

CLIENT MEMORANDUM

FTC Implements a New HSR Filing Withdrawal Rule

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The Federal Trade Commission (the “FTC”) has recently announced a new “withdrawal” rule under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”). The HSR Act imposes an obligation on parties to large proposed acquisitions to notify the transaction to the FTC and Department of Justice (“DOJ”) and observe a prescribed waiting period before consummating such acquisition in order to allow the regulatory agencies an opportunity to assess the competitive impact of the proposed acquisition.

The FTC’s new “withdrawal” rule – 16 C.F.R. Section 803.12 – will become effective on August 9, 2013 and codifies in a formal rule an informal “pull-and-refile” practice that has been used frequently over the past thirty years. Further, the rule provides for an automatic withdrawal of certain filings where an envisioned merger or acquisition has been formally terminated prior to consummation, and that termination has been publicly announced. The FTC’s public announcement concerning the new withdrawal rule can be accessed via <http://ftc.gov/opa/2013/06/hsr.shtm>.

The FTC believes that the new withdrawal rule, to the extent it relates to abandoned proposed transactions, will increase the efficiency of the antitrust agencies, and ensure that their scarce resources are focused only on transactions that are likely to move forward.

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Rule 803.12 – The Withdrawal Rule

Effective August 9, 2013, 16 C.F.R. Section 803.12 will implement a new withdrawal rule. As noted in our introduction, the new withdrawal rule codifies the heretofore informal pull-and-refile process, and implements a formal automatic withdrawal procedure for certain abandoned transactions.

Section 803.12(a), working together with 803.12(c), essentially codifies the long-standing pull-and-refile informal procedure that has been well known to, and frequently utilized by, the HSR bar for thirty years. The FTC has permitted parties to pull their filings prior to expiration of the initial waiting period, and then refile (after certain required updating and recertifying of the form) within two business days without requiring an additional filing fee. This process effectively created a 60-day initial waiting period, and has been utilized in circumstances where the agencies were not prepared to clear a notification by the thirtieth day, but where few obstacles remained to complete that review, and the parties were confident that an additional thirty days would be sufficient time to permit the agencies to complete the review and allow the waiting period to expire. This pull-and-refile process had become a very effective tool, as in many cases, the parties have managed to avoid the issuance of a request for additional information and documents (a “Second Request”), and the attendant burdens and expenses associated with substantially complying with the Second Request, by effectively doubling the length of the initial waiting period through the pull-and-refile mechanism.

Notably, the new rule provides that this procedure can be utilized only once, where under the prior informal practice, the agencies have, on some occasions, allowed the parties to pull-and-refile twice. It would appear that under the formal rule, a second pull-and-refiling would not be permitted.

Section 803.12(b), also working together with Section 803.12(c), implements, for the first time, an automatic withdrawal process for certain publicly terminated transactions. This new rule is intended to cover terminated events such as (i) the expiration, termination or other abandonment of a tender offer where the offeror has filed a Schedule TO-A with the Securities and Exchange Commission (the “SEC”), thereby ending a pending tender offer, and (ii) the abandonment or termination of a proposed merger or other proposed acquisition of a public company pursuant to a bilateral agreement, where the parties have filed a Form 8-K with the SEC, announcing the termination, expiration or abandonment of the acquisition agreement. This automatic withdrawal process will apply only during the pendency of the initial waiting period, and requires that one of the reporting persons notify the FTC and DOJ by letter that such SEC filing has been made. Withdrawal will be deemed effective as of the date of the relevant SEC filing.

Under Section 803.12(c), the parties are permitted to refile a transaction that has come back to life within two business days of the automatic withdrawal, without the payment of an additional fee, where the terms of the reborn tender or proposed acquisition have not changed materially from the initial filing and the new HSR form has been updated and recertified.

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The FTC believes that the new withdrawal rule will improve the efficiency of the premerger notification program, though this view was not unanimous, as Commissioner Joshua D. