

PUBLICATION

FTC Formalizes HSR Withdraw and Refile Procedures [Ober|Kaler]

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The Hart Scott Rodino Act (“HSR”) requires parties to certain mergers and acquisitions meeting specified size thresholds to file pre-merger notification and report forms with the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice, and adhere to a waiting period (30 days for most health care-related transactions) before consummating the proposed transaction. Completion of the notification and report forms, and payment of the filing fee (ranging from \$45,000 to \$280,000 depending on the size of the transaction), is burdensome and expensive.

However, the expense of preparing and filing the notification and report forms pales in comparison to the cost associated with complying with an agency request for additional information (i.e., a second request for information). Compliance with a second request generally entails the production of volumes of documents dating back many years, as well as responding to the equivalent of interrogatory requests. In addition, the required waiting period (before consummation of the proposed transaction is permitted) is extended until after the parties have substantially complied with the second request.

While the second request is regarded as a tool used by the agencies to investigate transactions that may raise serious competitive concerns, it, unfortunately, is not uncommon to see the issuance of such a burdensome request in situations where the competitive concerns have simply not been sufficiently analyzed by the enforcement agencies during the initial statutory waiting period. However, in situations where the enforcement agencies may be in a position to clear a transaction with just a little more time (i.e., the length of a second statutory waiting period) and without the need for additional information, the agencies have (for approximately the last 30 years) followed an informal procedure to allow the parties to withdraw their initial notification and report forms and then shortly thereafter resubmit those same forms (without a new fee) to start a new waiting period.

Recently, the HSR rules were amended to formally adopt and clarify this withdrawal and refile procedure. Compliance with this new rule is relatively straightforward. Under the new rules, the parties may withdraw a pending form and refile virtually the same form, thereby starting a new waiting period without paying a new fee, by:

1. providing the FTC and the Antitrust Division with written notification of the parties' intention to withdraw and refile;
2. resubmitting the notification and report forms with new certifications and updated information related to Item 4 of the form (including any new documents that analyze competition) prior to the close of the second business day after withdrawal; and
3. providing a new affidavit confirming the parties' intention to complete the transaction.

Importantly, this procedure can only be taken advantage of one time, and is not available for transactions that have changed in any material way.