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## FTC Update: Merger Review

The Federal Trade Commission (“FTC”) made an unusual announcement earlier this week that may cause uncertainty surrounding closing for some transactions that raise antitrust issues and receive questions from the FTC during the initial HSR waiting period. The FTC said that for some mergers they may keep their investigation open after the initial 30-day waiting period expires (or 60-days if the parties “pulled and refiled”) even if they do not issue a formal request for additional information about the transaction (“Second Request”). While the U.S. antitrust agencies have always had the statutory power to investigate deals that were not reportable or deals that went through HSR review and were not challenged, it has been generally accepted that there is no meaningful risk to close a deal after the HSR waiting period expires. However, now for deals that receive questions from the FTC during the initial waiting period and that receive letters that the FTC’s investigation is not closed (“open investigation letters”), the parties could be closing with some risk of post-closing divestitures or other conditions. The parties are legally permitted to close, but if the investigation remains open, the FTC may continue to consider challenging the deal and seeking to unwind it or impose divestitures, without any way for the parties to force the FTC to reach a determination one way or another. In contrast, under the Second Request process, parties who substantially comply with the investigational requests can force the authority to reach a determination within a limited period of time (30 days after substantial compliance, although this is typically negotiated to 60 days or more).

This policy will not impact deals that raise no substantive antitrust issues and receive no questions from the FTC. The Department of Justice has made no statement to suggest they are also going to adopt this procedure. The FTC, however, warned that for deals receiving an open investigation letter: “Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk.”

Practically, we recommend carefully drafting conditions to close and termination provisions for future transactions. Further, keeping in close contact with the FTC staff during an investigation and a careful record of correspondence with the FTC and their review will be important for transactions should the FTC decide to challenge the deal. Companies issuing disclosures about the HSR process for any transactions may also need to take into account these open investigation letters.

The announcement can be found [here](#).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com); Lauren Rackow (counsel) at 212.701.3725 or [lrackow@cahill.com](mailto:lrackow@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).