

Clients & Friends Memo

7-Eleven/Speedway: Bumps on the Road to Closing Are Conventional Closing Conditions Sufficient to Protect Buyer Interests?

May 17, 2021

In an extraordinary, perhaps unprecedented, action, parties to a proposed deal that had been under investigation for about nine months closed the transaction almost immediately upon expiration of the Hart-Scott-Rodino (“HSR”) waiting period—which had been extended four times by mutual agreement of the parties and the Federal Trade Commission (“FTC”)—leading to public recriminations among the sitting FTC Commissioners for botching what could have been a successful settlement agreement with substantial divestitures that instead ended in a “mess.” It appears that the buyer, relying on a proposed settlement agreement negotiated provisionally with FTC staff but not yet been approved by the Commissioners, and perhaps fed up with ongoing FTC requests to extend the waiting period, made an affirmative decision to close the deal despite the obvious risks of a post-consummation enforcement action for unspecified divestitures.¹ The seller supported the buyer’s position, stating that “[t]he parties closed the transaction after all conditions to close were fully satisfied.”² Although the buyer here appears to have willingly assumed the risk, it is not difficult to envision a scenario where conventional purchase agreement closing conditions may allow a seller to force a closing and expose the buyer to potential post-consummation litigation with the antitrust agencies in the event of significant substantive antitrust concerns held by the relevant agency despite the expiration of the applicable HSR waiting period. We explore some possible solutions to this problem.

Background

7-Eleven, a subsidiary of Tokyo-based Seven & i Holdings Co., Ltd. reached a \$21 billion deal last August to acquire approximately 3,800 Speedway stores in 36 states from Marathon Petroleum Corp. (“Marathon”). The parties filed notification under the HSR Act and then were issued a

¹ See [7-Eleven, Inc. Response to FTC Commissioner Statement](#) (May 14, 2021). In this case, the buyer, 7-Eleven, had the contractual power on its own to decide to consummate the proposed transaction. Section 5.5(d) of the [Purchase and Sale Agreement](#) gives 7-Eleven “the right . . . to determine, direct and have control over the strategy and process by which the parties will seek required approvals under the Antitrust Laws and to control the defense or prosecution of any claims, actions or proceedings relating thereto, including all matters relating to any Divestiture Actions.”

² See [Marathon Petroleum Comments on Speedway Sale Closing](#) (May 14, 2021).

Second Request by the FTC. In connection with the Second Request, the parties entered into a timing agreement with the FTC whereby they agreed to delay closing of the transaction for a period of time after expiration of the waiting period (i.e., 30 days after the parties substantially complied with the Second Request) so that the FTC could complete its investigation. At the request of FTC staff, the timing agreement was extended four times – twice in February and once in each of March and April. According to 7-Eleven, the final extension made clear that the transaction would close on May 14, 2021.

At the end of April, 7-Eleven entered into a settlement agreement with FTC staff that required the divestiture of 293 fuel outlets in order to address competitive concerns with the transaction.³ 7-Eleven's understanding was that FTC staff, including leaders of the Bureau of Competition, recommended that the FTC Commissioners approve the settlement. On May 11, three days before the scheduled closing, Acting FTC Chairwoman Rebecca Kelly Slaughter and her fellow Democratic Commissioner Rohit Chopra requested additional time to review the settlement agreement. Although 7-Eleven "took the request very seriously," the company felt that "such a last-minute delay would have created enormous disruption to the lives of our new colleagues at Speedway and to the business." Asserting that there was no legal basis for the delay and that it was abiding by a negotiated settlement agreement, 7-Eleven opted to close on the morning of May 14 after the timing agreement lapsed the night before without action from the FTC. This is an unusual move given that companies normally wait for resolution with the antitrust authorities before completing their transactions.⁴

Following announcements of the deal's consummation,⁵ Acting Chairwoman Slaughter and Commissioner Chopra issued a statement that they are "extremely troubled" by 7-Eleven's closing of the transaction despite the FTC's open investigation.⁶ The Commissioners stated that they had "reason to believe that this transaction is illegal," that the FTC will continue to investigate the transaction "to determine an appropriate path forward to address the anti-competitive harm," and that they will continue to work with State Attorneys General. Noting that "[w]ith the support of a majority of Commissioners, the Commission can and routinely does challenge these harmful

³ See [CrossAmerica Buying 7-Eleven Stores for Speedway Deal Fix](#), Matthew Perlman, Law360 (April 29, 2021).

⁴ Indeed, in 2018, the consent agreement in [7-Eleven's \\$3.3 billion acquisition of retail fuel stations from Sunoco](#) was announced before the deal closed, as were the divestitures in [Marathon's deal to acquire Express Mart](#).

⁵ See [Notice Regarding Completion of Acquisition of Shares and Other Interests Related to the Convenience Store Business and Other Business of U.S. Company Marathon Petroleum Corporation by a Subsidiary](#), Seven & i Holdings Co., Ltd. (May 15, 2021); [Marathon Petroleum Corp. Announces Close of \\$21 Billion Speedway Sale and Return of Capital Plans](#), Marathon Petroleum Corporation (May 14, 2021).

⁶ [Statement of Acting Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra](#), Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation, File No. 201-0108, Federal Trade Commission (May 14, 2021).

mergers,” the Commissioners stated that the parties “have closed their transaction at their own risk.”

