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Skadden Discusses FTC Moratorium on Early Terminations of HSR Waiting Periods

By Matthew P. Hendrickson, Steven Albertson and Rita Sinkfield-Belin February 22, 2021

Comment

On Thursday, February 4, 2021, the Federal Trade Commission (FTC), with the concurrence of the Department of Justice’s Antitrust Division (DOJ), announced that it had suspended the process by which requests for early termination of Hart-Scott-Rodino Act (HSR Act) waiting periods are granted, potentially signaling a more aggressive approach to merger review.

Key Takeaways

- For the foreseeable future, filing parties must in all cases wait for the full 30-day waiting period to expire before closing.
- The rule applies to currently filed transactions and to any new filings.
- The shift in practice by the FTC and the DOJ may preview a significant departure from the approach to merger enforcement under both Democratic and Republican administrations for decades.

Under the HSR Act, certain parties to mergers and other acquisitions are required to submit premerger notification filings to the FTC and the DOJ, and cannot close their transactions until the HSR waiting period has expired or been terminated. This allows the agencies time to review transactions before the parties close. The statutory waiting period is 30 calendar days, but filing parties may request early termination of the waiting period, and in the case of transactions that clearly pose no threat to competition, these requests are often granted. Historically, requests for early termination have been granted in roughly half of all notified transactions.¹

On February 4, 2021, the FTC issued a press release announcing the moratorium, explaining the shift is intended to help address a high volume of transactions under the current challenging circumstances. “Given the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic, we will presume we need [the full] 30 days [of the HSR waiting period] to ensure we are doing right by competition and consumers,” said Acting Commission Chairwoman Rebecca Kelly Slaughter in the release. The release states that the moratorium is expected to be “brief,” and that the time will be used to review “the processes and procedures used to grant early termination” under the HSR Act.

Notably, the FTC made the decision to suspend all grants of early termination after the agency had proposed a change to the HSR rules that would increase the number of HSR filings and the volume of information that filing parties will be required to provide with certain HSR filings. The public comment period on that proposed rulemaking ended on February 1, 2021.

The move to suspend grants of early terminations formalizes a practice that appears to have begun with the inauguration of President Biden. Since just prior to the resignation of former FTC Chairman Joseph Simons on January 19, 2021, and the corresponding loss of a Republican majority on the commission, only a single request for early termination has been granted.² While precedent exists for the suspension of grants of early termination — most recently an 11-day suspension in March 2020 while the FTC changed its HSR filing procedures in response to COVID-19 lockdowns — this announcement comes weeks after suspension of grants of early termination began.

In their objecting statement published simultaneously with the press release, Republican Commissioners Noah Joshua Phillips and Christine C. Wilson addressed the proffered rationale for the moratorium, suggesting that current filing volumes are not unprecedentedly high, but are actually “70 percent lower” than at their recent peak in November. They further suggested that the lower volume, together with the fact that the FTC staff successfully handled the challenges during the previous 10 months of pandemic conditions, rendered the arguments in favor of the move unpersuasive. “[I]n more than four

decades of HSR Act review, the Agencies have never suspended early termination because of leadership transitions or increased merger filings,” Commissioners Phillips and Wilson wrote.

Implications for the Future

President Biden and members of his transition team have reportedly received pressure to appoint more progressive-leaning officials to senior antitrust roles in the new administration and to ensure a more rigorous enforcement posture at both the DOJ and the FTC. The suspension announcement also comes amid talk on Capitol Hill of significant new antitrust legislation to, for example, increase agency budgets and to make challenging mergers easier. The FTC’s early termination moratorium under Acting Chairwoman Slaughter and Commissioner Rohit Chopra may presage an eagerness by the FTC to reassess long-standing practices to help facilitate scrutiny of, and challenges to, transactions previously presumed to be competitively neutral or even considered to enhance efficiency.

President Biden’s upcoming appointments to replace former Chairman Joseph Simons and current Commissioner Rohit Chopra (the latter of whom is departing the FTC for the Consumer Financial Protection Bureau) will reflect the direction the new administration intends to take regarding antitrust practices.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “FTC Announces Unprecedented Indefinite Moratorium on Early Terminations of HSR Act Waiting Periods,” dated February 8, 2021, and available [here](#).

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