will likely change the dynamics of FDI screening processes, which have so far taken place entirely within the host country's borders. In principle, the host Member State's obligation to give other Member States' and the Commission's views due consideration (or, in the case of Commission opinions on FDI of Union interest, to take utmost account of them) creates a potential for conflict. In practice, however, the Commission and Member State authorities can be expected to resolve any differences through confidential negotiations in the vast majority of cases.

The regulation as finally adopted made a number of changes intended to reduce the risk of extended delays, curtail the possibility of screening foreign investments that have already been completed, and limit the Commission's discretion to identify investments of Union interest in which it may intervene. The FDI Regulation nonetheless continues to raise many questions. For example, it is unclear how Member States without a screening mechanism will participate in the review process, and the regulation may in fact lead to a proliferation of additional Member State regimes.

Perhaps most importantly, the FDI Regulation says nothing about how the Commission will exercise its powers or the possibility for foreign investors and EU investees to have input into the process. Investors, investees, and other interested parties will no doubt seek to share their views through various Commission channels, potentially creating confusion and undermining the credibility of the process. It is to be hoped that the Commission will use the 18 months before the new framework needs to be applied by creating and staffing a new unit within the Directorate-General for Trade and preparing procedural rules to clarify how it will exercise its new powers.

ENDNOTES:

[1] http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/AG/2018/12-10/1171525EN.pdf.

[2]New rules entered into force in Germany on December 29, 2018. *See*, https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zwoelfte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=4.

[3]New rules entered into force in the UK in June 2018. *See*, https://www.gov.uk/government/news/new-merger-and-takeover-rules-come-into-force.

[4]*See* for example the joint statement of 18 EU industry ministers on December 18, 2018, *available at* https://www.bmwi.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6.

[5] https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf.

[6] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

[7] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.PDF.

[8] http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=36097&no=1.

IMPACT OF THE FEDERAL GOVERNMENT SHUTDOWN ON M&A TRANSACTIONS, SEC AND INVESTMENT ADVISER FILINGS AND REGISTRATIONS, GOVERNMENT CONTRACTS, AND LITIGATION

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We summarize below the key impact of the federal government's partial shutdown on M&A transactions, SEC and Investment Adviser filings and registrations, government contracts, and litigation. The shutdown,

which lasted 35 days and ended in late January, was the longest federal government shutdown on record. President Trump has stated that the shutdown may be reinstated in mid-February if his negotiations with the U.S. Congress regarding funding for a border wall are not resolved by then.

During the shutdown, a significant percentage of federal government employees were furloughed. Although some members of the federal workforce continued to work without pay, most federal agencies operated with extremely limited staff. Most federal agencies did not continue to process filings that were pending when the shutdown began and did not process new filings. In addition, most of the agencies did not provide new guidance or interpretive advice. Many agencies provided FAQs on their websites regarding their operations during the shutdown. The greatest impact on M&A-related deals at this point is the considerable backlog that has developed in connection with the work at federal agencies. A near-term resumption of the shutdown would significantly exacerbate the backlog problem.

M&A Transactions

Antitrust. The Federal Trade Commission and the Department of Justice continued to accept Hart-Scott-Rodino filings during the shutdown. The applicable statutory HSR waiting periods ran, but early termination of the waiting period was not granted during the shutdown. Thus, even for transactions that presented no substantive antitrust issues, without the possibility of early termination, parties needed to endure the full statutory waiting period (30 days for most transactions). Second requests continued to be issued. Given the limited agency staff working during the shutdown, parties experienced delays and many considered pulling and refiling HSR filings to allow the agencies additional time to conduct preliminary reviews, with the goal of avoiding or narrowing the scope of in-depth Second Request investigations. In addition, resource constraints may have prompted the agencies to issue more Second Requests than otherwise in order to allow additional time to complete their investigations. The agencies still performed certain critical functions with respect to time-sensitive investigations and (if timing extensions or suspensions could not be negotiated) pending litigation or new cases that "[had to] be filed due to [HSR] or statute of limitations deadlines."

