

Cost And Opportunity In Suspending Early Merger Clearances

By **Leslie Overton, James Goldfeier and Sam Sherman**

On Feb. 4, the Federal Trade Commission announced that, with the support of the Antitrust Division of the U.S. Department of Justice, it would temporarily suspend the practice of granting early termination to filings made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[1]

During **the suspension**, the FTC, with DOJ support, will review the processes and procedures used to grant early termination.

Acting FTC Chairwoman Rebecca Kelly Slaughter cited a "historically unprecedented volume" of HSR filings in early 2021, the transition to a new presidential administration and the pandemic as reasons for the move.[2]

The suspension appears to have effectively begun Jan. 15.

The agencies granted early termination for only one matter since that date: Thermo Fisher Scientific's acquisition of Mesa Biotech, a point-of-care molecular diagnostics provider.

It appears that the rationale for granting early termination in that case was related to the fact that it would facilitate the introduction of a low-cost point-of-care COVID-19 solution and a scale that the acquired company could not do alone.[3]

By contrast, the agencies granted early termination in 56 matters in the period from Jan. 15 to Feb. 4 last year.[4] The FTC has not announced when the policy of granting early termination will be reinstated, but it "anticipate[s] that this temporary suspension will be brief."[5]

Early Termination and the HSR Process

Under the HSR Act, parties to certain mergers, acquisitions or joint ventures are required to notify the FTC and DOJ and observe an initial waiting period before closing, during which the agencies review the transaction.

The HSR Act — and its filing and waiting period requirements — apply to more than just mergers: Acquisitions of minority stakes in corporations, executive compensation transactions and reorganizations are among the types of transactions that can trigger an HSR filing obligation where the applicable thresholds are met.[6]

The initial waiting period lasts 30 calendar days, or 15 calendar days in the case of a cash tender offer or bankruptcy transaction, and affords the agencies the opportunity to "identify and challenge those transactions that may substantially lessen competition in violation of federal law"[7] — before the transactions have closed.

The agencies, however, have certain discretion to shorten or extend the HSR waiting period.



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If a reviewing agency finds that the transaction may raise competition issues, and the parties are unable to resolve those questions or concerns during the initial waiting period, the agency can extend the waiting period by issuing a request for additional information, a so-called second request, to the parties.

If the agencies do not identify competition concerns with the transaction, or if the parties address the questions or concerns sufficiently quickly, the agencies can let the waiting period expire or grant early termination — so long as one of the parties has requested it.[8]

Once the waiting period has expired, or if the transaction has been granted early termination, the parties are free to close.

Both agencies must agree before early termination is granted.

The need to secure both agencies' agreement can affect timing as the agencies may review the early termination request at different speeds.[9]

Even when early termination is granted, there is no guarantee as to when in the waiting period this will happen: It can be granted as late as day 29.[10] Moreover, as the FTC has reminded the public in the past, there is no "right" to early termination.[11]

As the table below reflects, early termination historically has been requested by parties in the majority of transactions,[12] and has regularly been granted by the agencies.[13]

Table 1: Early Termination, or ET, Summary Statistics[14]

	Share of All Reportable Transactions where ET was Requested (“ET Request Transactions”)	Share of ET Request Transactions where ET was Granted	Share of All Reportable Transactions where ET was Granted
FY2019	74.2% (1507 / 2030)	73.5% (1107 / 1507)	54.5% (1107 / 2030)
FY2018	74% (1500 / 2028)	78% (1170 / 1500)	57.7% (1170 / 2028)
FY2017	77.9% (1552 / 1992)	78.6% (1220 / 1552)	61.2% (1220 / 1992)

By contrast, as shown in Table 2, the share of reportable transactions in (1) which clearance has been granted to the FTC or DOJ to commence an investigation and (2) in which the agencies issued a second request were considerably smaller.

The former reflect those transactions in which one or both agencies had at least an initial competitive concern or question; the latter — the subset of those transactions for which the concerns or questions could not be resolved within the initial waiting period — leading to the agency to issue a second request.

In sum, the vast majority of transactions reviewed by the agencies have historically not raised competitive questions meriting even a preliminary investigation — let alone a second request.

Moreover, even those transactions that do merit a preliminary investigation will sometimes also be granted early termination as competitive concerns or questions are quickly resolved by parties and their counsel engaging productively with agency staff.