Suggesting a rift along party lines, their Republican counterparts, Commissioners Noah Joshua Phillips and Christine S. Wilson, issued a separate statement that criticized Commissioners Slaughter and Chopra instead of the companies.⁷ Agreeing that the deal violates antitrust laws, Commissioners Phillips and Wilson denounced the Democrats for allowing the deal to proceed. “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. Their words do not bind the merging parties, leaving consumers completely unprotected.” Referring to the FTC’s inability to finalize a decision after a months-long investigation, the Republican Commissioners said, “There is no good reason for the commission to be in this mess.” With the deal announced in August and promptly notified to the antitrust agencies, there was “plenty of time for staff—who, since January, have worked at the direction of the Acting Chairwoman—and the parties to negotiate a resolution.” The Republican Commissioners further stated, “To the extent that our colleagues insinuate that the parties have acted in bad faith in this process, we have been given no information suggesting the parties failed to work constructively with staff to negotiate a timely and effective resolution. Yet the Commission is opting to permit the transaction to close without a remedy in place.” Referencing the HSR Act framework within which the FTC has worked for decades to protect consumers and offer businesses certainty, Commissioners Phillips and Wilson stated, “The Commission failed to do that today, and consumers and businesses both lost. We sincerely hope this lapse is an isolated incident, not the beginning of a trend.”

It is unclear from either of the dueling statements what prevented the FTC from making a decision on how to proceed before the timing agreement expired. The stalemate could be the result of the lingering 2-2 party-line split created by the departure of former Republican Chairman Joseph Simons earlier this year, as the Commission needs majority support for any course of action. 7-Eleven may have made the strategic decision to close the deal before the pending nomination of a third Democratic commissioner, Lina Khan, is resolved by Congress.

Affirming its continued compliance with the settlement agreement, 7-Eleven stated that it would continue working with the FTC “to ensure that 7-Eleven meets its obligations under the negotiated settlement,” and that it was hopeful that the FTC would approve the deal “in the near term.” In its statement, Marathon stated that it and “7-Eleven worked very cooperatively over many months with the FTC and will continue to do so going forward.”

⁷ [Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson](#), Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation, File No. 201-0108, Federal Trade Commission (May 14, 2021).

Closing Conditions

7-Eleven's press release asserts that the parties were legally allowed to close the Speedway transaction on Friday upon satisfaction of all conditions to close. Specifically, Section 6.1 of the Purchase and Sale Agreement (the "Purchase Agreement")⁸ requires:

- (a) *All waiting periods applicable to the Sale under the HSR Act shall have expired or been terminated; and*
- (b) *No Law, order or injunction (in each case, whether temporary, preliminary or permanent) of any Governmental Entity of competent jurisdiction shall have been enacted, promulgated, issued, entered or enforced by any Governmental Entity which enjoins, restrains, makes illegal or otherwise prohibits the consummation of the transactions contemplated hereby.*

It first should be noted that the closing condition in Section 6.1(a) above technically was satisfied once the second HSR waiting period expired (30 days after the parties certified substantial compliance with the Second Request), regardless of any timing agreement in place. Although timing agreements affect when parties may close the transaction, they do not extend the waiting period under the HSR Act.⁹ As the parties likely knew a Second Request was coming, and also that a timing agreement was possible, the following language would have been better suited as a closing condition:

All waiting periods applicable to the Sale under the HSR Act, any extensions of such waiting periods, and any commitments by the parties not to close before a certain date under a timing agreement entered into with the applicable Antitrust Authority shall have expired or otherwise been terminated.

Without the additional language addressing the timing agreement, one party could argue that the other party's failure to close after the expiration of the HSR waiting period constitutes a breach of the agreement that permits termination, possibly resulting in the buyer having to pay a reverse termination fee. Or the seller could force the buyer to close the transaction notwithstanding the timing agreement, pushing all antitrust risk (and the relevant agency's ire) onto the buyer.

Here, 7-Eleven controlled the regulatory strategy and made an affirmative decision to close on the Speedway deal despite the risk of a post-consummation enforcement action by the FTC. It is not

⁸ [Purchase and Sale Agreement by and among Marathon Petroleum Corporation, the Entities Set Forth on Schedule I Hereto and 7-Eleven, Inc.](#), dated as of August 2, 2020.

⁹ A timing agreement "does not affect the statutory expiration of the Hart-Scott-Rodino waiting period. Regardless of the commitments made in the timing agreement, the HSR waiting period expires 30 days after the parties certify substantial compliance with the Second Request. (These periods may differ in a cash tender or bankruptcy filing.) Additional time provided by the parties beyond this 30-day waiting period is by agreement, and does not alter this statutory provision." Bruce Hoffman, [Timing is Everything: The Model Timing Agreement](#), Bureau of Competition, Federal Trade Commission (Aug. 7, 2018).

difficult to imagine, however, the same situation but where the buyer is pressured by the seller into closing after the relevant HSR waiting period and any timing agreement has terminated, but the anticompetitive concerns have not yet been resolved to the satisfaction of the relevant antitrust authority. Some additional language could address this issue:

*All waiting periods applicable to the Sale under the HSR Act, any extensions of such waiting periods, and any commitments by the parties not to close before a certain date under a timing agreement entered into with the applicable Antitrust Authority shall have expired or otherwise been terminated, **any investigation by the applicable Antitrust Authority has been concluded, and any proposed settlement agreement negotiated provisionally with the applicable Antitrust Authority has been formally approved.***

Such additional language may not have been welcome by the parties in the Speedway deal, as they would not have been able to close their transaction when the Commission could not come to a decision within a reasonable amount of time. For some buyers, however, such language could guard against being forced to close and assuming all of the antitrust risk, or from having to pay a reverse termination fee in the event the buyer refuses to close, in the case where the HSR waiting period has expired but a timing agreement is in place or where the investigation by the relevant antitrust agency still is open.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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