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Federal Trade Commission (FTC) Proposes Rules for Withdrawal of Hart-Scott-Rodino (HSR) Merger Filings

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The Federal Trade Commission (FTC) has proposed formalizing its process for handling withdrawals of merger notifications under the Hart-Scott-Rodino (HSR) Act in order to better allocate its resources. The proposed changes to the HSR rules, which have been published for public comment, would codify the existing procedure for pulling and refiling an HSR notification without payment of an additional filing fee and, more controversially, would 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.

Under long-standing existing practice, the FTC allows HSR filers to withdraw their notification at any time and (for acquirors) refile within two business days without paying another filing fee, thereby restarting the 30- or 15-day initial waiting period and providing more time for the federal antitrust agencies, the FTC and the Department of Justice Antitrust Division, to perform a competitive review of a deal. This procedure can sometimes enable parties to a transaction to avoid the substantial time, expense, and burden of a "second request" following the initial waiting period, or at least narrow the scope of a second request. Part of the FTC's proposed rules would convert the existing informal system into an official withdrawal and refiling procedure.

However, the FTC has also suggested a rule that would create an automatic HSR withdrawal mechanism by linking the HSR filing with disclosures required by the SEC under U.S. securities laws. Specifically, an HSR filing would be deemed to have been withdrawn if companies make a filing with the SEC announcing the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of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. Such automatic withdrawal would occur even if statements are made in the parties' SEC filing indicating a desire to recommence the tender offer or enter into a new or amended agreement or letter of intent. Any subsequent transaction between the parties, if otherwise reportable, would be subject to a new HSR filing and a new filing fee. The FTC explains this proposed automatic withdrawal procedure as necessary to prevent the antitrust agencies from expending scarce resources on transactions that have become hypothetical.

Although the FTC voted unanimously to invite public comment on the proposed rules, new FTC

Commissioner Joshua Wright issued a concurring statement questioning the wisdom of the automatic withdrawal mechanism. Calling the proposal "a solution in search of a problem", Commissioner Wright notes the lack of evidence of agency resources being devoted to truly hypothetical transactions. He also warns that the changes could increase the costs of corporate takeovers and distort the market for corporate control by forcing firms to restart their antitrust review, leading to significant delays and added expenses. The proposed rule could also discourage the use of tender offers and disproportionately burden U.S. public companies, since automatic HSR withdrawal would not apply to the many non-public and foreign companies that are not covered by SEC disclosure requirements.

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

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