

ANTITRUST TRADE AND PRACTICE

FTC and DOJ Suspend Early Termination of Hart-Scott-Rodino Reviews

On Feb. 4, 2021, the Federal Trade Commission and Department of Justice unexpectedly issued a joint statement announcing the temporary suspension of early merger clearances under the Hart-Scott-Rodino (HSR) review process. Before this suspension, HSR filings that posed no competition concerns were routinely granted early termination and did not wait for the full 30-day period. The only prior official pauses in early termination occurred during government shutdowns, and from March 13, 2020 until March 20, 2020, when the Premerger Notification Office switched to an electronic filing system in response to the COVID-19 pandemic.

The suspension of early terminations will hold up filings on transactions that raise no competitive concerns such as an officer acquiring shares in her own company, or a private equity fund implementing an internal reorganization such that a portfolio company is technically held by a different ultimate parent, even if the managers and most of the investors remain the same.

The Democratic commissioners on the FTC cited the new Biden



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administration, the pandemic and an increase in the number of filings to review as reasons for halting the quick review termination, but the Republican commissioners strongly disagreed with this change in policy, noting that the policy was not suspended when the number of filings was substantially higher. See Press Release, “FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination” (Feb. 4, 2021). The announcement says the suspension of early terminations will be brief, but increased interest in antitrust reform from the Biden Administration and Congress could lead to permanent changes to this process.

HSR Filing Requirements

Under HSR, if a proposed merger or other business combination meets certain thresholds, the parties must notify the FTC and the DOJ and observe a waiting period before consummating the transaction. The agencies then have 30 days to review most filings to determine if the proposed transaction raises

antitrust concerns. At the end of the 30 days, the reviewing agency either allows the transaction to proceed or requests additional information from the transaction parties, commonly known as a “Second Request.” There is also an option for parties to pull their filing and refile to extend the time for agency review without triggering a Second Request. After substantial compliance with a Second Request, the government has another 30 days to determine whether it will clear the transaction.

The HSR thresholds are adjusted annually and recently were reduced because the economy contracted last year, resulting in a lower Gross Domestic Product (GDP). The new minimum filing threshold for the size of the transaction is now \$92 million. Transactions that exceed this threshold and meet the size-of-person threshold are required to file for HSR review, unless there is an exemption. The size-of-person standard has also been adjusted to reflect the reduction in GDP: One party must have sales or assets of at least \$184 million and the other has sales or assets of at least \$18.4 million. A transaction valued below the revised minimum notification threshold of \$92 million generally will not need to be reported, and transactions valued above \$368 million will be reportable regardless of the size-of-person test unless an exemption applies.

Early Termination of Merger Reviews

Before the temporary suspension, filings that clearly posed no anti-trust issues were routinely granted early termination, allowing the parties to proceed with the acquisition or merger before the 30-day waiting period expired. The early termination mechanism was originally created as an exception to HSR review if the parties showed a “special business reason.” This more stringent standard requiring a “special business reason” for early termination was weakened by *Heublein v. FTC*, 539 F. Supp. 123, 125 (D. Conn. 1982), after which early termination of initial 30-day reviews became commonplace if the merger clearly did not warrant further review. In 2019, 74.2% of HSR filings requested early termination and the FTC granted 73.5% of those requests, meaning roughly half of all HSR filings in 2019 were granted early termination. See FTC & Dep’t of Justice, Antitrust Div., *42nd Hart-Scott-Rodino Annual Report: Fiscal Year 2019*.

Temporary Suspension of Early Termination

As of Feb. 4, all HSR filings must now wait the full 30 days before either completing the HSR process or receiving a Second Request. Only one merger review was granted early termination since Jan. 15—a matter involving Thermo Fisher Scientific’s acquisition of Mesa Biotech that had COVID-19 testing implications. See FTC Early Termination Notice, 20210958: Thermo Fisher Sci.; Mesa Biotech (Feb. 3, 2021). This deal was approved on Feb. 3, one day before the new guidance was released. *Id.*

In the joint statement announcing the temporary suspension of early termination, Rebecca Slaughter, Acting Chairwoman of the FTC,

stated: “We, as an agency and a country, are in unprecedented times, and our obligation is to be responsive to these circumstances, in this case by temporarily suspending early termination. ...The law provides 30 days for the agencies to review the competitive implications of transactions. Given the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic, we will presume

The temporary suspension of early termination has sent a shockwave through the business and legal community. The FTC and DOJ’s joint announcement was unprecedented, unexpected and its effects are only starting to be realized. Will this move be a sign of broader changes to come from the new administration or a temporary move that will soon be forgotten? Karen Hoffman Lent and Kenneth Schwartz discuss in this edition of their Antitrust Trade and Practice column.

we need those 30 days to ensure we are doing right by competition and consumers.” Press Release, “FTC, DOJ Temporarily Suspend Early Termination” (Feb. 4, 2021). Richard Powers, Deputy Assistant Attorney General and Senior Supervisory Official of the Department of Justice’s Antitrust Division, added: “We support the FTC’s decision to temporarily suspend early termination grants to ensure appropriate review of transactions during this challenging transition period.” *Id.*

