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HSR Headwinds: FTC Hits 'Pause Button' on HSR Early Terminations

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Parties to transactions requiring filings under the Hart-Scott-Rodino (HSR) Act are already facing considerable headwinds from US President Joe Biden's antitrust enforcement agencies on important substantive and procedural issues that will delay transactions closing and potentially increase compliance costs and burdens. The HSR Act requires parties to transactions that meet certain financial thresholds to notify the FTC and DOJ, and observe a mandatory waiting period, prior to closing.

Most recently, on February 4, the US antitrust enforcement agencies hit the pause button on using their discretion to grant early termination of the HSR waiting period. "Early termination" is a process through which the agencies will agree to shorten the waiting period when parties request early termination and the agencies determine the transaction does not raise substantive antitrust issues. The suspension was announced at the end of a two-week period during which early termination was granted in only one transaction. This was down dramatically from the typical pace of early termination approvals, which on average is more than 75% of all transactions requesting early termination.

After the seeming two week hiatus, in a move that provided transparency to the business community, Acting FTC Chair Rebecca Slaughter indicated that the "confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic" meant that the agencies would "presume we need those 30 days to ensure we are doing right by competition and consumers." The deputy assistant attorney general and senior supervisory official of the DOJ's Antitrust Division was supportive of the decision as necessary "to ensure appropriate review of transactions during this challenging transition period."

Republican Commissioners Noah Phillips and Christine Wilson jointly expressed concerns with the move, blasting the decision to suspend the agencies' ability to exercise discretion in granting early termination. Phillips and Wilson opined that there was "no rationale" for the suspension, arguing that "[f]ear that one anticompetitive transaction may obtain an [early termination] should not hold up the thousands that are competitively benign." Phillips and Wilson concluded that the FTC staff "is fully capable of continuing its work through changes in political leadership and fluctuations in merger filing thresholds."

Earlier in the pandemic, in March 2020, the FTC briefly suspended early termination grants for two weeks to allow for a transition to submission of electronic filings and work from home. After the suspension, the then director of the FTC Bureau of Competition announced that the agency was "pleased to announce that, in light of the success of the temporary e-filing program to date, we will return to processing requests for early termination … and will resume the practice of granting early termination of the HSR Act's waiting periods when both [agencies] have determined that no enforcement action will be taken during the waiting period."

In that announcement, the FTC emphasized that competitive "concerns will be fully investigated in every case, and doubts will be resolved against granting early termination." The agency emphasized that "consistent with the Bureau's normal practice, investigations will not be closed if doubts remain, and early termination will not be granted for any transaction for which enforcement action may be necessary." Following the resumption of early termination grants, the pace of grants appeared to be consistent with the era preceding the suspension. However, by this January that cadence had changed, and the effective ban on early terminations has now exceeded two weeks based on publicly available data.

Providing context to the situation, January 2021 clocked in over 200 HSR filings, which is substantially higher than normal for that time of year, including the 162 received in January 2020. Even so, the volume is in line with what the agency regularly handles in other months. Even during the pandemic the agencies received 233 filings in October and 424 filings in November of 2020.

Increasing the filing fees that must be paid for transactions notified to the agencies may be next on the acting FTC chair's agenda. The fees currently range from $45,000 to $280,000 and are used by the agencies to fund their enforcement efforts. On February 5, the acting FTC chair and Commissioner Rohit Chopra issued a joint statement “strongly support[ing] efforts in Congress led by Senators Klobuchar and Grassley to increase merger-filing fees for large transactions and to ensure that the fees keep pace with the US economy.”

When the “brief” suspension of early termination grants will be lifted or if the calls for increases in the filing fees will come to fruition remains to be seen. What we do know is that this is likely just the beginning of a change in federal antitrust enforcement to a more aggressive agenda.

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