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CLIENT MEMORANDUM

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FTC Now Sending Warning Letters When It Does Not Finish Merger Reviews within Statutory Timeframe

- The Federal Trade Commission, citing capacity constraints, has begun sending warning letters to deal parties when it does not complete merger investigations within the waiting period established under the Hart-Scott-Rodino Act. The letters state that the parties consummate transactions in these circumstances "at their own risk" if they do so prior to the completion of the Commission's investigation.
- While the FTC has always had the ability to challenge transactions post-closing where warranted, such challenges have been extremely rare. The new policy of sending warning letters does not in and of itself create additional risk of such challenges, though prior statements of certain Commissioners suggest that the FTC may be more likely to bring post-closing challenges than in the past.
- The receipt of a warning letter from the FTC likely would not excuse the parties from their obligation to close unless the governmental approvals closing condition broadly covered the absence of pending or threatened investigation or review by a governmental authority (which is not common).

In a blog post today, Holly Vedova, the Acting Director of the Federal Trade Commission (FTC) Bureau of Competition, wrote that "for deals that we cannot fully investigate within the requisite [statutorily-set] timelines, we have begun to send standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk." The blog post notes that the issuance of such a letter "should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to an HSR filing should not be construed as a determination that a deal is lawful." The practice of sending these form letters is new.

Today's blog post states that "the FTC has been hit by a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines." Under the Hart-Scott-Rodino (HSR) Act, parties to acquisitions meeting certain thresholds must make a filing with the federal antitrust agencies and then observe a waiting period before they close the transaction. (For most deals, this waiting period is thirty days, which the parties can choose to extend for an additional thirty days.) During that time period, the agency with responsibility for reviewing the transaction decides whether to issue a "second request" for information and documents to the parties. If this happens, under the HSR Act, the waiting period is extended for thirty days after the parties comply with the second request, a process that can take several months. If the initial waiting period expires and no second request is issued, parties can close their transactions and be confident that in all but the most unusual situations, the FTC will not take further action.

Post-consummation merger challenges have been exceedingly rare and, when they do occur, generally involve challenges to transactions that were not reportable under the HSR Act. Today's blog post does not in and of itself create additional risk of such challenges, though prior statements of certain Commissioners suggest that the FTC may be more likely to bring post-closing

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challenges than in the past. Regardless, today's announcement serves as a reminder that, as the blog post states, "[w]hen the FTC does not challenge a transaction prior to its consummation, this does not constitute an 'approval' or 'clearance' of the deal, and the agency maintains the right to challenge a deal regardless of whether it was initially investigated." Indeed, the FTC's form letter notes that "in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions – before or after their consummation – that threaten to reduce competition and harm consumers, workers, and honest businesses." One other note: the receipt of a warning letter from the FTC likely would not excuse the parties from their obligation to close unless the governmental approvals closing condition broadly covered the absence of pending or threatened investigation or review by a governmental authority (which is not common).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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