CLIENT ALERT

The FTC and DOJ Are Open for Electronic Merger Filings, Are Working Remotely, and May Request By-Agreement Extensions of Statutory Time Periods

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The Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") are open for merger business, albeit remotely and with some important qualifications.

The FTC has announced that, in response to COVID-19 concerns, most of its staff is working remotely, and, in an extraordinary measure, the Premerger Notification Office ("PNO") will accept HSR filings only electronically. In a further unprecedented step, the PNO will no longer grant early termination until further notice. The FTC has said that it may request merging parties to agree to extensions of statutory time periods.

To facilitate electronic filing, the PNO will accept electronic signatures on the Hart-Scott-Rodino ("HSR") certification and affidavit. All HSR electronic filings made after 5:00 p.m. ET will be treated as submitted on the next business day. The DOJ has adopted the same HSR procedures. The FTC noted, however, that filing parties may have to submit hard copies of their e-filings after "the resumption of normal agency operations."

Regarding waiting-period modifications, the FTC appears to be concerned that remote assessments will be more time-consuming than those in the ordinary course and suggested that it may view agreed-upon extensions of the statutory waiting periods as necessary. The agency urged parties to adopt a "flexible and reasonable approach" and warned that it would "take affirmative action to protect consumers when necessary, including when an unmodified time period does not allow us to address competitive concerns." The FTC thus suggested that a second request or a merger challenge may follow a refusal by the parties to extend a statutory waiting period as requested.

The DOJ also announced that it is offering "maximum telework flexibilities" and that all meetings will be conducted by phone or video conference "absent extenuating circumstances." On substantive matters, the DOJ said that it is asking merging parties that have timing agreements with the DOJ in the context of second requests to permit the DOJ 30 additional days, presumably following substantial compliance, for the DOJ to consider the impact of the transaction on competition.

Transactional parties thus may choose to monitor the progress of agency reviews more closely than usual and to engage proactively with staff on issues of substantive concern. Parties also may wish to consider carefully with counsel all aspects of agency requests for extensions of statutory waiting periods.

The European Commission, whose merger control procedures differ from those of the FTC and DOJ, asked merging parties to forbear from submitting final merger notification filings until further notice. Though not stated, merging parties are likely able to engage with the staff of the European Commission on preliminary drafts of those filings.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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