

Federal Trade Commission (FTC) Merger Guidance Roundup: Summer 2013

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The FTC has not taken a vacation from providing merger guidance this summer, and Labor Day is still to come. So far, the commission has issued guidance regarding the “pull and refile” process, levied fines for Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) violations, challenged or settled merger investigations, and released a draft five year strategic plan. All of this activity provides helpful guidance for HSR practitioners and transaction parties.

Pull and Refile Rules Allow Second HSR Waiting Period (Which Helps Allocate Commission Resources)

On June 28th the FTC issued final rules that largely formalize the commission’s long-standing informal position that allows parties to voluntarily withdraw and refile their HSR notifications within two days without paying an additional filing fee.^[1] It is in the parties’ discretion whether to take advantage of this procedure, which allows the antitrust agencies additional time to review a transaction during an extended “initial 30 days” waiting period. The benefit of the additional review time is that the parties may be able to avoid a “second request” for information, thus saving time and resources for the parties and the government.

These new rules also establish a procedure for automatic withdrawal of parties’ HSR notifications when the Securities and Exchange Commission is notified that the subject transaction has been terminated. The enforcement agencies believe that this change will allow them to make more efficient use of agency resources by reducing the need to review abandoned transactions. Commissioner Joshua D. Wright objected to the automatic withdrawal procedure, noting the “absence of evidence that the automatic withdrawal rule would remedy a problem that exists under the current HSR regime....”^[2]

On August 20, 2012, a notice of proposed rulemaking was published in the Federal Register regarding the treatment under the HSR Act of certain licensing transactions in the pharmaceutical industry.^[3] Three sets of comments were received by the agencies, and, according to the FTC’s website,^[4] the Pharmaceutical Research and Manufacturers of America has met with commission staff and provided views regarding the legality of the proposed rulemaking as well as the potential additional costs to the pharmaceutical industry should the rules be adopted as proposed. The rules

have not yet been finalized.

Fines Highlight the Need for Company HSR Compliance Program and Investment Monitoring

The FTC announced fines of \$720,000 and \$480,000 for technical violations of the HSR Act on June 20th and July 2nd. In the first situation, the filing party had submitted an HSR notification and observed the waiting period with respect to the subject issuer in 2007. However, the period during which a person can continue to acquire securities relying on a previously filed HSR expires after five years, in that case, in February 2012. The acquiring person failed to make a new HSR filing prior to 2012 acquisitions, made a corrective filing two months later and agreed to pay the \$720,000 civil penalty. In the second situation, the acquiring person allegedly exceeded the HSR Act's notification threshold in 2010. In 2012, the issuer contacted the investor about HSR Act compliance. The acquiring person was not able to take advantage of the "passive investor" exemption because he was a director of the issuer. He therefore agreed to pay the \$480,000 civil penalty to settle the charges.

Notably, in both of these situations, the acquiring person had made a previous corrective filing regarding earlier HSR Act violations. No penalties were imposed for the first violations alleged against them.

Merger Challenges Target Wide Range of Transactions

The FTC made considerable progress regarding quite a number of open merger investigations over the past few months. In some cases, the commission was prepared to block a transaction to prevent its consummation, but it became unnecessary for it to do so.

Specifically, on June 27th, the FTC issued a statement regarding a health system merger that had been under investigation but had been withdrawn. According to the commission, the termination of the parties' proposed transaction "will preserve access to low-cost, high-quality health care for the citizens of Hot Springs, Arkansas." ^[5]

On May 29th, the FTC challenged a transaction involving two casino operators, alleging that the transaction would "reduce competition and lead to higher prices and lower quality for customers in the St. Louis, Missouri and Lake Charles, Louisiana areas." ^[6] On August 1st, the commission and the parties filed a joint motion to withdraw matter from adjudication ^[7] while the terms of a consent agreement are finalized.

On July 1st, the FTC challenged a transaction involving manufacturers of glass containers for beer and spirits, alleging that the proposed transaction would combine the second and third largest manufacturers of glass containers, resulting in them controlling 75% of the approximately \$5 billion U.S. glass container industry. ^[8] The proposed transaction was withdrawn.

Other transactions were able to close after reaching agreements that the FTC believed would preserve competition. On July 10th and 11th, the FTC responded to public comments and approved a modified final order in Hertz's acquisition of Dollar Thrifty, whereby Hertz agreed to divest its Advantage Rent A Car business, along with the rights to 29 of Dollar Thrifty's airport-based rental locations, thereby creating an independent rental car company. ^[9] On July 19th, the FTC agreed to settle its investigation into the acquisition of an aircraft engine component manufacturer whose part is allegedly a "critical component" for the engine its rival makes for Airbus's A320neo aircraft. Among

other things, the settlement incorporates provisions of existing and new commercial agreements of the parties relating to the design and development of the “critical component” and related parts, thus making a breach of those contract provisions a violation of the agreement with the FTC.^[10]

Continuing a trend of enforcement involving consummated transactions, on July 25th the FTC voted to accept a proposed consent agreement pursuant to which a manufacturer of specialized software used by the automotive recycling industry agreed to divest assets acquired in its 2012 purchase of another manufacturer of yard management systems software.^[11] The FTC’s complaint alleged that the acquisition significantly harmed the market for YMS, which was allegedly already highly concentrated. The action is notable both because the consummated 2012 transaction was valued far below the HSR Act’s transaction size thresholds, and because the consent agreement requires the divestiture of acquired assets to a buyer formed by seller’s managers to acquire the divested business.

Five Year Plan Projects Increased Efficiency, Challenges with “Significant” Results

On July 16th, the FTC issued a draft strategic plan for fiscal years 2014-2018, calling for increased efficiency of investigatory processes and enhanced enforcement outcomes. The goals stated in the plan include (i) improving timeliness of investigations and merger review under the HSR Act, (ii) negotiating merger and non-merger consent orders and seeking litigated orders that have significant remedial, precedential and deterrent effects, (iii) increasing compliance with consent decrees and orders and with HSR reporting obligations, and (iv) increasing the transparency of the FTC’s decision-making process.^[12]

In sum, it has been a very busy summer for merger enforcement at the FTC this year. Perhaps there is even more to come before the summer season is over.

[1] See <http://www.ftc.gov/opa/2013/06/hsr.shtm>.

[2] See <http://www.ftc.gov/speeches/wright/130628hsrstmtwright.pdf>.

[3] See <http://www.ftc.gov/os/comments/premergeriprights/index.shtm>.

[4] *Id.*

[5] See <http://www.ftc.gov/opa/2013/06/capella.shtm>.

[6] See <http://www.ftc.gov/opa/2013/05/pinnacle.shtm>.

[7] Available at <http://www.ftc.gov/os/adjpro/d9355/130801jointmotionwithdrawadjudication.pdf>.

[8] See <http://www.ftc.gov/opa/2013/07/ardagn.shtm>.

[9] See <http://www.ftc.gov/opa/2013/07/hertz.shtm>.

[10] See <http://www.ftc.gov/opa/2013/07/generalelectric.shtm>.

[11] See <http://www.ftc.gov/opa/2013/07/solera.shtm>.

[12] Available at <http://www.ftc.gov/opp/gpra/strategic/d-spfy14fy18.pdf>.

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