

**Increased Risk of Unwinding as Result of Extended Agency Review**

Introduction

The Hart-Scott-Rodino (HSR) Act remains the backbone of antitrust enforcement in the United States. Assuring that merging parties will not have an anticompetitive effect on the market is essential for maintaining a fair and equitable marketplace.<sup>1</sup> The Federal Trade Commission (FTC) and the Department of Justice have the shared responsibility of reviewing transactions that meet a predetermined threshold in order to facilitate the standards set out in the HSR Act.<sup>2</sup> In August of 2021, the FTC announced that the agency would begin instituting a “warning letter” process because of a large increase of reported transactions that has led to a resource constraint in which the agency is unable to properly review each transaction within the original review waiting period.<sup>3</sup> The “warning letter” states that the proposed transaction can be closed but the agency still has the opportunity to review and challenge the transaction for anti-competitive effects in the future.<sup>4</sup> This process has subsequently resulted in uncertainty for companies that report their transactions via the HSR Act.<sup>5</sup>

This article will begin with a brief history of the origins of the HSR Act and requirements set forth in the Act. Next, this article will discuss the recent “warning letter” procedure enacted by the FTC, highlighting the agency’s current and growing interest in preventing illegal mergers

---

<sup>1</sup> *Premerger Notification Program*, FED. TRADE. COMM., <https://www.ftc.gov/enforcement/premerger-notification-program> (last viewed Mar. 18, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> Ed Harvey, *HSR Filers: Close at your own risk as FTC is overwhelmed by “tidal wave of merger filings”*, THOMPSON COBURN LLP (Aug. 19, 2021), <https://www.thompsoncoburn.com/insights/publications/item/2021-08-19/hsr-filers-close-at-your-own-risk-as-ftc-is-overwhelmed-by-tidal-wave-of-merger-filings>; *see also* Hilly Vedova, *Adjusting merger review to deal with the surge in merger filings*, FED. TRADE COMM’N (Aug. 3, 2021), <https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (defining new merger review process and FTC’s limited resources in light of the “tidal wave of merger filings” in 2021).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

and resource constraints. Then, this article will analyze the repercussions that an unwinding of a transaction could have on the parties involved, and lastly, propose procedural changes that the FTC can enact to alleviate the current load of the agency's merger reviews.

### Background of the HSR Reporting System

Prior to the formation of the Hart-Scott-Rodino Act (HSR Act), mergers that could have resulted in anticompetitive effects were often completed without government intervention.<sup>6</sup> In order to begin to regulate these transactions, in 1908, Theodore Roosevelt and the Commissioner of Corporations worked to create the Hepburn Bill which would have effectively required large firms to provide advance notice of proposed mergers.<sup>7</sup> But, unfortunately, the bill did not become law.<sup>8</sup> A few years later in 1914, Congress passed the Federal Trade Commission (FTC) Act and Clayton Act which outlawed anticompetitive mergers but did not require a premerger notification process.<sup>9</sup>

Decades later in 1976, three bills were introduced that were made to address the shortcomings in the mechanisms of antitrust enforcement.<sup>10</sup> The three bills address Department of Justice (DOJ) civil investigative demands, established premerger notification, and created *parens patriae* authority for state attorneys general.<sup>11</sup> But in an act of procedural maneuvering, Senator Hart and Representative Rodino moved the bill through Congress, resulting in the Hart-Scott-Rodino Act.<sup>12</sup> The HSR Act established that companies must file premerger notifications

---

<sup>6</sup> Kelly Signs, *Milestones in FTC history: HSR Act launches effective premerger review*, FED. TRADE COMM. (Mar. 16, 2015), <https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; See Robert Longley, *What is the Parens Patriae? Definition and Examples*, THOUGHTCO. (Jan. 4, 2021), <https://www.thoughtco.com/parens-patriae-definition-examples-4588615> (defining *parens patriae* as something that is applied in lawsuits between the states and in suits dealing with the wellbeing of a state's entire population).

