

FTC and DOJ Suspend Early Termination of Merger Reviews; FTC Publishes Revised Hart-Scott-Rodino Notification Thresholds for 2021

Client Alert | February 5, 2021

On February 4, 2021, the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice jointly announced that both agencies would review the processes and procedures regarding early termination of merger notification waiting periods under the Hart-Scott-Rodino Act.^[1] The announcement also stated that early termination requests would not be granted for the pendency of this review.

The Hart-Scott-Rodino Pre-Merger Notification program imposes a 30-day waiting period for most proposed transactions that meet the program's notification requirements. During that 30-day period, the merging parties may not consummate the proposed transaction. The program permits the parties to seek early termination of the waiting period if the agencies conclude that the transaction does not pose a risk of substantial lessening of competition under the Clayton Act.

The agencies' announcement does not describe what areas the agencies intend to review or the basis for the suspension. Rebecca Kelly Slaughter, Acting Chairwoman of the Federal Trade Commission, states in the announcement that the suspension was warranted given "the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic." In a dissenting statement, Commissioners Noah Phillips and Christine Wilson note "[b]y definition, transactions terminated early are those in which the agencies are not interested. And there are many. Early terminations constitute roughly half of all transactions noticed to the agencies under the HSR Act," adding, "[s]uspending early terminations introduces inefficiency into market operation, harming consumers and other stakeholders involved in the transactions that would have consistently received [early termination] at any point during the last 45 years."^[2]

The announcement likewise does not set out a timeframe for the review, instead noting only that the suspension will be "brief," but the bipartisan scrutiny of consolidation in various economic sectors may lead to other changes in the U.S. merger review framework.

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Separately, on February 1, 2021, the Federal Trade Commission announced its annual update of thresholds for pre-merger notifications of M&A transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Pursuant to the statute, the HSR Act's jurisdictional thresholds are updated annually to account for changes in the gross national product.

The size of transaction threshold for reporting proposed mergers and acquisitions under Section 7A of the Clayton Act will decrease by \$2.0 million, from \$94 million in 2020 to \$92 million for 2021. The new thresholds will take effect on March 4, 2021, applying to transactions that close on or after that date.

Original Threshold	2020 Threshold	2021 Threshold
\$10 million	\$18.8 million	\$18.4 million
\$50 million	\$94.0 million	\$92.0 million
\$100 million	\$188.0 million	\$184.0 million
\$110 million	\$206.8 million	\$202.4 million
\$200 million	\$376.0 million	\$368.0 million
\$500 million	\$940.1 million	\$919.9 million

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\$1 billion \$1,880.2 million \$1,839.8 million
The maximum fine for violations of the HSR Act has increased from \$43,280 per day to \$43,792.

The amounts of the filing fees have not changed, but the thresholds that trigger each fee have decreased:

Fee	Size of Transaction
\$45,000	Valued at more than \$92.0 million but less than \$184.0 million
\$125,000	Valued at \$184.0 million or more but less than \$919.9 million
\$280,000	Valued at \$919.9 million or more

The 2021 thresholds triggering prohibitions on certain interlocking directorates on corporate boards of directors are \$37,382,000 for Section 8(a)(I) (size of corporation) and \$3,738,200 for Section 8(a)(2)(A) (competitive sales). The Section 8 thresholds took effect on January 21, 2021.

If you have any questions about the new HSR size of transaction thresholds, or HSR and antitrust/competition regulations and rulemaking more generally, please contact any of the partners or counsel listed below.

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

[2] *Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations*, Feb. 4, 2021, available at: https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding the HSR Act or antitrust issues raised by business transactions. Please contact the Gibson Dunn lawyer with whom you usually work, or any member of the firm's Antitrust and Competition practice group:

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