

FTC Announces Revised HSR Thresholds, Pauses Early Termination

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On February 2, 2021, the Federal Trade Commission (FTC) announced revised premerger notification thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR).[1] The FTC is required to revise the thresholds annually based on the change in the gross national product (GDP).

Generally, an HSR filing with the FTC and the Department of Justice (DOJ) is necessary prior to consummating certain fundamental transactions if the transaction value exceeds a certain dollar value and the parties have certain minimum revenues or asset values. However, if the transaction size exceeds a higher value threshold, then a HSR filing is necessary regardless of the size of the parties. The revisions announced by the FTC reduced the size of transaction threshold from \$94 million to \$92 million and also reduced the size of person thresholds from \$188 million to \$184 million and from \$18.8 million to \$18.4 million. The large transaction threshold was also reduced from \$376 million to \$368 million. It is unusual for the FTC to announce a reduction in the thresholds (however, 2020 GDP decreased from 2019 GDP, in large part due to the economic effects of the pandemic). The revised thresholds apply to transactions closing on or after March 4, 2021.

If a HSR filing is necessary, the parties must wait a specified period (30 days for most transactions (other than cash tender and bankruptcy transactions for which there is a 15 day waiting period)) prior to consummating the transaction (assuming no intervening contact from the FTC/DOJ for more information or other action). Under the HSR, in certain circumstances, the FTC and DOJ had the ability to grant "early termination" which allows the parties to close the transaction prior to the end of the applicable waiting period. However, on February 4, 2021, the FTC and DOJ announced that they were temporarily suspending early termination grants in order to allow for appropriate review of transactions during the transition to the Biden administration.[2] Accordingly, parties that are required to make HSR filings must now and until further notice wait until the lapse of the applicable waiting period. Importantly, the FTC and DOJ also announced that during this suspension, they will be reviewing the processes and procedures used to grant early terminations. Therefore, it is possible that changes to the early termination rules could be forthcoming.

The rules regarding the applicability of the HSR and the filing requirements are complex and a new administration could bring significant changes to the early termination procedures and possibly other aspects of the review process. We will continue to monitor these important developments. If you have any questions or need additional information, please contact Gary P. Biehn (biehng@whiteandwilliams.com; 215.864.7007).

[1] Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 Fed. Reg. 7870 (Feb. 2, 2021).

[2] FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, Federal Trade Commission (Feb. 4, 2021)

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