<sup>12</sup> Signs, *supra* note 6.

with the FTC and the Antitrust Division of the DOJ for certain acquisitions that meet thresholds that are updated annually.<sup>13</sup>

The HSR Act receives its power from Section 7 of the Clayton Antitrust Act, which prohibits mergers, acquisitions, and certain joint ventures where the effect may be to substantially lessen competition.<sup>14</sup> The most common forms of transactions that need to be reported are acquisitions of voting securities, acquisitions of assets, acquisitions of control of a non-corporate entity, mergers of corporate and non-corporate entities, formations of corporations and non-corporate entities, and exclusive licenses for certain types of intellectual property.<sup>15</sup> But in order for these transactions to be reported, they must meet the three threshold tests for required reporting.<sup>16</sup> The first is the commerce test, which simply requires that either party is engaged in commerce or in any activity affecting commerce to be satisfied.<sup>17</sup> The second test is the *size of the parties* test, which requires that one party has at least \$202 million in total assets or annual net sales, and the other party has to have at least \$20.2 million in total assets or annual net sales.<sup>18</sup> The last test is the *size of transaction* test, which requires transactions that are valued at \$101 million or more are required to be reported.<sup>19</sup> But if the transaction is valued at more

---

<sup>13</sup> *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, FED. TRADE COMM., <https://www.ftc.gov/legal-library/browse/statutes/hart-scott-rodino-antitrust-improvements-act-1976> (last viewed Mar. 18, 2022).

<sup>14</sup> *Section 7 of the Clayton Act*, THOMSON REUTERS, <https://1.next.westlaw.com/Document/Ie18fbbfe2f3e11e798dc8b09b4f043e0/View/FullText.html> (last viewed Mar. 18, 2022).

<sup>15</sup> *Id.*

<sup>16</sup> *What is the Hart-Scott-Rodino Act?*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/navigating-the-hart-scott-rodino-act-> (last viewed Mar. 18, 2022).

<sup>17</sup> *Steps for Determining Whether an HSR Filing is Required*, FED. TRADE COMM., <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing> (last viewed Mar. 18, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

than \$403.9 million, then the transaction will be subject to premerger reporting requirements regardless of the *size of the parties* test.<sup>20</sup>

Once the report has been filed with the review agencies, there is a 30-day waiting period during which either the FTC or the DOJ will review the transaction for anticompetitive effects as described in Section 7 of the Clayton Act.<sup>21</sup> The FTC and DOJ will determine which agency will review the transaction depending on what are of business the parties are in; this is called the “clearance process”.<sup>22</sup> But during that 30-day waiting period the reviewing agency can either allow the initial waiting period to expire, terminate the waiting period prior to the end of the waiting period (Early Termination or “ET”), or the review agency can issue a request for additional information from each party (known as the “Second Request”).<sup>23</sup> If the waiting period expires or is terminated then the parties are free to close their deal, but if the agency issues a Second Request which extends the waiting period a significant amount of time, this prevents the companies from closing their deal until they have “substantially complied” with the Second Request.<sup>24</sup> The Second Request typically requires the parties to send business documents and data that will inform the agency of the company’s products, services, market conditions, and likely competitive effects of the merger.<sup>25</sup>

This entire process is required to determine whether a transaction can be cleared and subsequently closed.<sup>26</sup> The review agencies communication with the businesses allows them to

---

<sup>20</sup> *Id.*

<sup>21</sup> *Premerger Notification and the Merger Review Process*, FED. TRADE. COMM., <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process> (last viewed Mar. 18, 2022).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

close the deal without fear of the review agencies challenging the transactions in the future.<sup>27</sup> Since August of 2021, however, the FTC has been providing warning letters that create uncertainty for companies undergoing a transaction as to whether their deal will be challenged for anticompetitive effects in the future.