CFIUS. During the shutdown, operations of the Committee on Foreign Investment in the U.S. were generally suspended. CFIUS filings could be submitted during the shutdown, but they were generally not commented on or accepted for review. The only exception is that CFIUS exercised "caretaker functions" related to cases involving national security exigencies or for which a review or investigation was initiated prior to the enactment of FIRRMA (on August 18, 2018). For all other cases, CFIUS review and investigation deadlines were tolled for the number of days of the shutdown. As CFIUS operations resume, the backlog of cases can be expected to increase the chance that pending CFIUS reviews will be rolled over to investigation or that pending cases that are in investigation may have to be withdrawn and refiled in order for CFIUS to complete its work.

FCC. During the shutdown, the Federal Communications Commission did not review or process new or pending applications for the assignment or transfer of control of FCC licenses. Applications filed during the shutdown were considered accepted as of the first business day after the FCC returned to normal operations. Review of pending applications, and the FCC's informal 180-day timeframe for the review of transactions, were suspended and recommenced as of the first business day after the FCC returned to normal operations.

Bank Regulators. The federal banking regulatory agencies are not dependent on Congressional appropriations for their operations. Accordingly, these agencies (the Federal Reserve, the OCC, the FDIC, and the CFPB) remained open and fully operational during the shutdown.

SEC Filings

Division of Corporation Finance

EDGAR Filings. While EDGAR filings, including periodic reports under the Securities Exchange Act of 1934 (the "Exchange Act"), reports of beneficial ownership required by Section 16 of the Exchange Act, and

registration statements under the Securities Act of 1933 (the "Securities Act") could still be made during the shutdown, and deadlines for filings were not changed, the Division of Corporation Finance had on hand only a limited number of staff members and responded (via an emergency email address) only to questions relating to fee calculations. A statement posted by the Division as of January 27 notes that, following re-opening, the Staff intends to address filings in the order in which they were received, absent "compelling circumstances."

Filing Review and Interpretive Advice. The Division of Corporation Finance was not available during the shutdown for interpretive advice, no-action letters or processing of new or pending applications for exemptive relief. As with matters relating to EDGAR filings, the Staff intends now to process requests for interpretative advice or relief in the order received, but has noted that filers requiring more immediate assistance may request expedited treatment by submitting a request through the Division's emergency e-mail address.

Impact on Registration Statements and Securities Offerings. During the shutdown, Securities Act registration statements were not reviewed; and registration statements requiring SEC action to become effective (*e.g.*, registrations on Forms S-1 and F-1, or filings by non-WKSI issuers on Form S-3) were not declared effective, though WKSI filers utilizing Form S-3 were unaffected and such registrations became effective upon filing. The Staff had provided guidance permitting filers of registration statements that were submitted as of the commencement of the shutdown to file an amendment removing the delaying amendment language that typically prevents a registration statement from becoming effective automatically after 20 days. The Staff further stated in its shutdown guidance that any such filing was required to include all information called for by the applicable form, including the price of the securities to be sold, at the time that the filing without the delaying amendment was made. Although this approach was not practicable for offerings for which a period of marketing was needed to determine an appropriate price, numerous filers proceeded with the removal of delaying language (including an IPO filer that took the unusual step of preparing a "red herring" prospectus that included an offering price, only to amend the registration statement following the reopening to remove the price). Registrants who removed the delaying amendment language during the shutdown were cautioned that their filings could be subject to post-effective review. Upon reopening, the Staff stated that it intends to contact registrants in cases where re-filing with the delaying amendment is deemed appropriate in order to permit Staff review. In addition, registrants may now contact the Staff to request acceleration of the effectiveness of pending registrations. Some filers that removed or omitted the delaying amendment from their registration statements during the shutdown may choose to wait out the automatic effectiveness period; however, the decision to proceed with effectiveness absent SEC clearance should be discussed with counsel.

