THOMPSON HINE

Antitrust, Competition & Distribution Update

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Antitrust Agencies Suspend Early Termination - Temporary or Indefinite?

On February 4, the Federal Trade Commission (FTC), supported by the Antitrust Division of the Department of Justice (DOJ), announced that it was suspending the grant of early terminations of the waiting period under the Hart-Scott-Rodino (HSR) Act. The FTC's statement cites the ongoing pandemic, high volume of filings, and transition to a new presidential administration as reasons for the suspension, and the FTC "anticipate[s] that this temporary suspension will be brief." But, two FTC commissioners objected to the suspension of early termination, referring to the suspension as "indefinite" and noting that it was unclear "when and under what circumstances it will resume."

Under the HSR Act, a filing must be made if the parties are a certain size and the value of the transaction exceeds $94 million (this threshold will decrease in March to $92 million). The parties cannot close the transaction until 30 days after filing. However, parties may request early termination of the waiting period, and the FTC/DOJ (the "Agencies") typically grant such requests in deals where there is no apparent competitive concern.

Requests for early termination are common and regularly granted. In 2019, parties requested early termination in almost 75% of reported transactions, and about 75% of those requests were granted. Overall, this means the Agencies grant early termination in about half of the transactions reported under HSR. This reflects the Agencies' historical desire to, as the objecting commissioners wrote, "minimize the impact of HSR review" and further the public policy of providing "investors and companies certainty, predictability, and the ability to make plans to invest capital, provide shareholder input, hire employees and the like."

The February 4 announcement halts this practice without a defined timeline for its return. In the meantime, the Agencies "will be reviewing the processes and procedures used to grant early termination" under the HSR Act. It remains to be seen whether and when the practice will return and whether the procedures will be different if the practice is reinstated. In the meantime, parties should not plan to close any transactions, even "competitively benign" ones, before the full 30-day waiting period expires.

FOR MORE INFORMATION

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