Impacts of Covid-19 on Closing M&A Transactions

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The World Health Organization declared the outbreak of the novel coronavirus disease (COVID-19) a pandemic, prompting numerous public and private organizations and agencies to accelerate their contingency plans so as to mitigate continued transmission. The responses to this public health concern have also introduced additional uncertainty and complexities into the process and administration of merger and acquisition transactions. Below is a list of considerations for pending and prospective acquisitions during this time of uncertainty that could help mitigate potential adverse effects.

Hart Scott Rodino (HSR) Filings

- The FTC’s Premerger Notification Office (PNO) has announced the below changes for all Hart Scott Rodino (HSR) While these changes have been described as temporary, no specific end date has been identified.

- Hard-copy HSR filings are no longer being accepted.

- Starting at 8:30 a.m. on Tuesday, March 17, HSR filings must be submitted through a new, temporary e-filing system that is not yet operational. While this temporary e-filing system is in place, early termination will not be granted for any filing.
For transactions requiring an HSR filing, companies should consider allowing extra time to complete the HSR filing and drafting definitive agreements accordingly. For transactions involving substantive antitrust issues, our current understanding is that antitrust agencies are no longer holding in-person meetings with outsiders, so any meetings or presentations will need to be by phone or videoconference.

For more information on HSR Filings, please visit: Antitrust Law Blog - Coronavirus/HSR Filings

Representations and Warranties Insurance

The insurance brokers to whom we have spoken indicate that parties to transactions involving representations and warranty insurance (RWI) are, not surprisingly, experiencing newly focused scrutiny on how the target business may be impacted by COVID-19 and on certain representations and warranties most susceptible to breach due to COVID-19.

In the due diligence performed by underwriters and their counsel, the buyer should be prepared to discuss the following:

- the potential impact of the COVID-19 outbreak on the target’s industry generally and on the target specifically, including any potential impact on the target’s ability to perform under its contracts and on its relationships with customers, distributors, suppliers, and employees, and any discussions the buyer has had with such parties;

- whether a slowdown in the businesses of the target’s customers would lead to a corresponding slowdown in the sale of the target’s products or services to such customer or a material reduction in revenue generally;

- actions taken by the target to address the outbreak (including the revision of internal projections) and actions buyer intends to take once the deal is closed; and

- key issues related to COVID-19 raised in connection with the transaction, including risk allocation.

Underwriters have also increased their attention to the language of the representations and warranties that are most likely to be breached by COVID-19 disruptions, such as those addressing financial statements, no unknown liabilities, inventory and material customers/suppliers. The underwriters have attempted to carve out losses resulting from COVID-19 under these representations in the policy.

Companies with deals in the pipeline that are expected to involve RWI but for which the underwriting has not yet begun should expect broad exclusions for losses resulting from COVID-19, regardless of the target company or industry, based on the most recent information from the brokers with whom we have spoken.
Given the increased scrutiny by underwriters and the uncertainty of the current business climate, buyers should seek clarity on the above issues as early as possible in the RWI process and ensure that they are specifically addressed in any proposals or non-binding indications provided by underwriters.

**Status of Secretary of State Services**

- As of this posting, the Delaware Division of Corporations has directed companies to its online document upload service and limited in-person access by appointment only. However, the filing agents with whom we have spoken only expect the limitation on in-person access to affect only non-commercial filers (i.e., individuals, not the filing agents) at this time. Other states have also limited counter services and the availability of expedited processing. Moreover, we would expect that, upon reopening after a closure, secretary of state services would be inundated with backlog filing requests that could delay the processing of new requests. Information may be directly obtained from the Delaware Division of Corporations [here](#).

**Formation Matters**

- For pending transactions or reorganizations involving holding companies, merger subsidiaries or other shell entities, clients should consider forming generic “contingency entities” in their preferred jurisdictions in anticipation of a reduction (or cessation) of secretary of state services. The availability of these contingency entities could minimize the impact of any disruptions to secretary of state services. Companies should also consider the following supplemental proactive measures for these contingency entities:

  - **EINS.** Obtaining EINs for contingency entities as promptly as practicable to enable financing activities. This would be in anticipation of EIN processing being unavailable during a federal government shutdown.

  - **Bank Accounts.** Opening bank accounts for contingency entities as promptly as practicable in case financial institutions’ services become limited.

  - **Good Standing Certificates.** Obtaining good standing certificates for entities that are likely to be party to a transaction as promptly as practicable.

  - **While the dissolution of, or name change amendments to, unused contingency entities will involve both administrative and third party filing costs, we think that the availability of these entities and their necessity for consummating pending transactions may outweigh those costs.**

**Filing Matters**

- Based on the most current information received from our filing agents, we would expect that (i) filings submitted during a period in which a secretary of state office is closed would nevertheless receive an effective date of the date of submission (assuming no future effective date is specified) and (ii) filings submitted during a period in which a secretary of state office is open that would
be effective during a time at which the secretary of state office is closed would still be able to receive the specified future effective date. However, as circumstances continue to shift, filing agent procedural changes or changes at secretary of state offices could affect the above.

**Escrow Services**

- The escrow and paying agents to whom we have spoken indicated that they intend to continue to provide uninterrupted services for existing and prospective arrangements during this time of uncertainty. They also do not expect escalated remote work arrangements to impact the quality of their services at this time.

**Other Considerations**

- **For Publicly-Traded Companies.** Please visit: Corporate & Securities Law Blog.

- **Digital Signatures.** As remote work becomes more prevalent, companies should consider confirming that their service providers are experienced with digital signature technology.

- **Corporate Action Authorizations.** Organizational documents may not permit the authorization of transactions or other corporate actions via telecommunications. Companies should consider reviewing and updating their organizational documents to ensure that they reflect technological advancements permitted under the law of a company’s jurisdiction of formation.

- **Lien Searches.** In anticipation of limited secretary of state services across the United States, companies undertaking lending or acquisition transactions should consider ordering lien searches sooner rather than later.

- **Franchise Taxes.** Delaware LLC franchise taxes are due on June 1, 2020. Companies considering acquisitions in Q3 that may require certification of good standing should consider paying franchise taxes in advance, retaining evidence of that payment and requesting a good standing certificate after doing so.

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