

# Enforcement Agencies Announce Moratorium on Early Termination Program for Merger Reviews

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The US Federal Trade Commission (FTC) released a [joint statement](#) with the Department of Justice (DOJ) on February 4, 2021, signaling comprehensive changes to the merger review process. In a significant development, the agencies declared a moratorium on the early termination program for merger reviews. This policy shift signals a potential sea change in antitrust enforcement under the Biden administration.

The Hart-Scott-Rodino (HSR) Premerger Notification program imposes an initial 30-day waiting period, prior to merger consummation, during which the enforcement agencies have an opportunity to evaluate the likely effects of the proposed merger and decide whether to investigate further by issuing a Second Request or ending the HSR review by letting the initial 30-day waiting period expire.

A third potential outcome of the initial 30-day waiting period is early termination. The early termination program under the HSR Act was originally established as an exception to an HSR review if the relevant parties demonstrated a “special business reason.” This policy was reversed after *Heublein v. FTC* (1982) and since that time early termination of the initial 30-day waiting period has become commonplace if the merger does not merit further review (in 2019 early termination was requested in 74.2% of transactions and granted in 73.5% of those instances). Further review would be merited, if the enforcement agencies determined the transaction posed a risk of a substantial lessening of competition under the Clayton Act.

Pursuant to the moratorium on early terminations, merging parties must now refrain from consummating any proposed transaction for the full initial 30-day waiting period—early termination is not a potential outcome.

The joint statement regarding the early termination moratorium provided the following justifications:

- The early termination review was precipitated because of the transition to a new presidential administration as well as an “unprecedented volume” of HSR filings;

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- The above factors warrant the use of the full 30-day window to allow the agencies to do “right by competition and consumers;”
  - The suspension of the early termination program “will be brief.”

Past pauses in early terminations coincided with extraordinary circumstances such as the move to an [e-filing system](#) at the Premerger Notification Office (PNO) at the outset of the COVID-19 pandemic (paused from March 13, 2020, until March 30, 2020) or during periods of government shutdown. However, this current pause appears likely to endure longer than these past instances, given that this pause is driven by the confluence of a number of factors, beyond what was indicated in the joint statement, such as:

- A longstanding agency funding drought resulting in understaffing
- Transitioning to a new presidential administration
- A desire to engage in more expansive investigations under the new Biden administration
- A large influx in HSR filings in recent months (on pace for a 60% increase in 2021)

From the agencies’ point of view, these changes are necessary to meet their mandate of preventing unfair competition and anticompetitive practices. With agency resources stretched thin due to budget constraints, in addition to an increased rate of filings, the staff needs the maximum amount of time statutorily permitted to evaluate the merger.

On February 5, 2021, one day after the joint FTC and DOJ statement, Acting FTC Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra [issued a statement](#) seeking to increase the financial resources available to the FTC. This statement further illustrated the FTC’s view that it is severely underfunded and evidences the underlying rationale for the pause in early terminations. The February 5 statement requested the following:

- Additional funding from Congress
- A congressional amendment to the HSR Act allowing for the annual adjustment of merger filing fees “to account for the last 20 years of economic growth”

These process changes and funding requests are consistent with what is expected to be more aggressive merger enforcement under the Biden administration. These initiatives will result in a more onerous review process for merging parties, which, at the very least, will last the full 30 days for the foreseeable future.

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