### The Warning Letter Process

On August 3, 2021, the Federal Trade Commission (FTC) issued a statement that the commission will now be issuing warning letters to some parties that reported their transactions for review.<sup>28</sup> The purpose of the warning letter is to inform the merging parties that the FTC's investigation will remain open even after the close of the HSR Act waiting period.<sup>29</sup> The statement issued by the FTC stated that these letters are being issued because of capacity and resource constraints due to an increased amount of reported transactions.<sup>30</sup> This tidal-wave of merger filings has been straining the agency's capacity to accurately and in a timely fashion, investigate deals ahead of the statutory deadlines.<sup>31</sup> In 2021, there has been a total of 4,130 merger notifications within the United States, compared to an average of 1,991 merger notifications a year over the past six years.<sup>32</sup>

Exemplifying the restraint faced by the Commission, in a January 2022 statement the Bureau of Competition notes that the FTC and DOJ launched a public inquiry aimed at

---

<sup>27</sup> *Id.*

<sup>28</sup> William H. Stallings & Scott P. Perlman, *One Bite at the Apple or Two? The FTC Warns Companies of Potential Post-Waiting Period Investigations*, MAYER BROWN (Aug. 6, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/08/one-bite-at-the-apple-or-two-the-ftc-warns-companies-of-potential-post-waiting-period-investigations>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Ed Harvey, *HSR Filers: Close at your own risk as FTC is overwhelmed by "tidal wave of merger filings"*, THOMPSON COBURN LLP (Aug. 19, 2021), <https://www.thompsoncoburn.com/insights/publications/item/2021-08-19/hsr-filers-close-at-your-own-risk-as-ftc-is-overwhelmed-by-tidal-wave-of-merger-filings>.

<sup>31</sup> *Id.*

<sup>32</sup> J. Mark Gidley et al., *Shining a light on the massive global surge in merger control filings*, WHITE & CASE (Jan. 10, 2022), <https://www.whitecase.com/publications/insight/shining-light-massive-global-surge-merger-control-filings>

strengthening the agencies' enforcement against a rising number of illegal mergers.<sup>33</sup> The recent inquiry is designed to ensure that the merger guidelines, established to detect and prevent illegal transactions, reflect the modern market in which industries are becoming less competitive and more significantly concentrated.<sup>34</sup> Mergers, whether legal or illegal based on the reporting threshold value, may result in lessened consumer choice and increased decision-making by powerful firms subject to the reporting requirements.<sup>35</sup> In light of the growing number of filings, the agencies have announced that parties subject to the HSR reporting requirements who receive a warning letter will proceed at their own risk, while the FTC's delayed investigations remain open.<sup>36</sup>

This warning letter process has left companies in a tricky position. The companies subject to agency review of their proposed merger must choose whether to proceed with transactions that have not been investigated to the full extent by the FTC and run the risk of facing a challenge to the already consummated merger.<sup>37</sup> In light of this predicament, these companies are facing a multitude of complications that need to be accounted for.<sup>38</sup>

First is that there is an overall greater sense of uncertainty for companies that wish to complete their mergers and begin operating their new business at the end of the initial HSR waiting period.<sup>39</sup> Traditionally, at the end of the 30-day waiting period, the parties would be able

---

<sup>33</sup> *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, FED. TRADE COMM. (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See FTC Warning Letters Prompt Modified Hart-Scott-Rodino Closing Condition*, THOMPSON REUTERS PRACTICAL LAW ANTITRUST (Feb. 07, 2022) ()

<sup>37</sup> Ed Harvey, *HSR Filers: Close at your own risk as FTC is overwhelmed by "tidal wave of merger filings"*, THOMPSON COBURN LLP (Aug. 19, 2021), <https://www.thompsoncoburn.com/insights/publications/item/2021-08-19/hsr-filers-close-at-your-own-risk-as-ftc-is-overwhelmed-by-tidal-wave-of-merger-filings>.

