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## **FTC Issues Warning on Use of Debt Retirement in M&A Transactions to Avoid HSR Filings**

On August 26, 2021, the U.S. Federal Trade Commission's ("FTC") Competition Bureau issued a warning to Merger and Acquisition ("M&A") parties not to seek to avoid Hart-Scott-Rodino ("HSR") pre-merger notification filings by structuring deals to retire seller/target debt in place of paying cash consideration.

HSR, codified as section 7A of the Clayton Act, requires the parties to acquisitions of any voting securities or assets of the acquired party meeting certain qualifying monetary thresholds to notify the FTC and U.S. Department of Justice ("DoJ") of the transaction and await the expiration of a mandatory waiting period prior to closing the transaction. The monetary thresholds at which HSR notification is required are revised annually; in 2021, for the first time, the FTC *lowered* rather than raised the qualifying thresholds (see our advisory ["FTC Lowers 2021 Hart-Scott-Rodino Reporting Thresholds for Qualifying Mergers, Acquisitions and other Transactions, available at Kurtin PLLC Whitepapers and Advisories"](#)).

The FTC Competition Bureau stated that the widely-used practice of M&A parties relying upon "informal interpretations" solicited from the Bureau staff as to whether certain transactions required HSR notification had apparently led to instances of deliberate deal structuring to retire debt instead of making cash payments in the belief that, by staying under the HSR monetary thresholds, HSR filing obligations could be circumvented. The Bureau further noted that the perception that HSR filing obligations could be circumvented by retiring debt instead of paying cash might incentivize some seller/target companies to take on new debt in advance of an

anticipated acquisition, so that the acquirer could pay off that debt in the transaction instead of paying cash.

The Competition Bureau stated that M&A party reliance on informal opinions, that do not have the force of law and which are often out of step with both FTC policy and modern market realities, as though they were an exemption to HSR notification obligations, was inconsistent with the FTC's law enforcement mission, and cautioned that, beginning on September 27, 2021, it will begin to recommend enforcement action for companies engaged in M&A activity that fail to make HSR filings when retirement of debt is part of the transaction consideration. The FTC and DoJ are currently engaged in a wholesale review of the merger review process.

For additional information, please contact us at [info@kurtinlaw.com](mailto:info@kurtinlaw.com).

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