

# "Re-Animator" or "Dead Man Walking"? FTC Says No to Zombie Deal Reviews – Formalizes Withdrawal and Refiling Procedure

July 10, 2013

Antitrust review under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") is a fact of life that many dealmakers would happily do without. So, when a deal dies midstream few would opt to continue with the HSR process. Still, the FTC has issued a new rule that will foreclose that possibility.

HSR review can be complicated and is made all the more so by unwritten or "informal" practices which are known mostly by practitioners who are "down in the weeds" of agency practice. One such informal rule is the "pull and refile" practice, whereby an HSR submission can be withdrawn at the end of the statutory waiting period (usually 30 days) and refilled within two days without having to pay a new filing fee, which can be as high as \$280,000. "Pulling and refiling" has been informally available for decades, and is typically used in transactions that do not have significant antitrust issues but require more than the statutory 30-day review period to give the agency what they need to close.

Under the strict letter of the statute and rules, the reviewing agency must close its investigation after the initial waiting period or issue a Second Request. Thus, in transactions where the parties are working actively with agency staff during the initial waiting period to satisfy substantive concerns, the approaching end of the initial HSR waiting period can force the issuance of a Second Request if the agency is not otherwise prepared to close the investigation. The pull and refiling procedure thus begins a new HSR waiting period and allows the investigating agency additional time to analyze the transaction. A more draconian "Second Request" investigation, which can last four to six months or sometimes more, is therefore avoided.

On June 28, 2013, the FTC issued a new rule that will become effective in early August and codifies existing procedure, with one important addition. Consistent with current practice, parties may withdraw their premerger notification filing by notifying the FTC and the Antitrust Division in writing. If the parties wish to pursue the acquisition, new notifications and a new filing fee will be required unless the filing occurs within 2 business days of the withdrawal. A new waiting period also must be observed prior to consummation of the acquisition. The procedure may be used only one time, and only under the following circumstances: (i) the proposed acquisition does not change in any material way; (ii) the resubmitted notification is recertified, and relevant parts of the submission are updated; and (iii) the resubmitted notification is refiled within two business days of the withdrawal.

The new rule, however, adds a wrinkle in the case of tender offers. The new rule would deem an HSR filing *automatically* withdrawn upon (i) filing a Schedule TO-A with the SEC announcing the expiration or termination of a tender offer, or (ii) other public filing with the SEC, such as an Form 8-K, announcing the deal's termination. The automatic withdrawal provisions of the new rule will require parties to notify the FTC and the Antitrust Division of the SEC filing that triggered the automatic withdrawal. The new rule also requires the parties to submit a new executed affidavit with resubmitted HSR filings attesting to the parties' execution of a new agreement and their good faith intention to proceed with the transaction. Again if the new filing occurs within two days, a new filing fee would not be required.

Few, if any, deals have continued through the HSR antitrust review process after they have terminated, but there can be good reasons to do so where all indications are that the deal is coming back and restarting antitrust review would add delay. This is especially true in cash tender offers where the initial waiting period is only 15 days. The automatic withdrawal provisions of the new rule complicates this calculus, so the best advice in such cases under the new rule will be to carefully manage what is filed with the SEC to avoid automatic withdrawal.

The new rule's automatic withdrawal provision was passed over the objection of Commissioner Wright, who issued a dissenting statement that exemplified his judicial philosophy. Commissioner Wright argued that "a principle of good governance that the FTC should follow is that it should not issue new regulations unless "their benefits exceed their costs." In his view, "the record does not support the conclusion that the new automatic withdrawal rule offers any benefits that justify its adoption. The notice of proposed rulemaking claims the automatic withdrawal rule is necessary to prevent the antitrust agencies from expend[ing] scarce resources on hypothetical transactions. However, I have not seen evidence that any of the over 68,000 transactions that have been notified under the HSR Rules has resulted in the allocation of resources to a truly hypothetical transaction." Accordingly, "in the absence of evidence that the automatic withdrawal rule would remedy a problem that exists under the current HSR regime, and thus benefit the public, I believe we should refrain from creating new regulations."

Any transaction implicating antitrust or HSR review should be analyzed by counsel for reportability and substantive antitrust implications. The highly technical nature of the rules, coupled with strategic and timing considerations for how and when to best approach antitrust enforcers, means important points can be lost if not considered early by an antitrust team well equipped to deal effectively with these issues.

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