<sup>38</sup> Leon Greenfield et al., *The FTC's New "Warning Letter" in Merger Reviews: More Waiting After the HSR Waiting Period?*, WILMERHALE (Aug. 16, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210816-the-ftcs-new-warning-letter-in-merger-reviews-more-waiting-after-the-hsr-waiting-period>.

<sup>39</sup> *Id.*

to close their deal with only a very small likelihood that the transaction would be challenged in the future.<sup>40</sup> Now the FTC is explicitly stating that although the 30-day waiting period has finished, the parties may close their deal but there is still a significantly larger chance that the deal may be challenged.<sup>41</sup> Additionally, this warning letter process allows for further delays in the review process.<sup>42</sup> Transactions that raise no substantive antitrust concerns can still expect to see longer timelines until they fully receive a cleared notice from the FTC, which creates hesitancy in closing the deal after the end of the 30-day waiting period.<sup>43</sup>

Furthermore, parties will have to have an increased focus on antitrust-related deal terms.<sup>44</sup> The parties will have to determine, in their transaction agreements, whether a warning letter will have any effect on either the buyer's ability to suspend the closing or the seller's ability to force the closing.<sup>45</sup> It will be up to the discretion of the parties to determine whether the possibility of a warning letter should be addressed within the transaction agreements prior to the transaction filing their HSR report.<sup>46</sup>

Lastly, there will be a greater chance of consummated transactions having to unwind.<sup>47</sup> When review agencies like the FTC challenge a consummated merger, it will need to bring a post-closing case that will be heard by an Administrative Law Judge employed by the FTC, whose decisions will be reviewed *de novo* by the same Commissioners who had voted to bring

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Colin Kass, *New FTC Leadership Continues to Flex Their Muscles: New Practice of Issuing Warnings Imposes Unnecessary Uncertainty on Merging Parties*, THE NAT. L. REV. (Oct. 12, 2021), <https://www.natlawreview.com/article/new-ftc-leadership-continues-to-flex-their-muscles-new-practice-issuing-warnings>.

the case in the first place.<sup>48</sup> This process has led to the FTC having a fairly good track record in the merger cases that it does bring.<sup>49</sup> Even if the FTC's challenge is not successful, the financial impacts of the litigation on a mid-size buyer could add unexpected consequences to the deal.<sup>50</sup>

### Consequences of Unwinding a Consummated Transaction

An intended benefit of the premerger notification process for the merging parties is that the parties would have 'near-certainty' that the FTC would not further attempt to unwind a consummated transaction due to antitrust concerns, though this assumption is not automatically true.<sup>51</sup> This assurance that the merging party would not need to duplicate their compliance efforts as part of an HSR investigation is in effect negated where the agency seeks to review and unwind an already consummate merger. Even where merger review has resulted in divestiture of the organizations in question, this remedy may have come either too late or were too small to effectively address any anticompetitive issues to the extent expected from the Commission.<sup>52</sup>

Beyond the lost assuredness that regulators would not review an already consummate merger, the unwinding of a merger – whether it was initially reviewed as falling within the HSR reporting threshold – can have major and otherwise costly consequences as to whether the individual companies can survive post-unwinding. The unwinding of mergers challenged years after consummation is met with growing difficulties in the breaking up and dividing of operations and corporate assets in a manner that helps restore competition.<sup>53</sup> Additionally, an extended investigation into the merger long after it has already taken effect may dissuade market

---

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Steven Cernak, *Unwinding Consummated Mergers – Just Because You Can Does Not Mean You Should*, WASHINGTON LEGAL FOUND. (May 7, 2020), <https://www.wlf.org/2020/05/07/publishing/unwinding-a-consummated-mergers-just-because-you-can-does-not-mean-you-should/>

<sup>52</sup> *Id.*

<sup>53</sup> Menesh Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 1005 (2020).



entrants from participating in the market due to increased uncertainty surrounding the market.<sup>54</sup> Dominant firms may avoid otherwise procompetitive mergers or transactions amid this growing uncertainty concerning if they would be required to divest the acquired assets many years following the completed transaction.<sup>55</sup>

