

Agencies' Halt Of Early Merger OKs May Signal Policy Shift

By **Bryan Koenig and Matthew Perlman**

Law360 (February 9, 2021, 10:34 AM EST) -- In the short term, the decision by the U.S. Department of Justice and the Federal Trade Commission last week to suspend early permission slips for apparently innocuous mergers will be a headache for delicate deals, but long-term, antitrust professionals say it could signal a broader rethink of American competition policy.

The agencies called it a "temporary suspension" of the heavily used program, which grants so-called early terminations of the statutory 30-day waiting period required for most mergers. Early terminations are typically granted, upon request of the merging parties, to deals that pose no apparent competition concerns.

But the FTC's two Republicans, now in the minority with the change in administration, call it something else, a massive and "unwarranted" disruption of a process granted to "roughly half of all transactions" the agencies review under the Hart Scott Rodino Antitrust Improvements Act of 1976.

However disruptive the suspension might be to deals currently in the pipeline, the longer term implications of the announcement, which came as a surprise to the antitrust bar, remain unclear.

"The big unknown at this point is how long of a pause is this going to be, and when it's lifted whether or not there's going to be a higher standard or more skepticism of granting early termination, even for deals that historically everyone agreed didn't create any issues," said Paul Cuomo of Baker Botts LLP.

Some antitrust professionals contacted by Law360 note that the suspension isn't the only potential upheaval to U.S. competition enforcement. President Joe Biden still must select new leadership at the DOJ's antitrust division and fill open seats on the FTC, and it's uncertain **how aggressive his new enforcers will be**. The hold on early terminations also comes as Sen. Amy Klobuchar, D-Minn., pushes a sweeping overhaul to competition law that may be the best chance in years for enacting tighter antitrust laws.

All these developments "could foreshadow significant changes to merger review and antitrust enforcement moving forward," said Vishal Mehta of Morrison & Foerster LLP.

Freshfields Bruckhaus Deringer LLP's Jan Rybnicek went even further, saying the suspension is part of a trend that has seen "greater hostility towards M&A, more generally."

"It's something that's been building over time, there's been a steady drum beat for a while, including in the spring and summer calls for a merger moratorium," Rybnicek said.

In unveiling the suspension Thursday, the FTC and DOJ said they will be assessing the procedure and process used to grant early terminations for merger reviews and that during the examination, enforcers will not grant any early terminations.

The agencies cited the transition to a new administration, the "unprecedented volume" of merger filings received at the start of the fiscal year and the ongoing pandemic as reasons for reviewing the procedure, adding that they "anticipate that this temporary suspension will be brief."

The FTC and DOJ may have been subtly signaling the change for weeks through simple inaction. While government records, which are made public by the FTC, show early terminations generally are granted at a steady clip, the last month has seen a dramatic slowdown. Although it is rare for new terminations to appear more than a week apart, the FTC shows only a single early termination granted since Jan. 15, on Feb. 3, to Thermo Fisher Scientific Inc.'s \$450 million bid for molecular diagnostics firm Mesa Biotech Inc.

"We actually had been noticing the lack of early termination grants," said William Stallings of Mayer Brown LLP. "It's something we have been telling our corporate people that it looked atypical to us, and so we'd already started advising ... that early terminations could be delayed."

Stallings noted that the Thermo Fisher deal that did receive an early termination was for a company that makes products to detect infectious diseases, like the novel coronavirus.

"It does go to show you why it can be very important to get these deals closed as quickly as possible," he said. "That's just one example."

The agencies have briefly suspended early terminations in the past, for government shutdowns and for a two-week period at the beginning of the pandemic to implement an electronic filing system. But according to the FTC's two Republicans, Commissioners Christine S. Wilson and Noah Joshua Phillips, those were situations where "a crisis made them unable to discharge their duties."

"Absent exigent circumstances, an indefinite suspension of the ET process — with no clarity regarding when and under what circumstances it will resume — is unwarranted," Wilson and Phillips said.

But some say that the limited resources with which the FTC and DOJ work could justify the suspension.

Following the agencies' suspension announcement, Klobuchar issued a statement saying the decision shows the need to provide enforcers with more resources to effectively review deals and said her bill would do just that.

"We know that we can't take on this problem with duct tape and band aids — we must ensure that enforcers at the FTC and Justice Department have the resources they need to tackle our competition problems," Klobuchar said.

Due to the resource strain, not everyone says the suspension portends a big rewrite of competition laws.

FTC data reflects a massive jump in filings that Cuomo attributed to a rush to mergers in the face of potential tax law and other changes with the political turnover at the end of last year. Filings reached a

high of 424 in November, more than double that of the same period in 2019.

"I really do think that the volume of M&A activity and the lack of resources ... was the primary reason" for the suspension, said Harry Robins of Morgan Lewis & Bockius LLP.

Robins doubts that the suspension speaks to a broader rethink of early terminations. From the perspective of the agencies, he said, early termination can simply mean a merger is under review for a matter of weeks less.

"So it's not practically realistic that the suspension is going to give the government a huge advantage," Robins said.

But that doesn't mean that the suspension of early terminations isn't nevertheless a potentially major issue for companies and firms navigating merger reviews, Robins said.

"Introducing any uncertainty about closing is bad for business," Robins said. "Even a two-week delay introduces the uncertainty: what could happen in those two weeks."

The uncertainty in that time period becomes even more intense for the firms that antitrust professionals say will be most impacted by the suspension: relatively small companies whose transactions are caught in a net that mandates notification of any merger exceeding \$92 million, based on current HSR rules.

"Today's announcement that the early termination program is suspended indefinitely amounts to a crude tax on economic activity targeted, if at all, only at smaller firms and transactions that would have otherwise been granted ET," tweeted Joshua Wright, a former FTC commissioner and current executive director of the Global Antitrust Institute at George Mason University.

Wright went on to assail the suspension as "a policy decision" targeted "at creating bureaucratic delay and sludge on all economic activity in the middle of an attempted economic recovery."

Whatever the ultimate outcome, antitrust professionals expressed surprise at the decision, noting that early terminations must be requested by the parties and that the agencies only grant the requests for the most apparently innocuous of mergers.

Historically, Rybnicek argued the early termination program is important to balance the need to look for competitive harms "against the risk of unduly burdening the capital markets and private parties' decisions." That's especially important, he said, as the U.S. tries to work its way out of the pandemic's massive economic impact.

He added it's also concerning that the FTC has provided no guidance about what will be needed for the program to restart and said the agencies could conduct a review while still administering it.

"It's fair to evaluate and regularly take stock of your processes and rules, but I think it's premature to suspend them during the review process, unless there's some evidence that the program is creating harm," Rybnicek said.

--Editing by Alyssa Miller.