FTC Divide on Temporary Suspension

While the Democratic FTC commissioners supported this temporary halt to early terminations, the Republican commissioners strongly opposed it. Commissioners Christine Wilson and Noah Phillips issued a scolding statement coinciding with the joint release announcing the new policy blasting the decision. Calling the move “unwarranted,” they saw no rationale sufficient to justify the suspension of all early terminations: “We are concerned that freezing grants of [early terminations] will delay the consummation of competitively innocuous transactions. Particularly during a time of economic difficulty, impeding the transfer of assets could have knock-on effects that harm employees, small businesses, and financially imperiled firms.” Statement of Comm’rs Phillips & Wilson, *Regarding the Commission’s Indefinite Suspension of Early Terminations* (Feb. 4, 2021). They would prefer that the market decide whether competitively benign transactions should proceed, not the FTC. *Id.*

The suspension has in fact created concern regarding the resulting lack of predictability for investors and companies in their plans to invest capital, hire new employees, discuss details with shareholders, and work in other areas to finalize a merger while it is undergoing the mandatory 30-day review. Parties whose mergers clearly pose no competition concerns would normally view HSR as a formality as the companies and investors moved toward completion of an agreement, where now there is uncertainty over the scrutiny that awaits when the 30-day waiting period expires.

Rationale for the Suspension

The FTC and DOJ announcement relies heavily on the “unprecedented volume of HSR filings” to start the fiscal year as the rationale

for halting early terminations. A concurring statement by the Democratic commissioners the day after the announcement cited the increase in size and complexity of mergers brought to the FTC for review as a justification for increased funding from Congress, which indicates that FTC might need more resources to resume the early termination process. See Concurring Statement of Acting Chairwoman Slaughter Joined by Comm'r Chopra, *Regarding the Revised Clayton Act Thresholds* (Feb. 5, 2021).

The Republican commissioners note that the number of HSR filings currently before the FTC is not atypical and thus did not require such an unprecedented step by the majority. See Statement of Comm'rs Phillips and Wilson, *Regarding the Commission's Indefinite Suspension of Early Terminations*. (Feb. 4, 2021). Filings peaked in November, but have fallen by approximately 70% since. *Id.* While filings are on pace for a significant increase over last year, that likely is due to a lack of M&A activity early in the pandemic. Republicans have argued that, if the FTC could handle the influx of filings in November, when more than 400 notifications were filed, it likely could continue operating as it was before the temporary halt.

The FTC/DOJ announcement also mentions the transition to the new Biden Administration as another reason for halting early terminations, but it does not expand on this point. This temporary move by the FTC could signal to the antitrust reformers that the administration is open to more stringent merger review measures. There is widespread speculation that the Biden Administration will institute more rigorous merger reviews than we have seen in the past and this move could be the first sign of things to come.

Many Democrats, including Sen. Amy Klobuchar, are pushing the administration to create stricter merger reviews in addition to other potential antitrust reform measures. Senator Klobuchar's bill, among other things, flips the burden from the government to the merging parties, requiring merging parties to show that the proposed transaction would not harm competition by more than a de minimis amount in situations including acquisitions of nascent competitors by firms with a 50% or higher market share, "mega-mergers" involving transactions over \$5 billion, or where the acquiring company has a market cap of more than \$100 billion and makes an acquisition of \$50 million or more. If implemented, these policies would create a much more robust merger review regime and could create significant hurdles for merging parties.

The temporary halt could also be a sign that the Biden Administration has not decided whether it wants to change merger review policies, and thus is delaying a decision until a new FTC Chair is nominated and confirmed, as well as a new commissioner to replace Rohit Chopra if he is confirmed as the head of the Consumer Financial Protection Bureau. The turnover at the FTC is in addition to the vacant nomination for an assistant attorney general to lead the Antitrust Division at DOJ, who will have a significant role in determining this new administration's antitrust policy.

There is also the possibility of the Biden Administration naming an antitrust czar to oversee a policy overhaul from the White House while working with new leadership at FTC and DOJ. The new leadership within the agencies could be tasked with deciding whether early terminations will be halted for longer than the brief period mentioned in the release, as HSR authorizes

the agencies to issue early terminations, but does not require it. Theoretically, the agencies could simply decide not to issue early terminations again. There would be no need for any formal rulemaking to effectuate this (and any such rulemaking preventing early terminations would arguably run afoul of the statute).

Another explanation for the FTC/DOJ action is to lobby Congress for more funding. One day after pausing early terminations, Acting Chairwoman Slaughter and Commissioner Chopra issued a statement strongly supporting efforts by Sens. Klobuchar and Chuck Grassley to increase merger filing fees for large transactions, as well as calling on Congress to devote more resources to the FTC. It is notable that the statement calling for more funding came one day after implementing an unprecedented policy that brought attention to HSR filings and merger delays.

Conclusion

The temporary suspension of early termination has sent a shockwave through the business and legal community. FTC and DOJ's joint announcement was unprecedented, unexpected and its effects are only starting to be realized. Stay tuned to see whether this move is a sign of broader changes to come from the new administration, or whether this temporary move will soon be forgotten.