

# Clients & Friends Memo

## COVID-19 Update: The Effects of COVID-19 on U.S. Antitrust Merger Clearance and Potential Delays in Transaction Closings

March 23, 2020

As businesses and government agencies continue to take measures in response to the new coronavirus, one area of notable change is the federal merger clearance process. On March 13, the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) implemented a temporary e-filing system for premerger notification documents and announced that, beginning on March 16, (1) they no longer would accept hard-copy filings and (2) early termination would not be granted for any filing as long as the e-filing system remained in place.<sup>1</sup> As part of these efforts to limit the further spread of the coronavirus, the FTC also canceled a workshop on its vertical merger guidelines.<sup>2</sup>

Four days later, the Department of Justice announced that it was asking companies with pending merger reviews for an additional 30 days to look over deal documents, with the possibility that they will revisit timing agreements further in light of any new developments. (The European Commission went one step further and “encouraged” all companies to delay filing merger notifications indefinitely, absent a clear justification for making a filing in the current environment.) Additionally, the DOJ stated that all meetings are shifting to phone or video conferences, and all currently scheduled depositions are postponed and will be rescheduled to take place via videoconference.<sup>3</sup> The FTC simultaneously announced additional steps it had taken, including having most employees begin working remotely, suspending non-critical travel, suspending unplanned visitor access to FTC facilities, and shifting to telephone and videoconference for almost all internal and external meetings indefinitely.<sup>4</sup>

While the DOJ and the FTC remain resolute in their enforcement efforts and in continuing the review process with as few disruptions as possible, clients should expect possibly substantial

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<sup>1</sup> [Premerger Notification Office Implements Temporary e-Filing System](#), FTC, Mar. 13, 2020.

<sup>2</sup> [Federal Trade Commission Cancels March 18 Workshop on Draft Vertical Merger Guidelines](#), FTC, Mar. 13, 2020.

<sup>3</sup> [DOJ Seeking Extra Month to Check Mergers As Virus Spreads](#), Bryan Koenig, Law360, Mar. 17, 2020.

<sup>4</sup> [FTC Outlines Agency's Response to Coronavirus Challenges](#), FTC, Mar. 17, 2020.

delays and other hiccups as the government adjusts to the brand-new e-filing system, reschedules postponed depositions, adapts to having the vast majority of their employees working remotely, and otherwise takes steps to contain the coronavirus.

Parties to merger transactions should be aware that these combined delays (along with similar issues at other regulatory agencies, and any other slowdowns the parties themselves are experiencing due to the effects of the coronavirus on their business or the economy at large) are likely to affect the timelines for the closing of transactions. For certain industries that are especially susceptible to the virus' effects, such as airlines and cruise lines, an extended period of time to satisfy regulatory closing conditions could increase deal uncertainty and create opportunities for buyers to establish, over a more significant period of time, that a material adverse effect ("MAE") has occurred on the target business under the terms of the relevant agreement. Sellers, by contrast, may seek to include provisions in new agreements with MAE clauses that exclude the effects of pandemics. In short, parties should be aware that the longer these delays and disruptions persist, the more uncertain closings become, at least until M&A activity adjusts to this new normal in the coming weeks and months.

We will continue to monitor these events and apprise you of any further developments.

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If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

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