Table 2: Transactions in Which FTC/DOJ Was Cleared to Open an Investigation and a Second Request Was Issued, by Year^{[15][16][17]}

	Share of Reportable Transactions in which FTC/DOJ was Cleared to Open an Investigation	Share of Reportable Transactions in which a Second Request was Issued
FY2019	11.7% (237 / 2030)	3% (61 / 2030)
FY2018	14.1% (286 / 2028)	2.2% (45 / 2028)
FY2017	13.9% (277 / 1992)	2.6% (51 / 1992)

Why Did the Agencies Suspend Early Termination?

FTC Chairwoman Slaughter has stated that the "temporary suspension" is warranted due to "the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic."^[18] As Table 3 shows, agency workload over the last few months has been higher than it was a year prior.^[19]

Table 3: HSR Transactions by Month/Year^[20]

November 2019	209	November 2020	424
December 2019	172	December 2020	192
January 2020	162	January 2021	210

Moreover, in a statement issued Feb. 5 — the day after the suspension — Slaughter, and FTC Commissioner Rohit Chopra, noted that FTC resource constraints have progressively worsened over time: "Over the past ten years, the absolute number of HSR filings has nearly doubled, but the number of employees we have in our Bureau of Competition has stayed almost flat." [21]

This is not the only time the agencies have suspended early termination. [22]

On March 13, 2020, as part of the agencies' response to the COVID-19 pandemic, they established a temporary e-filing system for HSR filings, in place of the hard copy or DVD submissions previously required, and announced that they would not grant requests for early termination while the temporary e-filing was in effect. [23]

By March 30 — with e-filing still in effect — however, the agencies resumed processing early termination requests, albeit reminding the public that early termination "is not a right" and would be "granted in fewer cases, and more slowly, than under normal circumstances." [24]

Bill Baer, a visiting fellow at the Brookings Institution, former assistant attorney general in charge of the Antitrust Division of the DOJ and former director of the bureau of competition at the FTC, tweeted that the current suspension is "a legitimate and lawful public policy response to a unique confluence of events. It is temporary. And it will cause only a modest delay — days — in the expiration of the waiting period for some transactions. It's the right thing to do." [25]

Support for the Suspension Not Unanimous Among the Commissioners

FTC Commissioners Christine S. Wilson and Noah Joshua Phillips issued a statement regarding the "Commission's Indefinite Suspension of Early Terminations" that was critical of the decision:

Absent exigent circumstances, an indefinite suspension of the early termination process — with no clarity regarding when and under what circumstances it will resume—is unwarranted. [26]

The commissioners were unpersuaded by the FTC's proffered justifications, noting that:

In more than four decades of HSR Act review, the Agencies have never suspended early termination because of leadership transitions or increased merger filings. Even when HSR filings more than doubled in November 2020, compared to November 2019, the processing of early termination requests continued.[27]

Wilson and Phillips highlighted that the suspension of early termination — "reserved for the transactions that raise no apparent competitive concern" — would come at a cost, as "impeding the transfer of assets could have knock-on effects that harm employees, small businesses, and financially imperiled firms"[28] and "harm consumers and other stakeholders involved in the transactions that would have consistently received early termination at any point during the last 45 years." [29]

Those commissioners also appear to have been concerned that the suspension was announced after it had already effectively begun: "[T]he suspension announcement [came] more than two weeks after the most recent early termination was granted, with only one exception of which we are aware. In the future, we hope major changes to agency practice that affect external stakeholders will be announced simultaneously with the action taken, if not before." [30]

Opportunity in the FTC's Review

Thermo Fisher's acquisition of Mesa Biotech is a prime example of how expediting the ability of parties to close can benefit consumers — in this case by increasing testing scale-up of low-cost point-of-care solutions in the critical fight against COVID-19.

There were no counterbalancing competition concerns as this was not an area where Thermo Fisher competed.

While the FTC's suspension temporarily imposes costs on parties and consumers, its review — with the DOJ's support — of processes and procedures to grant early termination provides an opportunity.

Even before the suspension began, there were some procompetitive or competitively benign transactions whose benefits for consumers and other stakeholders were sometimes delayed if early termination was granted late in the waiting period or not at all.

If as a result of the FTC's review, the agencies further align their approaches and timelines with respect to early termination approval, and implement processes that are more predictable, more transparent and more efficient in identifying those transactions that qualify and granting them early termination as early in the waiting period as possible, there may end up being significant benefits of this — hopefully brief — suspension for parties, consumers and other stakeholders.

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Disclosure: Axinn represented Thermo Fisher in its acquisition of Mesa Biotech.

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[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (the "HSR Act").

