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FTC Issues Proposed Rulemaking Relating to Withdrawal of HSR Filings

The Federal Trade Commission (FTC) recently issued a Notice of Proposed Rulemaking that, if adopted, will codify the FTC's longstanding informal procedures for voluntarily withdrawing and refiling an HSR Act Premerger Notification and Report Form (HSR filing) and, more significantly, will mandate that certain HSR filings are automatically withdrawn following notification by the parties to the Securities and Exchange Commission (SEC) that a transaction has been abandoned. Publication of the proposed changes in the Federal Register is expected shortly and will initiate a comment period that ends April 15, 2013, during which time interested parties may submit written comments in favor of, criticizing or suggesting alternatives to the proposed changes.[1]

Voluntary Withdrawal

Pursuant to informal agency procedures, the FTC historically has allowed parties to withdraw their HSR filings at any time. Under proposed §803.12(a), either party can withdraw its HSR filing by notifying in writing both the FTC and the Antitrust Division of the Department of Justice (DOJ) (collectively, the Agencies).[2] Such notification voids the filing and terminates any pending Request for Additional Information (so-called Second Request). Additionally, for transactions in which the HSR waiting period has expired or been terminated, withdrawal of the HSR filing terminates the one year period that parties have to consummate the transaction. Therefore, if the parties choose to pursue the transaction at a later date, a new HSR filing must be submitted by each party.

Automatic Withdrawal

The most significant changes set forth in the proposed rulemaking (new §803.12(b)) relate to the proposal to create a "bright line trigger" for the automatic withdrawal of HSR filings that are subject to SEC disclosure requirements with respect to certain transactions that have been abandoned and, thus, in the FTC's view, have become "hypothetical." Under SEC disclosure requirements, if a tender offer (TO) has expired, terminated or been withdrawn, the offeror generally must disclose this fact in an amendment to its Schedule TO filing. Similarly, if parties terminate a definitive merger or other purchase agreement, they generally must notify the SEC in a Form 8-K filing. In order to ensure "that [the Agencies] do not expend scarce resources on hypothetical transactions," proposed §803.12(b) requires that in both of these cases any associated HSR filings will be automatically deemed to be withdrawn on the date of the SEC filing, and requires the parties to notify the FTC and DOJ in writing when such an SEC filing is made. However, an HSR filing will not automatically be withdrawn if the applicable HSR waiting period has expired or terminated, and the parties have not entered into a timing agreement with the FTC or DOJ to delay the closing. In addition, note that proposed §803.12(b) will not apply to all abandoned transactions, rather only those for

1 Generally, towards the end of the comment period, staff of the FTC's Premerger Notification Office will review the comments and draft a "final" rulemaking addressing any comments received, which will then be sent to the full Commission for another vote. If approved by the Commission, the changes will become effective 30 days after the Commission vote and publication in the Federal Register.

2 For transactions such as tender offers and open market acquisitions that are subject to HSR Rule §801.30, only the acquiring person (*i.e.*, the buyer) can withdraw its HSR filing.

which SEC disclosure is required; for example, it will not apply to certain nonpublic or foreign tender offers, open market purchases or transactions filed on a letter of intent.

Refiling

Pursuant to longstanding informal procedures, the FTC has traditionally allowed an acquiring person to withdraw a pending HSR filing and resubmit it within two business days in order to restart the waiting period without having to pay another filing fee. Under this process, the acquiring person must update certain items in its HSR filing, but the filing retains the same transaction number. This procedure allows the reviewing agency additional time to assess the competitive issues of a transaction, which can benefit the parties, especially if no Second Request is issued as a result. Proposed §803.12(c) codifies this informal procedure and specifically includes filings that are both voluntarily and automatically withdrawn. An acquiring person can avail itself of this process — but only on one occasion — if (1) the transaction has not changed in any material way, (2) Items 4(a) through 4(d) are updated and a new certification is submitted, (3) a new affidavit is executed (a new requirement), and (4) the HSR is refiled with both the FTC and DOJ within two business days after withdrawal. As was the case under the informal procedures, only the acquiring person can withdraw and refile its HSR filing. This option is unavailable if the HSR filing of an acquired person is withdrawn in a non-801.30 transaction (whether voluntarily or automatically).