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HSR Early Terminations Return, But Timing Challenges May Persist in Some Reviews

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On Friday, March 27, 2020, the Premerger Notification Office of the Federal Trade Commission (“FTC”) took steps to expedite some premerger notification filings under the Hart-Scott-Rodino Act (“HSR Act”). At the same time, it reiterated that both the FTC and the Department of Justice Antitrust Division (“DOJ”) likely will need more time than usual to complete HSR reviews during the COVID-19 crisis.

The FTC’s March 13 Changes

Two weeks earlier, on Friday, March 13, the Premerger Notification Office issued a press release detailing changes to the normal procedures for accepting and reviewing HSR filings. The guidance required all HSR filings to be made electronically using a new e-filing system and further stated that no grants of Early Termination of the HSR Act’s mandatory 30-day waiting period would be issued. Consistent with this announcement, no transactions have received Early Termination in the last two weeks.

The FTC’s March 27 Updates

On March 27, the FTC announced that beginning on Monday, March 30, the agency would once again begin processing requests for Early Termination. As always, grants of Early Termination will be made only in transactions in which the DOJ and FTC have determined that no enforcement action will be necessary prior to the end of the 30-day waiting period. The FTC attributed this change of position to the fact that the new e-filing system implemented on March 13 has been working successfully and reviews are proceeding as needed.

At the same time, the FTC noted that the Premerger Notification Office staff is working “at capacity” and that the FTC and DOJ attorneys tasked with clearing transactions are similarly strained. As a result, the FTC stated that parties should expect that Early Termination “will be granted in fewer cases, and more slowly, than under normal circumstances.”

This is consistent with our prior guidance that during the COVID-19 crisis, given that DOJ and FTC attorneys are teleworking and face other hurdles to normal operating procedures, HSR investigations are likely to take longer than normal. The FTC’s announcement states that both agencies will continue to issue Second Requests to extend investigations as needed to address competitive concerns. However, at this point we have not heard any reports of the Second Request process being used to extend reviews in deals that do not have competitive implications. Instead, for now parties in



straightforward deals may see an increased likelihood in the need for a “pull and refile” to restart the HSR clock, giving the agencies an effective 60-day HSR review process.

The FTC’s announcement also states that the agency “may modify or rescind this policy at any time, in light of changes in circumstances, new information, availability of resources, and/or further experience with the temporary e-filing system.”

No Legislative Changes to the HSR Waiting Period for Now

Congress considered the possibility of including potential extension of the HSR waiting period in the COVID-19 relief package that passed on March 27. These proposals included a temporary 45-day waiting period during the COVID-19 crisis and, alternatively, a grant of discretion to DOJ and FTC leadership to extend notification timelines as necessary. However, the final bill that was passed did not include any HSR-related changes. As a result, the FTC and DOJ are still required to complete their initial review in 30 days, and can extend that statutory timeline only through issuance of a Second Request unless the parties voluntarily pull and refile their notification to restart the clock.

Paul Hastings continues to monitor the COVID-19 situation across all areas of our clients’ business and will provide further updates as they are available.



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