

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission's Indefinite Suspension of Early Terminations

February 3, 2021

Today, the Federal Trade Commission and the Antitrust Division of the Department of Justice (the “Agencies”) announced the suspension of early terminations (“ET”) of the review of transactions notified in accordance with the Hart Scott Rodino Antitrust Improvements Act of 1976 (the “HSR Act”). At this time, we see no rationale sufficient to justify suspending all grants of ET. In 45 years of administering the HSR Act, the Agencies have done so only when a crisis made them unable to discharge their duties. Even when HSR filings more than doubled in November 2020 compared to November 2019, the processing of ET requests continued.¹ And the number of filings has fallen approximately 70 percent since last November. Absent exigent circumstances, an indefinite suspension of the ET process—with no clarity regarding when and under what circumstances it will resume—is unwarranted. We write to express our concern.

Our understanding is that this decision to suspend grants of ET is premised on a desire to avoid inadvertently allowing potentially anticompetitive transactions to evade scrutiny during a period of political transition, a heightened number of HSR filings, and the ongoing Covid-19 emergency. But in more than four decades of HSR Act review, the Agencies have never suspended early termination because of leadership transitions or increased merger filings. We did not suspend early termination in September 2001, after the nation was attacked; or in November of that year, when filings reached 451 in a month. Nor were ETs suspended during the financial crisis of 2008. The experienced, knowledgeable career staffers who directly handle and advise on early terminations remain in place. And while the pandemic and the agency-wide move to telework in March 2020 prompted a two-week suspension of ET as we implemented an electronic filing system, that new process has been operating smoothly for the last ten months under the competent oversight of our diligent and dedicated career staff. For these reasons, we view the proffered justifications for suspending early termination as unpersuasive. We are concerned that freezing grants of ET will delay the consummation of competitively innocuous transactions. Particularly during a time of economic difficulty, impeding the transfer of assets could have knock-on effects that harm employees, small businesses, and financially imperiled firms.

The purpose of the HSR Act is to give the Agencies a chance to review transactions before they occur, so that we can block or remedy the anticompetitive ones without having to go to court and “unscramble the eggs” of a consummated merger.² As a general matter, investors and companies that submit HSR filings must wait 30 days to consummate. But that delay comes at a cost, which is why Congress gave the Agencies the discretion to reduce the burden by terminating review of competitively benign

¹ Preliminary numbers as of February 1, 2021. See HSR Transactions by Month, available at <https://www.ftc.gov/enforcement/premerger-notification-program>.

² Fed. Trade Comm’n, *Guide to Antitrust Laws*, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers>.

transactions early. The Agencies consistently have used this discretionary authority – in both Democrat and Republican administrations – to avoid imposing unnecessary burdens on transactions.³

For transactions where the Agencies do not grant ET, the HSR Act still mandates a strict timeline in which we must complete our review.⁴ These statutorily imposed deadlines reflect Congress’s intent to balance the need for the Agencies to scrutinize carefully transactions that may harm competition, with the need for the markets to allocate assets efficiently. Deadlines for merger review are not unique to the U.S.; competition authorities around the world also must work within them.⁵

Early termination—the program suspension announced today—is reserved for the transactions that raise *no* apparent competitive concern, for example equity purchases by index funds and small mergers and acquisitions in unconcentrated markets. By definition, transactions terminated early are those in which the agencies are not interested. And there are many. Early terminations constitute roughly half of all transactions noticed to the agencies under the HSR Act.⁶

The idea behind ET is simple: where transactions do not raise competition concerns, let the market work. Give investors and companies certainty, predictability, and the ability to make plans to invest capital, provide shareholder input, hire employees and the like. The Agencies have historically sought to minimize the impact of HSR review,⁷ including at the direction of Congress.⁸ They have suspended grants of ET only when they lacked the capacity to review transactions, in just two circumstances of which we are aware: government shutdowns, when the agencies are statutorily obligated not to do certain work; and for two weeks in March 2020 to establish and implement an electronic filing system in response to

³ See, e.g., William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act* (Oct. 31, 1996), available at <https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>; Statement of Commissioner Noah Joshua Phillips Concerning Hart-Scott-Rodino Act Premerger Notification Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking (Sep. 21, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1580699/p110014hsrulesphillipsstatement_0.pdf.

