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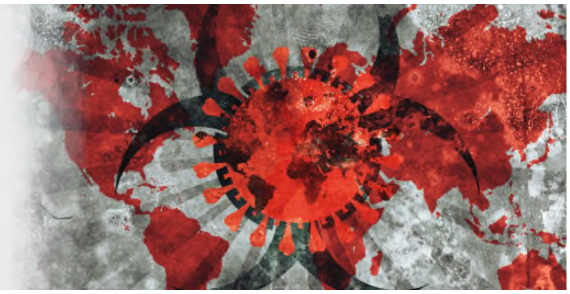

COVID-19 Update

April 2020

FTC and DOJ Announce Changes to Civil Merger Review Process During COVID-19 Pandemic, Including Changes to HSR Early Termination Procedure

As the novel coronavirus disease (COVID-19) has spread rapidly in the United States, people, businesses and governments have made drastic changes that have disrupted the economy and ordinary flow of daily life. The federal antitrust agencies—the Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC)—are no exception. With employees working remotely, DOJ and FTC have implemented several temporary changes to the usual civil merger review and investigation process that parties contemplating mergers and acquisitions should bear in mind in the coming weeks and months.

For example, the FTC has implemented a temporary e-filing system for filings made under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act; DOJ indicated it will accept e-filings as well. Ordinarily, HSR filings (which generally are required for all acquisitions valued at more than $94 million) must be made by paper or DVD delivered to the agencies. Other logistical differences from the usual procedure include acceptance of electronic signatures on certifications and affidavits.

Perhaps most importantly, when the temporary e-filing procedure was first announced on March 13, the FTC indicated it would not grant early termination requests while the temporary procedure was in place. But on March 27, the FTC announced that—because the temporary e-filing procedure had been successful so far—it would start "processing requests for early termination" again beginning on March 30. However, "for the duration of the COVID-19 pandemic crisis," early termination will "be available on a more limited basis than has historically been the case." The FTC indicated that early termination "will be granted in fewer cases, and more slowly, than under normal circumstances." Under normal circumstances, early termination is often granted 10 to 20 days before the 30-day statutory waiting period is scheduled to elapse in cases with competitive concerns clearly lacking, i.e., where the parties have no overlapping NAICS codes (f/k/a SIC codes). Yet even in those "normal" times, many filings seemingly qualifying for early termination get caught up in bureaucratic delays (especially at peak times of year), resulting in early termination being granted in the last week of the waiting period, if at all. Thus, even in the best of times, parties are typically well advised to anticipate a full 30 days to complete HSR review. Maintaining that expectation is all the more true now that granting early termination in the last few days of the waiting period seems likely to be the "new norm" for the time being, and parties able to secure such a grant should consider themselves fortunate to have secured the necessary level of attention from an understandably beleaguered FTC staff.

In addition to utilizing the temporary e-filing system, DOJ is requesting an additional 30 days in timing agreements to complete its review after parties certify substantial compliance with document requests (e.g., Second Requests). Given that DOJ's model timing agreement calls for 60 days to complete its review, parties should expect DOJ to request 90 days. All meetings will be held by telephone or videoconference, and depositions will be rescheduled and taken by videoconference.

Because of these temporary changes, parties contemplating acquisitions should expect civil merger reviews and investigations to take longer than usual and should contact our experienced antitrust practitioners about the effects of these temporary procedures on potential acquisitions.

FOR MORE INFORMATION

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ADDITIONAL RESOURCES

Thompson Hine has assembled a firmwide multidisciplinary task force to address clients' business and legal needs related to the COVID-19 pandemic. Please see our COVID-19 Task Force web page for additional information and resources.