DOJ and FTC Temporarily Suspend Early Terminations After Announcing Lower HSR Thresholds

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On February 4, 2021, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) announced they were temporarily suspending the practice of granting early termination to merger review filings under the Hart-Scott-Rodino Act, effective immediately. The agencies said the suspension is related to their review of the processes and procedures they use to grant early termination, and they anticipate the suspension will be brief.

The agencies cited the transition to a new administration and an unprecedented volume of HSR filings (that is, unprecedented for this time of year) as the reasons for the process review. The suspension comes over the objection of the two Republican members of the FTC, Christine Wilson and Noah Phillips, and may be a sign that the Biden Administration intends to subject mergers and acquisitions to greater scrutiny than has been the case in recent years.

Under the HSR Premerger Notification Program, companies must report certain proposed mergers and acquisitions to the federal government before they close the transaction to facilitate antitrust agency review. Parties must wait 30 days (15 days in the case of a cash tender offer or bankruptcy transaction) from the date they submit their HSR filings before they may lawfully close their deal. The agencies have the authority to grant an early termination of this preliminary waiting period, which allows the parties to close the transaction sooner.

The suspension of the early termination process comes on the heels of the FTC's announcement of its annual adjustments to the HSR notification thresholds, which are indexed to U.S. gross national product. The agency is reducing the HSR thresholds for the first time in 11 years; they will decline by 2.1 percent. The new thresholds will go into effect on March 4, 2021 and apply to all transactions that close on or after this date.

- The new size-of-transaction threshold will drop to USD 92 million, down from USD 94 million.

- The new HSR size-of-parties thresholds require one party to have sales or assets of at least USD 184 million and the other party to have sales or assets of at least USD 18.4 million, down from USD 188 million and USD 18.18 million, respectively.
- Transactions valued at more than USD 368 million will be subject to pre-merger notification regardless of the size of the sales or assets of the parties, down from the previous threshold of USD 376 million.

Notice of the new thresholds was published in the Federal Register on February 2, 2021.

In addition, the FTC announced on January 11, 2021 that the maximum civil penalty for a violation of the HSR rules under Section 7A of the Clayton Act, notably "gun jumping," would increase from USD 43,280 to USD 43,792 per day that an entity is not in compliance. The increase took effect January 13, 2021.

Sources:

Federal Register: **Revised Jurisdictional Thresholds for Section 7A of the Clayton Act**

FTC Press Release:**FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination**

FTC Press Release: **FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2021**

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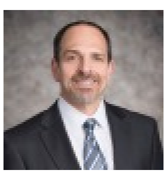

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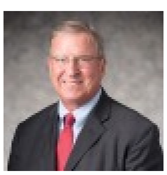

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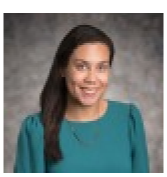

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