⁴ 15 U.S. §18a(b) and (e).

⁵ See, e.g., Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

⁶ Fed. Trade Comm’n and U.S. Dep’t. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, available at <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf>.

⁷ See note 2; Molly S. Boast, Report from the Bureau of Competition, American Bar Association Antitrust Section Spring Meeting, March 29, 2001, available at <https://www.ftc.gov/public-statements/2001/03/report-bureau-competition> (“The premerger staff also has proposed a number of other rules changes, most of them ministerial, but some substantive, to streamline the premerger notification process and make it less burdensome.”); Statement of the Federal Trade Commission’s Bureau of Competition on Guidelines for Merger Investigations, Dec. 22, 2002, available at https://www.ftc.gov/system/files/documents/public_events/114015/ftc_statement_on_guidelines_for_merger_investigations_12-22-02_2.pdf (“The changes announced today are designed to streamline the FTC’s merger review process, improving the efficiency and speed of our investigations while reducing the burden on the parties.”).

⁸ 15 U.S. §18a(e)(1)(B).

the COVID-19 emergency. There is no similar limitation here, and thus no reason to interfere with the functioning of the capital markets and the efficient allocation of resources.

Fear that one anticompetitive transaction may obtain an ET should not hold up the thousands that are competitively benign. We have the authority to enforce against consummated transactions that we later find to be anticompetitive. As several transactions have been abandoned recently in the face of enforcement, we can shift resources to the Premerger Notification Office if the office on the front line of HSR review is strained. It is not.

The Agencies can do merger review today, and we are. Last year, some in Washington called for a moratorium on mergers,⁹ arguing that the Agencies couldn't possibly do their jobs adequately while working remotely. Those proposals lacked a sound basis at the time.¹⁰ Commission staff subsequently (and quite convincingly) proved the skeptics wrong, smoothly adjusting to working remotely and pursuing investigations without a substantial slowdown. Over the course of the crisis, in fact, FTC merger enforcement has been at its highest level since the early 2000s.¹¹ And decades of experience demonstrate that our dedicated staff is fully capable of continuing its work through changes in political leadership and fluctuations in merger filing thresholds, including, where appropriate, granting ET.

When the Agencies have needed to suspend ETs in the past, they announced the change in advance of putting it into effect.¹² But the suspension announcement today comes more than two weeks after the most recent early termination was granted, with only one exception of which we are aware.¹³ 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.

⁹ See, e.g., Erik Wasson, *Warren, Ocasio-Cortez Float Long-Shot Bid to Pause M&A in Crisis*, BLOOMBERG, (Apr. 28, 2020), available at <https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban>.

¹⁰ Noah Joshua Phillips, *The case against banning mergers*, N.Y. TIMES, Apr. 27, 2020, available at <https://www.nytimes.com/2020/04/27/business/dealbook/small-business-ppp-loans.html>; Christine S. Wilson, *Remarks for "Merger Control in USA" Panel*, GCR Interactive: Merger Control, Oct. 21, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1583814/wilson_remarks_at_gcr_merger_control_2020.pdf.

¹¹ Since the time the FTC Bureau of Competition staff began teleworking due to the COVID-19 crisis, the agency challenged seven transactions in federal court and entered into ten consent agreements. The parties to 11 deals have abandoned the transactions, citing antitrust review.

¹² Press Release, Premerger Notification Office Implements Temporary e-Filing System, March 13, 2020, available at <https://www.ftc.gov/news-events/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing>. This suspension occasioned headlines in legal and business publications, indicating its significance for the settled expectations. See, e.g., Eleanor Tyler, *Merger Review Slowing, Moving Online with Covid-19*, BLOOMBERG, March 20, 2020 ("Perhaps the biggest change that the FTC announced is that the agency will not grant early terminations during the crisis. By itself, this will make a big difference in how mergers are handled.").

¹³ See <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notice>.

Suspending early terminations introduces inefficiency into market operation, harming consumers and other stakeholders involved in the transactions that would have consistently received ET at any point during the last 45 years. Because we do not believe a sound basis exists to incur those costs, we object.