As more time passes between consummation of and challenge to a merger, the more difficult it becomes to divide combined assets, and the risk of consumer injury increases.<sup>56</sup> For example, the breakup of regional telephone systems via consent decree was successful namely only due to the retention of interoperability and beneficial network effects following the breakup and restructuring, allowing for the continued compatibility of the network services.<sup>57</sup> But where an acquisition that was not subject to the HSR filing requirements was found to lead to higher prices and lessen competition, the FTC has ordered a sale of the acquired assets to an approved buyer.<sup>58</sup> As recognized following the Commission's decision, the FTC would normally prefer to

---

<sup>54</sup> Steven Cernak, *Unwinding Investigated Consummated Mergers – Inconsistent with Merger Policy Since 1976*, ANTITRUSTCONNECT BLOG (May 14, 2020), <http://antitrustconnect.com/2020/05/14/unwinding-investigated-consummated-mergers-inconsistent-with-merger-policy-since-1976/> (explaining how post-consummation challenges may result in below-market prices for the unwound merging parties, and entrants may forego efficient mergers for a fear or later litigation” due to the uncertainty surrounding the timing of merger challenges under the HSR filing scheme).

<sup>55</sup> Timothy Muris & Jonathan Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 2020 CRITERION J. ON INNOVATION 1, 31 (Nov. 26, 2019), <https://ssrn.com/abstract=3486469>

<sup>56</sup> Thomas Rosch, *Consummated Merger Challenges – The Past Is Never Dead*, FED. TRADE COMM., Mar. 29, 2012, at 20, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf)

<sup>57</sup> Herbert Hovenkamp, *Selling Antitrust*, 1, 11-12 HASTINGS L. J. (2022); *see also* United States v. AT&T Co., 552 F. Supp. 131, 141-42 & 173-74 (D.D.C. 1982) (defining divestiture and consent decree requirements following the breakup of AT&T and its operating companies, including dissemination of network standards and technical information relating to equipment manufacturing, a degree of compelled interoperability),

<sup>58</sup> *FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies Was Anticompetitive; Assets Must Be Unwound*, FED. TRADE COMM. (Nov. 6, 2019) <https://www.ftc.gov/news-events/news/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger-microprocessor-prosthetic-knee-companies-was>

address anticompetitive concerns prior to transaction consummation, as it can be increasingly difficult to “unscramble the eggs” after there is significant integration between the parties.<sup>59</sup>

As a remedial matter, when the agencies pursue the unwinding of a consummated merger, they must prove that the “*prospective* benefits of unwinding...outweigh the *prospective* harms, including the costs and inefficiencies that often arise from such de-integration.”<sup>60</sup>

Ultimately, however, the Commission may pursue post-consummation review of a transaction — either subject to or outside of the bounds of HSR reporting — where there is a concern that the acquisition would lessen competition, raise prices, reduce innovation or when the transfer of assets has an anticompetitive effect.<sup>61</sup> The agencies may do so in a variety of scenarios, including but not limited to i) when mergers fell below the HSR threshold dollar amount, ii) when they failed to obtain an injunction prior to the termination of the waiting period, and iii) when a merger has already been cleared under the HSR process yet the agencies become aware of information indicating the firms unlawfully proceeded through the clearance process or there are other concerns relating to the competitive effect of the consummated merger.<sup>62</sup> It is considerable that Congress initially enacted the HSR Act in an attempt to allow for the restoration of the competitive ‘status quo’ when unwinding a merger or requiring that operational units either divest their acquired assets or face structural changes long after the parties are fully integrated,<sup>63</sup> though the reporting process and increasing threshold value is often considered a safe harbor for organizations that fall below that value.

