

The FTC Giveth and the FTC Taketh Away: New Proposed Premerger Notification Rules

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The Hart-Scott-Rodino (HSR) Act requires qualifying companies to file a premerger notification with the FTC and Department of Justice Antitrust Division (the “Division,” and together with the FTC, the “Agencies”), pay a filing fee, and wait 30 days (15 days for all-cash tender offers) before consummating the merger. Within the waiting period, the Agencies are supposed to decide whether to challenge the merger, allow it, or seek additional information. The decision to seek additional information may take the form of a so-called “second request,” which may require the merging companies to provide copious amounts of data, documentation, and internal communications concerning their decision to merge.

Experienced practitioners have long known that it is possible to withdraw the notification for a two-day period and then resubmit it, which has the effect of restarting the clock and giving the agencies another 15- or 30-day window to review the transaction. The additional time occasionally suffices to persuade the Agencies to forego a second request, or at least narrow the scope of information sought.

The FTC has now proposed to formalize the process of withdrawing a notification and refiling it. Under proposed new rule § 803.12(c), the acquiring person may refile without paying an additional fee prior to the close of the second business day after the withdrawal. For the refiling to be effective, the proposed transaction must not have changed in any material way, and the filing must include a new executed affidavit pursuant to rule § 803.5 attesting to a good faith intention to proceed with the transaction.

The adoption of a formal withdraw and resubmit process is happy news for antitrust practitioners. Perhaps less welcome is another FTC proposal to add a new procedure for the automatic withdrawal of an HSR filing when filings are made with the U.S. Securities and Exchange Commission (SEC) announcing that a transaction has been terminated.

Specifically, under proposed new rule § 803.12(b), an HSR filing would be deemed to have been withdrawn if companies make a filing with the SEC (a Form TO in the case of a tender offer, or a Form 8-K announcing the termination of a merger agreement) announcing the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of intent, unless the antitrust agencies have already completed an investigation of the transaction. To effectuate the new rule, the parties to the merger would be required to notify the Agencies by letter when the relevant SEC filing is made. Any subsequent transaction between the parties, if otherwise reportable, would be subject to a new HSR filing and a new filing fee.

The FTC justifies this proposed automatic withdrawal procedure as preventing the Agencies from expending scarce resources on transactions that have become “hypothetical.” FTC Commissioner Joshua Wright issued a concurring statement questioning the wisdom of the automatic withdrawal mechanism. Stating that the new rule “appears to be a solution in search of a problem”, Commissioner Wright noted that he was unaware of any evidence that the Agencies are expending scarce resources on hypothetical transactions. He also suggested that the proposed rule “could increase the costs of corporate takeovers and thus distort the market for corporate control” by forcing firms to restart the review process.

The FTC is accepting public comments on the proposed rule changes through April 15, 2013.

About the Authors

Mr. Cohen is a partner and co-founder of the firm, and head of its Litigation & Arbitration practice group and its *Chambers USA* recognized White Collar Defense, Regulatory Enforcement and Internal Investigations practice group. He is a former Assistant United States Attorney for the Eastern District of New York. Mr. Cohen was recognized as a leading lawyer in his field by the 2013 edition of *Chambers USA*, the 2012 edition of *Benchmark Litigation*, and included as one of New York’s *Super Lawyers* in 2008-2012.

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