

February 2021

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HSR Early Terminations Suspended

By [Michael Wise](#) & [Mary Walser](#)

In an unprecedented move, on February 4, 2021, the Premerger Notification Office of the Federal Trade Commission (“FTC”) and the Department of Justice Antitrust Division (“DOJ”) issued a joint statement suspending the process of granting early termination (“ET”) of the review period for transactions notified under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”). Citing the transition to the new Administration, the ongoing global pandemic, and the unprecedented volume of HSR filings, the agencies noted they will be “reviewing the processes and procedures used to grant early termination.” The press release indicates the suspension is temporary, referring back to the temporary suspension in March 2020 at the onset of the pandemic. A review of the FTC’s website shows that only one ET notice was issued between January 15, 2021 and the agencies’ joint announcement. Companies engaged in M&A activity should be aware that for now, even non-problematic transactions will take the full 30-day HSR review period to be cleared.

This decision comes as many observers are carefully watching for signs that the FTC and DOJ will take a more aggressive stance on antitrust enforcement. Many will see this as a step in that direction. Notably, at the FTC, the decision drew dissenting statements from Republican Commissioners Noah Phillips and Christine Wilson, who argued that there is no basis for such a change to established procedure. Noting that HSR filings have fallen approximately 70% since November, Phillips and Wilson took issue with the stated rationale for the change. They pointed out that historically the suspension of ET grants only occurred during a government shutdown and during the exceptional time in March 2020 as the agencies implemented the HSR electronic filing system in response to the global pandemic. Given that no suspensions to ET were issued during any previous changes in Administration, or during other times of uncertainty such as September 2001 or during the financial crisis of 2008, Phillips and Wilson claim that no such justification exists today. In their words, “[s]uspending early terminations introduces inefficiency into market operation, harming consumers and other stakeholders involved in the transactions that would have consistently received ET at any point during the last 45 years.”

Background: The Hart-Scott-Rodino Antitrust Improvements Act of 1976

The HSR Act provides that, where certain jurisdictional thresholds are met, parties intending to merge or make acquisitions must (absent any applicable exemptions) furnish the Premerger Notification Office of the FTC and the Antitrust Division of the Department of Justice with prescribed information regarding their respective businesses and the proposed transaction, and wait a specified period of time before consummating the transaction. The statutory “waiting period” stays consummation of the transaction for a minimum of 30 days (15 days in the case of bankruptcy or cash tender offers), absent a grant of early termination. Prior to today, the agencies would, at their discretion, grant ET for deals where no

competition concerns arose. Any transactions currently on file with the agencies that were anticipating a grant of ET will now have to wait the full 30 days.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Gary Zanfagna
1.202.551.1940
garyzanfagna@paulhastings.com

Noah Pinegar
1.202.551.1960
noahpinegar@paulhastings.com

Michael S. Wise
1.202.551.1777
michaelwise@paulhastings.com

Mary Walser
1.202.551.1882
marywalser@paulhastings.com

Paul Hastings LLP

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