

U.S. Antitrust Enforcers Announce Additional Changes to Merger Review Procedures

Client Alert | March 19, 2020

On March 16 and 17, 2020, the U.S. Department of Justice, Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) announced additional temporary changes to their civil merger investigation processes in response to COVID-19.^[1] The agencies stated that the changes will enable them to continue reviewing transactions “efficiently and effectively” while complying with mass telework directives.^[2]

DOJ’s new policy states that for mergers that are subject to a Second Request and a negotiated timing agreement, it will request that merging parties agree to delay closing for *an additional 30 days* to allow it to complete its investigation before making an enforcement decision.^[3] Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), if the agency issues a Second Request—typically a small percentage (2-4%) of all HSR-reportable transactions—the parties must delay closing until 30 days (or 10 days in the case of a cash tender offer or bankruptcy) after the parties are in substantial compliance with the Second Request. After the Second Request is issued, the agencies normally will request the parties enter into a timing agreement, in which the parties agree not to consummate the transaction for a period of time after the HSR waiting period expires.

Under DOJ’s most recent “Model Timing Agreement,” this period of time is typically 60 days or less.^[4] Under this temporary process change, however, DOJ will request an additional 30 day delay, or up to 90 days total, after the parties comply with their Second Requests. DOJ cautioned it might seek further revisions to existing timing agreements in the future, depending on further developments.

The FTC’s announcement does not specify changes to its approach to timing agreements, but cautions that it is conducting a “matter-by-matter review” of its investigations and litigations to consider whether modifications are needed to timing agreements.^[5] As with DOJ, parties with transactions that are subject to an FTC Second Request investigation should expect requests to delay closing.

The agencies also announced that all meetings are being handled by phone or, where possible, video conference, absent extenuating circumstances, and DOJ has temporarily postponed all scheduled depositions until they may be rescheduled using secure videoconferencing capabilities.

These announcements come on the heels of the FTC’s announcement that it is implementing new e-filing procedures for HSR Act premerger notification filings. As noted in an earlier Client Alert, the FTC announced that the agencies (both FTC and DOJ) will not grant early termination of HSR Act waiting periods while e-filing procedures are in effect.^[6]

Clients with transactions subject to a Second Request issued by either agency should be prepared for an extended review and a request for an extension under any existing or

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pending timing agreement. HSR Act-reportable deals not subject to a Second Request may also face delays because the FTC has suspended granting Early Termination.

We will continue to monitor the situation and provide any additional updates regarding DOJ or FTC merger enforcement decisions or procedures.

[1] DOJ, Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event (Mar. 17, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-antitrust-civil-process-changes-pendency-covid-19-event> (hereinafter "DOJ Announcement"); FTC, Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic (Mar. 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus> (hereinafter "FTC Announcement").

[2] DOJ Announcement.

[3] *Id.*

[4] DOJ, Model Timing Agreement, <https://www.justice.gov/atr/page/file/1111336/download>.

[5] FTC Announcement.

[6] Gibson Dunn, U.S. Federal Trade Commission and DG COMP Implement Changes to U.S. and EU Merger Filing Procedures in Response to COVID-19 (Mar. 16, 2020), <https://www.gibsondunn.com/us-ftc-and-dg-comp-implement-changes-to-us-and-eu-merger-filing-procedures-in-response-to-covid-19/>.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

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