

## Stalemate at FTC Leads to Contested Merger Closing

Update

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On May 14, 2021, despite not having obtained official approval from federal antitrust authorities, 7-Eleven Inc., the largest convenience-store chain in the U.S., took the highly unusual step of closing its \$21 billion purchase of the Speedway retail gasoline and convenience-store chain from Marathon Petroleum.

The parties announced the transaction in August 2020. After notifying the federal antitrust agencies of the deal pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act), the parties received a request for additional information (known as a Second Request) from the Federal Trade Commission (FTC), as the agency's initial review of the transaction raised potential competitive issues due to the companies owning competing convenience stores in numerous local geographic markets. Last week's disputed closing followed an approximately nine month FTC investigation which included negotiations with FTC staff to settle those competitive concerns through divestiture of almost 300 stores. A settlement would have required a majority vote of the four sitting FTC Commissioners (the fifth seat was vacated in January by the departure of former Republican Chairman Joseph Simons). However, the two Democratic members of the Commission were unable to get comfortable with the proposed divestiture remedy, creating a deadlock with the two Republican Commissioners that allowed the companies to close their merger. The FTC's Commissioners immediately reacted to the contested closing, albeit with contrasting remarks from the Democratic and Republican members.

The two Democratic Commissioners, Acting Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra, together issued a [statement](#) denouncing the move, stating there is "reason to believe that this transaction is illegal under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, raising significant competitive concerns in hundreds of local

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retail gasoline and diesel fuel markets across the country.” Expressing concern that the transaction presents a “merger-to-monopoly” or at least reduces the number of competitors from three to two in many local markets, the Democratic Commissioners warned the parties that the agency’s investigation would continue and that they were closing the harmful merger “at their own risk.”

In a separate joint statement, Republican Commissioners Noah Joshua Phillips and Christine S. Wilson took issue with the lack of action by the FTC in this case: “Rather than resolve the issues and order divestitures (or sue to block the transaction), the Acting Chairwoman and Commissioner Chopra have issued a strongly worded statement” which does not bind the parties. Lambasting their Democratic colleagues, Commissioners Phillips and Wilson declared that “[t]here is no good reason for the Commission to be in this mess.” According to the Republican Commissioners, the agency had plenty of time to negotiate a resolution to resolve competitive concerns, and failure to do so has left consumers completely unprotected and created uncertainty for business.

Reacting to the Commissioners’ statements and shedding further light on the situation, 7-Eleven issued a statement later that day defending its decision to close the transaction, explaining that the parties had negotiated a settlement agreement with FTC staff at the end of April involving the divestiture of 293 stores that purportedly resolved all competitive concerns raised by the FTC. According to 7-Eleven, the FTC staff, including leaders in the Bureau of Competition, recommended to the FTC Commissioners that they approve that settlement. 7-Eleven had also entered into a timing agreement with the FTC staff that was extended four times to provide additional time to negotiate a mutually acceptable divestiture package, with the final extension on April 9, 2021 allowing for the merger parties to close on May 14.

According to 7-Eleven’s statement, “[d]espite FTC staff’s recommendation that the Commission approve the negotiated settlement, on May 11, 2021—less than three days before close—Acting Chairwoman Slaughter and Commissioner Chopra indicated that they wanted more time to review the settlement agreement. 7-Eleven took the request very seriously, but such a last-minute delay would have created enormous disruption to the lives of our new colleagues at Speedway and to the business. Given that there was no legal basis for such a delay and given that 7-Eleven was abiding by the negotiated settlement agreement, we closed today on schedule.”

Notably, 7-Eleven applauded the FTC staff “for their hard work and commitment in reviewing the Speedway transaction” and stated that it intends to abide by the negotiated settlement and complete the agreed-upon divestitures.

This case is the most recent and striking example of a growing rift among the FTC Commissioners along ideological lines regarding fundamental competition policy and enforcement issues. This rift is particularly significant right now, because the FTC is operating with a 2-2 party-line split. In February of this year, the Republican Commissioners issued a lengthy statement objecting to

the FTC's indefinite pause on early terminations of the review of transactions notified under the HSR Act. Last year, the Democratic Commissioners, who were then in the minority, issued dissenting statements upon the release of new Vertical Merger Guidelines, with both expressing concern that the new guidelines over-emphasize the benefits of vertical mergers and fail to adequately acknowledge their potential competitive harms. Commissioners Slaughter and Chopra have also jointly dissented from the then-Republican majority in several merger cases.

Merging parties with transactions that may raise competitive issues should take note that there is potential for continued stalemates at the FTC, at least in the near future. President Biden has nominated Democrat Lina Khan, a Columbia Law School professor, to fill the vacant seat on the 5-member Commission, however he has also nominated Commissioner Chopra to head the Consumer Financial Protection Bureau, which would create a new vacancy on the FTC.