Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FTC Dems Say Merger Surge Strains 30-Day Review Timeline

By **Bryan Koenig**

Law360 (November 8, 2021, 9:46 PM EST) -- The Federal Trade Commission's Democrats on Monday called for additional funding and legislative changes to address a massive surge in deal notifications, while trading potshots with their Republican peers over the nature of sweeping changes underway at the agency.

In a statement issued as part of an annual report on merger filings, FTC Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter noted the FTC's funding and subsequent staffing levels have declined over the years, even as the agency and the U.S. Department of Justice's Antitrust Division are dealing with the complications of the COVID-19 pandemic and a surge in merger filings.

The two Democrats argued they must manage "further strain" created by the review timelines under the Hart-Scott-Rodino Antitrust Act.

"The HSR Act — which was originally conceived to address a drastically different economy — gives the agency 30 days to determine whether a deal warrants close investigation, and then another 30 days after parties certify they have 'substantially complied' with the inquiry," the commissioners said. "Even in ordinary times, these timelines prove challenging given our tight resources; during a decades-high boom in merger filings, the 30-day window is crippling."

That boom, according to the statement, amounts to 3,500 merger filings the FTC appears on track to receive this year, representing an approximately 70% increase over average annual filings in recent years.

"While the FTC is seeking to adjust its procedures accordingly, legislative updates that reflect these new market realities would also help ensure that the core purpose of premerger review — to equip antitrust enforcers to identify and challenge unlawful mergers prior to consummation — is still being realized," the Democratic commissioners said. "Congressional action to increase merger-filing fees for larger transactions and annually adjust them, as the law requires for filing thresholds, would also help ensure that our merger processes are keeping pace with the growth of the U.S. economy and that our resources increase alongside booms in large deal-making."

In their own statement, Commissioners Noah J. Phillips and Christine S. Wilson traced the current spike in merger filings to last October, right after the end of fiscal year 2020 featured in the new HSR merger filings report. But the Republicans argued in striking tones that a spike last year, when the agency was still under GOP control, was addressed without any of the sweeping changes the Democrats have pushed through.

"For now, the policy changes undertaken by new agency leadership distort, almost beyond recognition, the merger review framework that Congress legislated," the Republican commissioners said.

The competing statements contrast sharply with the report itself, which actually tracked a decline in HSR merger filings in fiscal year 2020.

"While the report itself is unremarkable, the dueling statements from the FTC commissioners reflect the political divide within agency leadership and, more broadly, an argument over the future of U.S. merger enforcement," said Vishal Mehta of Morrison & Foerster LLP. "Chair Khan and Commissioner Slaughter cite unprecedented deal flow and resource constraints as factors necessitating equally unprecedented reforms. On the other hand, Commissioners Phillips and Wilson argue that the reforms themselves are needlessly complicating review and fundamentally distorting merger enforcement as we know it."

The pace of those changes has slowed somewhat since the FTC's third Democrat, Rohit Chopra, left the agency to headline the Consumer Financial Protection Bureau, where he was **sworn in Oct. 12**. His absence has left a 2-2 split that won't be addressed until privacy expert and Georgetown University Law Center scholar Alvaro Bedoya can be confirmed as the agency's third Democrat.

Before leaving the FTC, Chopra took several votes — the FTC won't say how many — to help the agency's Democrats push through a variety of changes over Republican objections. A commission spokesperson says the move is permitted under internal FTC policy and has been employed by prior departing commissioners.

Among other changes, the Democrats have suspended the practice of ending merger reviews early for deals that don't raise concerns, begun sending letters warning some merging parties that investigations will continue beyond the agency's deadline, and reinstated a policy requiring companies who ink merger clearance deals to get "prior approval" from the agency for related transactions for at least the next 10 years.

Khan and Slaughter argued Monday that the changes pushed through have been necessary, asserting, among other things, that prior approval "may help deter unlawful transactions while also conserving agency resources." They also argued that instead of creating greater policy differences between the FTC and DOJ, as the Republican commissioners suggested, their changes have in fact brought the agencies "in closer alignment."

Wilson and Phillips, who continued Monday to push for more transparency about the ongoing changes, argued in their own statement that the DOJ has faced the same filing surge without implementing the same changes. The DOJ did, however, also suspend so-called early terminations of merger reviews.

The Republicans also noted that despite their push to make merger enforcement more aggressive, fiscal year 2021 also saw "a remarkable drop in enforcement from the vigorous pace of enforcement in fiscal year 2020," when the FTC was under GOP control.

According to the Republican statement, the changes so far pushed through "cut directly against the efficient use of scarce resources."

"These changes also increase uncertainty, impose delays and raise the costs of all mergers, legal and illegal alike," they said. "What they do not do is make merger enforcement more efficient, effective, or fair."

--Additional reporting by Matthew Perlman and Jon Hill. Editing by Lakshna Mehta.