

August 27, 2021

Hart-Scott-Rodino Act

FTC Revises Treatment of Debt Payoff in HSR Analyses

SUMMARY

FTC announces reversal of its long-standing position concerning the treatment of debt payoffs in the calculation of the acquisition price for a stock acquisition.

FTC'S NEW TREATMENT OF DEBT PAYOFF

On August 26, the Acting Director of the FTC's Bureau of Competition issued a blog post (available [here](#)) announcing that the FTC was reversing its long-standing position that, in calculating the acquisition price for a stock acquisition for purposes of assessing whether an HSR Act filing is required, the retirement of debt should be excluded from the calculation. The Acting Director expressed concern that parties had evaded filing obligations in the past by structuring deals to have the target take on debt before the acquisition so that the value of this debt could be subtracted from the overall deal value.

The blog post and an accompanying post to another part of the FTC website (available [here](#)) left unclear when the retirement of debt should and should not be considered part of the acquisition price for HSR Act purposes. The FTC appeared to acknowledge that parties should not treat all retired debt as part of the consideration for a proposed transaction, indicating that full or partial retirement of debt should be included in calculating the acquisition price "in any instance where the selling shareholder(s) benefit from the retirement of that debt." For many years, the FTC has allowed parties in stock transactions to exclude from the calculation of the acquisition price repayment of existing debt of the target owed to third parties. The underpinning of that approach was that repayment of debt did not flow through to the selling shareholders and was therefore not part of the consideration received by the selling shareholders in exchange for their stock. The FTC now seems to be attempting to identify circumstances in which the selling shareholders do benefit from the retirement of the debt.

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The August 26 blog post announced that, effective September 27, 2021, the Bureau would recommend enforcement actions for companies that fail to make HSR Act filings when retirement of debt “is part of the consideration for the deal.” Although unclear, that assertion perhaps suggests that the FTC intends its new position to apply to transactions closing on or after September 27. Given the opaqueness of this new guidance, parties to transactions involving the retirement of debt should carefully consider the potential need to make an HSR filing. Relevant scenarios to be considered include leveraged recapitalizations in which the target pays a cash dividend to shareholders before completion of a sale.

Two other aspects of the FTC’s recent statements also merit attention. First, the FTC stated that it was “currently in the process of working with the DOJ to update its existing merger filing rules.” It is uncertain what those updates might look like, when they are likely, or what enforcement goals are animating that review. Second, the FTC statements were critical of party reliance on the FTC’s own informal interpretations, which the FTC itself makes available on its website. Specifically, the Acting Director criticized companies that “appear to rely on [the FTC’s prior interpretations] as a substitute or supplement for their own legal analysis.” Given the broad reliance of the antitrust community on those decades of interpretations (issued under FTC Chairs appointed by Presidents from both political parties), the FTC’s disavowal of the relevance of its precedent creates new doubt about other potential filing situations too. The distancing from interpretations made by prior Administrations is in keeping with President Biden’s remarks at the July 9 signing ceremony for the Executive Order on Promoting Competition in the American Economy (available [here](#)): “Forty years ago, we chose the wrong path ... and pulled back on enforcing antitrust laws.” Parties to all mergers should consider these developments in assessing not only potential filing obligations but other potential interactions with the enforcement agencies.

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