

ALERTS

FTC and DOJ Issue Surprise Announcement: Temporary Suspension to Early Terminations to HSR Act Merger Filings

February 4, 2021

The Federal Trade Commission announced today that the FTC and the Antitrust Division of the Department of Justice (“DOJ”) will not grant early termination (“ET”) to filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”), until further notice, citing “the transition to the new Administration.”^[1] In the announcement, the FTC said that it anticipates “this temporary suspension will be brief.”

The HSR Act requires that certain transactions be reported to the PNO and DOJ and a 15 or 30 day waiting period be observed prior to consummation if, as a result, the acquiring person will hold voting securities, assets and/or non-corporate interests of an acquired person valued above \$94 million (\$92 million from March 4, 2021 onward).

This action marks a sharp departure from past practice, as the only other times that there have been blanket suspensions on ET were during government funding shutdowns and a brief suspension in March 2020 during the move to electronic HSR filing and staff telework in response to the COVID pandemic. A change in administration has never prompted such a suspension.

The two Republican FTC Commissioners criticized the move: “we see no rationale sufficient to justify suspending all grants of ET. In 45 years of administering the HSR Act, the Agencies have done so only when a crisis made them unable to discharge their duties. . . . We are concerned that freezing grants of ET 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.”[2] These Commissioners also noted that “the suspension announcement today comes more than two weeks after the most recent early termination was granted . . . In the future, we hope major changes to agency practice that affect external stakeholders will be announced simultaneously with the action taken, if not before.”

As a result of today's FTC announcement, any parties with a pending HSR filing should expect to observe the full 30-day HSR waiting period (15 days for cash tender offers and bankruptcies) before being able to consummate their notified transactions, and parties currently negotiating deals or contemplating acquisitions should assume that any HSR notification will require observing the full waiting period.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>

[2] https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.

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