the issues presented by the transaction.

***Ensure a solid understanding.***

The new level of uncertainty imposes on practical implications, and not just potential or theoretical outcomes. An understanding of the levers available both to the agency and the parties, and their relative and likely impact, is required.

**Conclusion**

Whether the FTC is flexing its muscles or just getting warmed up, parties on both sides of deals need to consider the implications of the FTC's new warning letter policy.

Consider what additional antitrust conditions and efforts provisions are appropriate before putting ink to paper — otherwise, it may be too late to do anything other than proceed at his own risk. Sooner or later, the FTC will bring a post-warning-letter enforcement action to show it has the power and resolve to do so. And when it does, denial may no longer be an effective coping strategy.

*Reproduced with permission. Originally published November 3, 2021, "Preparing For The New FTC Warning-Letter Process In M&A,' Law360.*

**Related Professionals**

- **Colin Kass**
  Partner
- **John R. Ingrassia**
  Partner
- **David A. Munkittrick**
  Partner