

24 February 2020

Regulatory Risk — Uncertainty is the Only Certainty

One of the prevailing themes of M&A over the last two years is the increase in regulatory uncertainty in the U.S. and abroad. While primarily in the antitrust realm, expanded national security regimes, including CFIUS, also have added new risks to deal outcomes. This uncertainty has taken many different forms, including longer timelines, unexpected theories or remedies, and clearance hurdles in unanticipated jurisdictions.

Dealmakers need to consider these developments in the context of negotiating transaction agreements as some of the market precedent terms may prove inadequate in hindsight to address unexpected developments.

Some examples of contractual points that parties may wish to consider:

- » **Efforts Covenants** — Are the buyer's commitments to obtain required approvals (and the target's related rights and cooperation obligations), including accepting remedies, properly calibrated for the widening variety of outcomes, relevant jurisdictions and pathways to obtain approval?
- » **Interim Operating Covenants** — Does the customary set of restrictions on the operation of the target's business between signing and closing provide sufficient flexibility to allow the target to run its business in the event the timeline to closing is elongated, while continuing to provide the buyer the ability to appropriately minimize value leakage?
- » **Drop-Dead Dates** — Does the drop-dead date, along with triggers for potential extensions, appropriately protect against more uncertain outcomes and timelines?
- » **Value** — From both parties' perspectives, are the deal price terms struck at signing ones that work over an extended period of time where macro or company-specific changes inevitably can occur? Similarly, are the terms of any compensatory provisions,

such as reverse termination fees or expense reimbursements upon a failure to obtain approval, adequate for all potential scenarios?

- » **Jurisdictions** — Is the list of approvals identified as conditions to closing appropriately scoped to balance the risks to both parties?

Parties should exercise due care in crafting appropriate agreement terms to address growing regulatory uncertainty.

* * *

Not every deal presents a risk profile that requires expressly addressing each corner case and there may be good deal-dynamic reasons to proceed with intentional ambiguity around certain outcomes. But with unpredictability expected to continue in the regulatory realm, potentially exacerbated by electoral and geopolitical risk, parties should exercise due care in crafting appropriate agreement terms to seek to reduce the risk of unexpected contractual outcomes resulting from the uncertainty.

If you have any questions about the matters addressed in this *Kirkland M&A Update*, please contact the following Kirkland attorneys or your regular Kirkland contact.

Daniel E. Wolf, P.C.
daniel.wolf@kirkland.com
+1 212 446 4884

Jonathan L. Davis, P.C.
jonathan.davis@kirkland.com
+1 212 446 4835

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising. © 2020 KIRKLAND & ELLIS LLP. All rights reserved.