

To Our Clients and Friends

Memorandum

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Impact of the Federal Government Shutdown on M&A Transactions, SEC and Investment Adviser Filings and Registrations, Government Contracts, and Litigation

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. This information may change if the shutdown continues for a lengthy period.

In general, a significant percentage of federal government employees have been furloughed. Some members of the federal workforce are continuing to work without pay but most federal agencies are operating with extremely limited staff. Most agencies are not continuing to process filings that were pending when the shutdown began and are not processing new filings. In addition, most agencies are not now providing new guidance or interpretive advice. Many agencies have provided FAQs on their websites regarding their operations during the shutdown. Once the shutdown ends, delays in agency actions should be expected given the backlog that will have developed.

M&A Transactions.

- **Antitrust.** The Federal Trade Commission and the Department of Justice are continuing to accept Hart-Scott-Rodino filings during the shutdown. The applicable statutory HSR waiting periods will run, but early termination of the waiting period will not be granted during the shutdown. Second requests will continue to be issued. The agencies will perform certain critical functions with respect to time-sensitive investigations and (if timing extensions or suspensions cannot be negotiated) pending litigation or new cases that “must be filed due to [HSR] or statute of limitations deadlines.” Given the limited agency staff working during the shutdown, parties should expect delays. In particular, there may be additional need to pull and refile 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 prompt the agencies to issue more Second Requests than otherwise in order to allow additional time to complete their investigations. For transactions that present no substantive antitrust issues, without the possibility of early termination, parties will need to endure the full statutory waiting period (30 days for most transactions).
- **CFIUS.** During the shutdown, operations of the Committee on Foreign Investment in the U.S. are generally suspended. CFIUS filings can be submitted during the shutdown, but they will not be commented on or accepted for review. The only exception is that CFIUS will be exercising “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 will be tolled for the number of days of the shutdown. Once CFIUS operations resume, the backlog of cases could increase the chance that pending CFIUS reviews will be rolled over to investigation or that pending cases that were 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 will not be reviewing or processing new or pending applications for the assignment or transfer of control of FCC licenses. Applications that are filed during the shutdown will be considered accepted as of the first business day after the FCC returns to normal operations. Review of pending applications, and the FCC's informal 180-day timeframe for the review of transactions, have been suspended and will recommence as of the first business day after the FCC returns 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) remain open and fully operational.

SEC Filings.

- **Division of Corporation Finance.**
 - **EDGAR Filings.** All 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"), can still be made during the shutdown, and deadlines for filings have not been changed. The Division of Corporation Finance will have on hand a limited number of staff members to respond to questions relating to fee calculations relating to filings via an emergency e-mail address.
 - **Filing Review and Interpretive Advice.** The Division of Corporation Finance will not begin or continue review of any filing during the shutdown. In addition, the Staff will not be available for interpretive advice, no-action letters or processing of new or pending applications for exemptive relief.
 - **Impact on Registration Statements and Securities Offerings.** During the shutdown, Securities Act registration statements will not be reviewed; and registration statements that require SEC action to become effective (such as registrations on Forms S-1 and F-1, or filings by non-WKSI issuers on Form S-3) will not be declared effective. Form S-3 registration statements filed by WKSIs will continue to become effective upon filing.

For registration statements currently on file, registrants may choose to file an amendment removing the delaying amendment language that prevents the registration statement from becoming effective automatically after 20 days.

- Any such filing must include all information required by the applicable form, including the price of the securities to be sold, at the time that the filing without the delaying amendment is made (which may not be practicable for many offerings).
- Registration statements that do not contain the delaying amendment language will become effective 20 days after the most recent pre-effective amendment that removes or omits the delaying language, unless the shutdown ends beforehand and the registrant requests acceleration of the effective date.

- New registration statements may also be filed without the delaying amendment subject to the caveat above regarding inclusion of all required information.

Registrants should keep in mind that any filings that become effective as a result of the removal or omission of a delaying amendment could become subject to post-effective review. 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 will not be reviewed during the shutdown. Where Exchange Act Rule 14a-6 would require the filing of a preliminary proxy statement, companies should file the preliminary materials and defer mailing definitive proxy materials until the 10-day period specified by the rule has passed.

Investment Adviser Filings. 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) can be made during the shutdown. However, the Office of Compliance Inspections and Examinations will not be approving new or pending applications for registration by investment advisers. Also, the Division of Investment Management will not be providing interpretive advice or considering applications for exemptive relief under the Advisers Act.

Government Contracts. Because the shutdown only affects certain federal agencies, its impact, if any, on government contracts will vary from agency to agency. As a general matter, the impact will depend on the funding source for the contract, the terms of the contract, whether there is access to the federal facilities where the contract is performed, and other variables. Where federal contractors cannot perform during the shutdown, and contractors (or their employees) suffer 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 are restored once the shutdown ends. As with past shutdowns, there is certain to be post-shutdown litigation by government contractors seeking to be made whole for their losses. Further, in agencies affected by the shutdown, the norm will be that no new contracts or modifications to existing contracts will be awarded. Also, contractors are experiencing and should expect additional delays in the acquisition process for procurements and the payment of invoices. 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, have been operating, and expect to continue through January 18, 2019 to operate, on reserve funds. The Case Management/Electronic Case Files (CM/ECF) system remains in operation for the electronic filing of documents. Some courts, including the United States District Court for the Southern District of New York, have announced stays of civil cases in which the U.S. Attorney's Office is representing the government, but criminal cases in federal court are expected to proceed without interruption. Such orders are published on court internet sites. Many U.S. Department of Justice Civil Division attorneys have been furloughed and are prohibited from working on their pending cases. As such, in litigation where these attorneys represent the United States or federal agencies, or federal officials are parties, the Justice Department has filed motions seeking to stay the proceedings (including pending filing deadlines) until the "lapse in appropriations" ends, and is asking for extensions commensurate with the length of the shutdowns. For the most part, particularly where there is no opposition, courts are granting the motions. However, there are exceptions, particularly in cases seeking injunctive relief and matters where the federal agencies involved (such as the Department of Defense) are unaffected by the shutdown.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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