Impact on Proxy Statements. Preliminary proxy statements for annual or special stockholder meetings were not reviewed during the shutdown, nor were requests for no-action guidance under Exchange Act Rule 14a-8 processed during that period. The Staff recognizes that as proxy season approaches, certain requests under Rule 14a-8 may have become more urgent, and directs reporting companies to use the emergency e-mail address to request expedited review, noting that requests will otherwise generally be addressed in the order received.

Investment Adviser Filings. During the shutdown, it was possible to submit all Investment Adviser Registration Depository (IARD) filings (including annual and other-than-annual amendments to Form ADV, ADV-E and ADV-W filings) and PFRD filings (for Form PF filers). However, the Office of Compliance Inspections and Examinations did not approve new or pending applications for registration by investment advisers. Also, the Division of Investment Management did not provide interpretive advice or consider applications for exemptive relief under the Advisers Act.

Government Contracts. Because the shutdown only affected certain federal agencies, its impact, if any, on government contracts varied from agency to agency. As a general matter, the impact depended on the funding source for the contract, the terms of the contract, whether

there was access to the federal facilities where the contract was to be performed, and other variables. Where federal contractors could not perform during the shutdown, and contractors (or their employees) suffered financially as a result, the ability of the contractors to obtain relief will depend on the terms of the contracts and the manner in which appropriations were restored post-shutdown. As with past shutdowns, there is certain to be post-shutdown claims and litigation by government contractors seeking to be made whole for their losses. The outcome of these disputes will fall within a wide-spectrum, ranging from clear entitlement to relief in instances in which contractors could not access federal facilities in order to perform, to more challenging actions based on indirect losses such as the costs of extending lease terms on equipment or obtaining financing to maintain operations. In agencies affected by the shutdown, the norm during the shutdown was that no new contracts or modifications to existing contracts were awarded. Contractors experienced delays during the shutdown in the acquisition process for procurements and the payment of invoices—and will continue to experience delays given the backlog that now exists. Contractors should not assume that any statutory deadlines for filing claims and bid protests automatically will be extended.

Litigation. Federal courts, including the U.S. Supreme Court, operated on reserve funds during the shutdown. The Case Management/Electronic Case Files (CM/ECF) system remained in operation for the electronic filing of documents. Criminal cases in federal court generally proceeded without interruption, albeit staffed by federal attorneys and some agents who were required to work without pay. Many federal courts, including the United States District Court for the Southern District of New York, announced stays of civil cases in which the U.S. Attorney's Office was representing the government. Such orders were published on court internet sites. Many U.S. Department of Justice Civil Division attorneys were furloughed and prohibited from working on their pending cases. As such, in litigation where these attorneys represented the United States or federal agencies, or federal officials were parties, the Justice Department often filed motions seeking to stay the proceedings (including pending filing deadlines) until the "lapse in appropriations" ended, and asked for extensions commensurate with the length of the shutdown. For the most part, particularly where there was no opposition, courts granted the motions. However, there were several notable exceptions, particularly in cases seeking injunctive relief and matters where the federal agencies involved (such as the Department of Defense) were unaffected by the shutdown. In cases where the United States is the plaintiff, some courts held that the government needed to be treated like any other civil litigant and either prosecute the case or dismiss it. In the event of another shutdown, it is likely that this judicial sentiment will grow.

TRONOX'S ANTITRUST WOES CONTINUE WITH CRISTAL ACQUISITION

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Since it announced the Cristal acquisition in February 2017, Tronox has faced numerous antitrust roadblocks. As detailed in our earlier article on the subject,[1] following the HSR filing, the FTC investigated and challenged the deal in its administrative court. Normally, the FTC also files a federal court action seeking a preliminary injunction ("PI") to prevent the transaction closing pending the FTC administrative trial. In this case, the FTC opted not to go to federal court right away because the European Commission's ("EC") pending investigation barred closing. Parties often prefer to litigate in federal court because the courts typically produce a speedier outcome and are independent of the agency that sought to block the transaction in the first place.

Looking for a way out of the FTC's administrative court, Tronox unsuccessfully sought a declaratory judgment to force the FTC to litigate in Mississippi federal court or simply approve the merger. Faced with far-off resolution with both the EC and FTC, Tronox extended