[2] See Federal Trade Commission, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

[3] See Federal Trade Commission, Early Termination Notices, <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices> target="_blank"><https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices>. See also Thermo Fisher Scientific, Thermo Fisher Scientific to Acquire Point-of-Care Molecular Diagnostics Provider Mesa Biotech (Jan. 19, 2021), <https://thermofisher.mediaroom.com/2021-01-19-Thermo-Fisher-Scientific-to-Acquire-Point-of-Care-Molecular-Diagnostics-Provider-Mesa-Biotech>.

[4] See Federal Trade Commission, Early Termination Notices, <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices> target="_blank"><https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices>.

[5] See Federal Trade Commission, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

[6] Federal Trade Commission, You don't have to write a check to acquire an HSR-reportable interest (May 15, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/05/you-dont-have-write-check-acquire-hsr-reportable>.

[7] See Federal Trade Commission, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

[8] The FTC publishes grants of early termination on the Federal Register and the FTC website. See <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices> target="_blank"><https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices>. "The public notice identifies the (1) acquiring person, (2) the acquired person, (3) the acquired entity or entities and (4) the date of the grant of early termination." ABA Section of Antitrust Law, *Premerger Notification Practice Manual*, 231 (5th Edition 2015). Parties to non-public transactions concerned about keeping the transactions confidential will as a consequence generally choose not to request early termination to avoid the publicity.

[9] Federal Trade Commission, Getting in Sync with HSR Timing Considerations (Aug. 31, 2017), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations> ("Parties should understand that both agencies must agree to

grant ET, and that there can be timing differences in how quickly each agency is able to review a filing.").

[10] The acquiring person in some reportable transactions will choose to "withdraw and refile" the HSR - a procedure which can provide the agencies a new 30 (or 15) day waiting period for the agencies to review the transaction without issuing a Second Request. The procedure is often advisable for matters where the parties believe there is likelihood that the agencies can resolve any potential concerns with the benefit of a second initial waiting period. In such cases, the agencies may grant ET at some point during the second initial waiting period.

The agencies will also sometimes use ET to terminate the waiting period during the extended review of a transaction in a Second Request investigation when any competitive concerns have been resolved (either as a result of the investigation or a remedy entered into by the parties). It is not clear how ET in such cases will be affected.

[11] Connor, Ian, Resuming Early Termination of HSR Reviews (Mar. 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews>.

[12] ET is not requested in a significant number of transactions. Parties may choose not to request ET in order to maintain the confidentiality of a non-public transaction (and avoid the publicity attendant to the grant of early termination being published on the FTC website).

[13] See Federal Trade Commission; U.S. Dept. of Justice, Hart-Scott Rodino Annual Report: Fiscal Year 2019, (July 2020), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf>.

[14] Id. at 22.

[15] Id. at 27.

[16] See Federal Trade Commission; U.S. Dept. of Justice, Hart-Scott Rodino Annual Report: Fiscal Year 2018, at 28 (Sept. 2019), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf>.

[17] See Federal Trade Commission; U.S. Dept. of Justice, Hart-Scott Rodino Annual Report: Fiscal Year 2017, at 31 (April 2018), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_c.pdf

[18] See Federal Trade Commission, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

[19] Federal Trade Commission, Premerger Notification Program, <https://www.ftc.gov/enforcement/premerger-notification-program>.

[20] Id.

[21] See Federal Trade Commission, Concurring Statement of Acting Chairwoman Rebecca Kelly Slaughter, Rohit Chopra, at 2. (Feb. 5, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587163/p859910_concurring_statement_of_ac_slaughter_and_c_chopra_re_revised_hsr_thresholds.pdf (footnotes omitted).

[22] See Federal Trade Commission, Statement of Commissioners Noah Phillips, Christine Wilson (Feb. 3, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonstatement.pdf.

[23] Connor, Ian, Changes in Bureau Procedure During COVID-19 Coronavirus Pandemic (Mar. 16, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>.

[24] Connor, Ian, Resuming Early Termination of HSR Reviews (Mar. 27, 2020), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/resuming-early-termination-hsr-reviews>.

[25] Bill Baer (@Billbaer50), [Twitter](https://twitter.com/billbaer50/status/1357387171641118720) (Feb. 4, 2021, 12:54 PM), <https://twitter.com/billbaer50/status/1357387171641118720>.

[26] See Federal Trade Commission, Statement of Commissioners Noah Phillips, Christine Wilson, at 1. (Feb. 3, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/wilson_and_phillips_statement_on_et_indefinite_suspension.pdf.

[27] Id. at 1.

[28] Id. at 1.

[29] Id. at 4.

[30] Id. at 3.