

FTC, DOJ Show No Sign Of Resuming Early Merger OKs

By **Bryan Koenig**

Law360 (May 6, 2021, 9:57 AM EDT) -- The U.S. Department of Justice and the Federal Trade Commission said their suspension of early ends to merger reviews wouldn't last long, but three months later, the agencies have given no sign they'll soon restore the early terminations granted to huge numbers of transactions.

Antitrust professionals say they're adapting, telling clients to assume all reviews of transactions subject to antitrust scrutiny — from mergers above certain financial thresholds to some stock deals — will last the full 30-day waiting period established by the Hart-Scott-Rodino Act, even if a deal seems competitively innocuous like most of those reviewed by enforcers. Practitioners also say, however, that the extra time, whether measured in days or weeks, can add real costs to transactions and even make planning less certain.

"It affects how we do timings, mostly at the margins. But companies of course react because everyone wants deal certainty and approval as quickly as possible," said David Brenneman of Morgan Lewis & Bockius LLP.

Antitrust professionals say parties are still requesting early termination in some deals just in case it's restored. Until it is, however, they know that even for deal reviews unlikely to be extended with an in-depth investigation they'll have to wait the full 30 days.

And, no one knows when early terminations will be reinstated.

"I think they meant it when they said this would be short-lived. But I just don't know what short-lived means," said Anthony Badaracco of Dorsey & Whitney LLP.

The agencies, who agree to any early termination jointly, aren't saying. The FTC declined to comment on this story.

Some wonder whether early terminations, or "ETs" in antitrust parlance, will be granted as frequently even when they are resumed.

When acting FTC Chairwoman Rebecca Kelly Slaughter, a Democrat, declared the suspension on Feb. 4, her announcement, backed by the DOJ, said only that the pause would be "brief" while the FTC reviews its underlying "processes and procedures" — language that could intimate major changes amid a much larger rethink of antitrust enforcement in the agencies and in Congress.

"It is difficult to tell whether the continuation of the suspension for over two months now signals a

fundamental change that might be coming to the early termination process, the HSR Act or its implementing regulations," said Vishal Mehta of Morrison & Foerster LLP. "However it's possible that during the suspension and afterwards, that the agencies might decide that for certain numbers or certain types of transactions, to grant ET on a less frequent basis."

In the face of the broader introspective on the state of antitrust enforcement, Mehta said that when mulling early termination requests, "the agencies may err on the side of caution rather than letting a borderline or potentially anticompetitive transaction go through."

The only update since the early February suspension has been a March 12 clarification in an FTC blog post that early terminations may still be available in certain circumstances: transactions subjected to additional scrutiny where enforcers nevertheless determine the deal raises no antitrust concerns before the parties have turned over all requested information, and when parties are able to negotiate an agreement to alleviate antitrust concerns before they comply fully with the information request.

High Filings, Heavy Strain

The FTC led the suspension, which was supported by acting DOJ antitrust chief Richard A. Powers, and said it was justified based on the change in administration amid the COVID-19 pandemic and an "unprecedented volume" of deals notified to the competition enforcers under the HSR Act. Slaughter said at the time that given those factors, "we will presume we need those 30 days to ensure we are doing right by competition and consumers."

According to the FTC's March clarification, the 304 filings received in February marked a 10-year high for the month.

"The pace of deals and HSR filings has continued to be at this very high clip and has not subsided," said Brenneman, who anticipates the suspension won't be lifted until the notification numbers go down.

That spike, antitrust professionals note, has further strained agencies, which have had to adapt to all-remote work and where a lack of adequate funding has been a complaint for years.

Slaughter's February announcement further noted that early terminations were suspended at the beginning of the pandemic as enforcers shifted to remote work, although that initial suspension was ended after a matter of weeks thanks to quick adaptation.

This time around, the FTC's Republicans, who now find themselves in the minority at the agency, blasted the current suspension as "unwarranted" and disruptive to the "competitively innocuous transactions" that comprise the bulk of the enforcers' merger reviews. Estimates peg the number of deals eligible for early termination at up to 80% of those requested and according to the Republicans, they make up half of all HSR filings the agencies receive.

Republican commissioners Christine S. Wilson and Noah Joshua Phillips argued further that other than the beginning of the pandemic, early terminations have typically been suspended only amid government shutdowns.

The agencies only have 30 days to review most deals unless the parties voluntarily reset the clock or the enforcers take further action, usually by initiating more extensive review.

Extra Uncertainty

While antitrust professionals say few if any deals will be called off without early termination, the suspension can still hurt the bottom line.

"There are companies that are in financial distress for which getting the approval and the necessary funds from the deal for which the unavailability of early termination does have some meaningful impact," Brenneman said.

Badaracco said a variety of factors dictate just how much the extra waiting time can impact a deal, including things like fiscal calendars, accounting deadlines and notification requirements for transactions spanning multiple industry and government jurisdictions.

"An extra couple weeks might be hugely important. Or they might not be," Badaracco said.

Brenneman also notes that some deals are tied to stock prices, which can fluctuate.

The deals most likely to be impacted by the suspension, Brenneman said, are domestic deals with few other jurisdictions or regulatory hurdles to clear other than U.S. antitrust approval.

Managing Time

Without early terminations, antitrust professionals say clients eager to wrap up deals have had to look for new ways to move the calendar. One way, already used occasionally, is to submit a deal before a final combination agreement has been signed, instead basing antitrust review notification on a letter of intent, inked earlier in the merger notification process.

"You're saving yourself a couple weeks of deal and negotiation time," Badaracco said.

But not everyone has seen much change from the suspension.

Britton Davis with Crowell & Moring LLP said the last three months haven't really affected how he advises clients, even though some of their deals probably would have gotten early terminations previously.

"I have always advised clients that because early termination has always been [discretionary] on the part of the agencies ... then they should assume that they have to wait the full 30 days," Davis said.

Sometimes, Davis said, the agencies are simply busy and unable to grant an early termination even for the most innocuous deals. And Davis' clients know not to assume they'll get an early termination.

"I haven't really seen a change in their behavior since the suspension," said Davis, who estimates he's handled around five transactions in that period.

In one way, Davis said his clients now actually have a little more clarity rather than less.

"You know you're going to have to wait the 30 days," he said.

--Additional reporting by Matthew Perlman. Editing by Alyssa Miller.
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