

FTC Update: Merger Review

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The 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 compulsory 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.