---

<sup>59</sup> *Buyer Beware: FTC Orders Unwinding of a Consummated Transaction*, CADWALADER (Nov. 7, 2019), <https://www.cadwalader.com/resources/clients-friends-memos/buyer-beware-ftc-orders-unwinding-of-a-consummated-transaction>

<sup>60</sup> Muris, *supra* note 55.

<sup>61</sup> Opinion of the Commission, In the Matter of Otto Bock HealthCare North America, Inc., Docket. No. 9378 (Nov. 1, 2019), <https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf>

<sup>62</sup> Muris, *supra* note 55, at 33-34.

<sup>63</sup> *Id.* at 47.

## Proposal

In light of the FTC's decision to extend their review of transactions beyond the waiting period and the resulting increased authority to review and block transactions following their consummation with the issuance of additional warning letters,<sup>64</sup> potential merging parties should recognize that the HSR reporting threshold is no longer a safe harbor.<sup>65</sup> Antitrust enforcement agencies may seek to unwind acquisitions, mergers, and other transactions they believe to be anticompetitive – even after consummation.<sup>66</sup> Especially within recent years, the antitrust agencies are increasingly focusing on the technology and healthcare sectors, noting that they are using significant resources in the review of large mergers and related transactions that would fall within the HSR reporting requirements.<sup>67</sup>

The FTC's decision to issue more warning letters following the termination of the waiting period has been seen as the Commission seeking an unapproved and unintended de facto extension of their own deadlines,<sup>68</sup> potentially indicating a lack of resources available for the increasing number of filings the agency must review. Merging or merged parties, however, may consider the increasing issuance of warning letters superficial because the agency would still need to go to court to challenge a consummated merger, and would continue to face the high evidentiary burden associated with such litigation.<sup>69</sup>

---

<sup>64</sup> Colin Kass et al., *Preparing for the New TC Warning-Letter Process in M&A*, PROSKAUER (Nov. 4, 2021), <https://www.proskauer.com/pub/preparing-for-the-new-ftc-warning-letter-process-in-manda>

<sup>65</sup> Brandon Bigelow & Caleb Schillinger, *Antitrust Pitfalls: FTC Orders Unwinding of Two-Year-Old Acquisition*, SEYFARTH (Nov. 19, 2019), <https://www.seyfarth.com/news-insights/antitrust-pitfalls-ftc-orders-unwinding-of-two-year-old-acquisition.html>

<sup>66</sup> *Id.*

<sup>67</sup> Muris, *supra* note 55, at 47-48; Jonathan D. Janow et al., *What to Expect: FTC's 2022 Priorities & Identity Under New Leadership*, BUCHANAN INGERSOLL & ROONEY (Dec. 10, 2021), [https://www.bipc.com/what-to-expect-ftcs-2022-priorities-and-identity-under-new-leadership?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=LinkedIn-integration](https://www.bipc.com/what-to-expect-ftcs-2022-priorities-and-identity-under-new-leadership?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration)

<sup>68</sup> Kass, et al., *supra* note 64.

<sup>69</sup> *Id.*

In 2020, the threshold values of the *size of transaction* and *size of the parties* tests were set at \$94 million and \$184 million, respectively, which have both increased by the largest dollar amount (to \$101 million and \$202 million) seen over the past decade.<sup>70</sup> Of the 3,710 disclosed transactions reported to the agency in 2021, nearly 1,800 of these transactions fell above the threshold value and thus required extensive review by the FTC.<sup>71</sup> The HSR thresholds for the size-of-transaction and size-of-parties tests are adjusted annually to account for changes in the Gross National Product.<sup>72</sup> Thus, further adjustment to the HSR reporting thresholds may help to relieve the surmounting burden placed upon the agency by decreasing the number of transactions that are required to be reported under the HSR Act, thereby preventing the necessity of using warning letters to extend the timeframe for agency review.

