

FTC Issues Final Amendments Regarding Withdrawal of HSR Filings

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On June 28, 2013, the Federal Trade Commission (FTC) adopted a proposed rulemaking to codify its longstanding informal procedures for voluntarily withdrawing and refileing an HSR filing and, more significantly, to mandate that certain HSR filings will be deemed to be automatically withdrawn following notification by the parties to the Securities and Exchange Commission (SEC) that a transaction has been abandoned.¹ The final rules are effective 30 days after publication in the Federal Register, which is expected to occur shortly. Below is a brief summary of the amendments.

Voluntary Withdrawal

Historically and pursuant to informal agency procedures, the FTC has allowed parties to withdraw their HSR filings at any time. Under new §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 for which the filing was made. Thereafter, if the parties choose to pursue the transaction, a new HSR filing must be submitted by each party.

Automatic Withdrawal

The most significant amendments relate to the creation of a “bright-line trigger” for the automatic withdrawal of HSR filings for two types of transactions that require disclosure to the SEC: (1) a tender offer (TO) that has not been completed and (2) a definitive agreement that has been terminated. Under SEC disclosure requirements, if a TO has expired, terminated or been withdrawn, the offeror generally must disclose this fact in an amendment to its Schedule TO filing.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 the FTC’s view, when these circumstances occur, the transactions have been abandoned and have become “hypothetical.” As such, new §803.12(b) requires that any associated HSR filings submitted with respect to these two types of transactions automatically will be deemed to be withdrawn on the date of the SEC filing, and requires the party submitting the SEC filing to notify the FTC and DOJ in writing when such filing is made. An HSR filing will not be withdrawn automatically 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. Note that new §803.12(b) will not apply to abandoned transactions that relate to certain foreign tender offers, open market purchases, transactions filed on a letter of intent, or other agreements between private parties, that are not subject to the SEC disclosure requirements.

1 The Commission vote was 3-1, with Commissioner Joshua Wright dissenting because he does not believe that the evidence supported a need to create a new regulation for automatic withdrawal.

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

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, which is only available once per transaction, the acquiring person must update certain items in its HSR filing, but the filing retains the same transaction number issued to it when the original filing was submitted. 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. New §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 to save a second HSR filing fee — still 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.³ As was the case under the informal procedures, only the acquiring person can withdraw and refile its HSR filing. This refiling option is unavailable if the HSR filing of an acquired person is withdrawn in a non-801.30 transaction (whether voluntarily or automatically).

³ Note, this section applies only to the acquiring person's first withdrawal and refiling for a proposed transaction, and thus does not prohibit or limit the number of times that a party can withdraw and submit a new filing (which would require full compliance with the rules, including payment of a filing fee) for a proposed transaction.