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CLIENT ALERT

Managing Expectations: FTC Cautions Against Reliance on the Failing Firm Defense

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On Wednesday, against the backdrop of the largest economic decline in U.S. history, the Director of the Federal Trade Commission's Bureau of Competition provided anticipatory **guidance** regarding the agency's views on the "failing firm" defense. Responding to recent suggestions that the agencies might soon face a "wave" of mergers invoking such arguments as a result of COVID-19's devastating impact on the economy, Ian Conner cautioned that the failing firm defense is reserved for the very limited context in which an otherwise anticompetitive merger enables the preservation of productive assets that would otherwise exit the market. Conner reiterated that the FTC will not compromise its application of the defense and reminded that the often-made argument is rarely accepted by the agencies due to the particularly "stringent" conditions and the level of substantiation required to satisfy its definition. Conner warned counsel for merging parties to "think twice before making apocalyptic predictions of imminent failure during a merger investigation."

Wednesday's guidance follows an April **post** in which Conner assured companies and practitioners that, regardless of COVID-19 limitations, the FTC has and will maintain its "rigorous approach to ferreting out anticompetitive harm and seeking appropriate relief." In both blog posts, Conner underscored that the FTC will not relax its antitrust enforcement efforts or merger analysis during the COVID-19 pandemic and urged companies not to seek to take advantage of the ongoing crisis.

Despite Conner's obvious skepticism of the failing firm defense, it is inevitable that the current economic crisis will render some existing firms less competitive than they were in the period prior to the pandemic. Moreover, combining weakened competitors or underutilized assets may yield meaningful procompetitive benefits that are otherwise unattainable. The antitrust laws and the agency review process take these economic issues into account, and such changed circumstances should factor into the overall competitive effect of a potential transaction and – with or without failing firm arguments – may tilt the scales.

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