While an increase in the value of the reporting threshold is recommended, helping to reduce the number of filings the FTC must review and spend considerable resources to do so, this increase could simultaneously result in a greater number of anticompetitive transactions proceeding without agency review. However, merging institutions have recently started to include language relating to the possibility of warning letters in their agreements and merger filings, hoping to warn potential investors of this possibility of agency action during their review of the transaction.<sup>73</sup> In addition to the institutional response to the FTC's statement, some experts contend that the potential increase in number of warning letters prepared by the agency is of little import – the threat of post-closing action “may lack the teeth” to have a significant

---

<sup>70</sup> J. Mark Gidley et al., *FTC Announces Annual Changes to HSR Thresholds (2022)*, WHITE & CASE (Jan. 21, 2022), <https://www.whitecase.com/publications/alert/ftc-announces-annual-changes-hsr-thresholds-2022>.

<sup>71</sup> Statista Research Department, *Number of merger and acquisition transactions in the United States from July 2019 to June 2021, by deal value*, STATISTA (Jan. 11, 2022), <https://www.statista.com/statistics/245977/number-of-munda-deals-in-the-united-states/>.

<sup>72</sup> Gidley et al., *supra* note 70.

<sup>73</sup> Bryan Koenig, *Merging Cos. Incorporating FTC's 'At Own Risk' Warnings*, LAW360 (Sep. 14, 2021, 7:44 PM) <https://www.law360.com/articles/1419392/merging-cos-incorporating-ftc-s-at-own-risk-warnings>

impact on the transactions.<sup>74</sup> An increase in warning letters after the close of the warning period may simply be the agency's attempt to put parties on notice of their concerns about specific conduct, though the agency has always had the ability to fully investigate deals in advance of the applicable deadline.<sup>75</sup>

Thus, the FTC's notice of the change to the warning letter process may do nothing more than be of concern to the merging institutions, as the change in the agency's policy does not afford them greater time to review transactions and the agency has many other ways by which they can prevent potentially anticompetitive transactions from proceeding.<sup>76</sup> Alternatively, increasing the threshold value of the reporting requirement would lessen the total number of transactions requiring review, and would more substantially provide the FTC with the ability to better review each reported transaction due to the minimization of resource and capacity constraints felt by the agency.<sup>77</sup>

### Conclusion

The Federal Trade Commission's recent update to their warning letter process, as part of the larger Hart-Scott-Rodino Act merger review policy, has resulted in significant uncertainty for merging institutions or companies who must report their transactions to the Commission.<sup>78</sup> The announcement that the FTC could continue to review transactions for anticompetitive effect after the termination of the waiting period and after consummation of the merger, however, does not

---

<sup>74</sup> Matthew Perlman, *FTC Merger Warning Letters Seen As Largely Superficial*, LAW360 (Aug. 18, 2021, 5:05 PM) <https://www.law360.com/articles/1413816>

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (noting that companies have moved ahead with closing their transactions despite having received a warning letter from the FTC).

<sup>77</sup> See William H. Stallings & Scott P. Perlman, *supra* note 28 (noting the constraints and burdens felt by the FTC resulting from the suspension of the early termination program and the agency's promise for "aggressive enforcement" and issuance of warning letters).

<sup>78</sup> Harvey, *supra* note 5.

give the agency any new or additional time to complete their review.<sup>79</sup> Instead, this article proposes an increase to the value of the reporting thresholds (within both the *size of the parties* and *size of transaction* tests) to reduce the burden the FTC faces in reviewing the ‘tidal wave’ of merger filings over the past year.

An increase to the reporting threshold would provide the Commission with fewer filings to review, lessen the need to issue warning letters after the termination of the waiting period, and could also reduce the number of transactions closed prematurely, thereby allowing the agency more time to conduct a comprehensive review. In terms of the warning letters, however, merging organizations should continue to “proceed at your own risk” and should adjust the language of their filings to account for the uncertainty surrounding the significance of and potential impacts of the Commission’s updated policy.<sup>80</sup>

---

<sup>79</sup> Perlman, *supra* note 74.

<sup>80</sup> Harvey, *supra* note 5.