

FTC and DOJ Announce Temporary Suspension of Early Termination Grants

February 4, 2021

Key Points

- Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DOJ) have temporarily suspended discretionary grants of early termination of the waiting period under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976
- The HSR Act requires parties that meet certain transaction size and other tests to file premerger notification forms with both the FTC and DOJ and observe the required waiting period prior to consummating the transaction.
- This follows the [announcement earlier this week](#) that the HSR minimum transaction size test has decreased from \$94 million to \$92 million. The new size thresholds will apply to transactions consummated on or after March 4, 2021.¹

On February 4, 2021, the FTC and DOJ [announced](#) that the agencies would temporarily suspend the practice of granting early termination for HSR filings. The agencies have the discretion to “early terminate” the standard 30-day waiting period, or 15-day waiting period for cash tender offers, if requested by the parties, for transactions that do not pose apparent antitrust concerns upon initial review. The agencies state they are suspending early terminations and “will be reviewing the processes and procedures used to grant early termination” due to the transition to the new administration, the pandemic, and “the unprecedented volume of HSR filings for the start of a fiscal year.”² For the duration of the early termination suspension, the agencies will utilize the full 30-days (or 15-days for cash tender offers) to review all filings.

The Agencies will continue to accept HSR filings and review mergers. Since January 15, 2021, the Agencies granted early termination for only [one transaction](#).

FTC Commissioners Noah Phillips and Christine Wilson issued a [statement](#) expressing concern about the suspension. In “more than four decades of HSR Act review, the Agencies have never suspended early termination” and to do so now will delay consummation of transactions that pose no anticompetitive concerns. “Particularly during a time of economic difficulty, impeding the transfer of assets could

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have knock-on effects that harm employees, small businesses, and financially imperiled firms.”

This follows the FTC’s announcement on February 1, 2021, the latest annual revision to the size thresholds governing premerger notification requirements. The minimum transaction size test decreased from \$94 million to \$92 million for 2021. The new thresholds will apply to transactions consummated on or after the effective date, March 4, 2021.³

This is only the second time that the HSR thresholds have declined since Congress amended the HSR statute in 2000 to require the HSR thresholds be adjusted annually based on the change in gross national product. The last time the threshold decreased was in 2010.

Parties contemplating merger or acquisition activity are strongly encouraged to consult antitrust counsel to determine whether premerger notification is required. The rules governing the calculation of the relevant filing thresholds and the applicability of particular exemptions to all or part of a transaction are very complex.

Persons who fail to file and observe the waiting period when required to do so face civil penalties of up to 43,792 per day.⁴

¹ Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, available [here](#).

² FTC Press Release, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, Feb, 4, 2021 available at <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>

³ In addition to the size thresholds highlighted in this alert, most other HSR Act thresholds (for example, relating to various exemptions) have increased as well. For instance, on January 19, 2021, the FTC announced the annual revisions to the interlocking directorate thresholds under Section 8 of the Clayton Act, which prohibits an individual from serving as an officer or director of two competing corporations, with certain exceptions, provided the corporations meet certain thresholds. The new thresholds, effective January 21, 2021, are now \$37,382,000 for Section 8(a)(1) and \$3,738,200 for Section 8(a)(2)(A). Click [here](#) for more detail.

⁴ The FTC announced the maximum daily civil penalty has been adjusted for inflation to \$43,782, effective January 13, 2021. Click [here](#) for more detail.

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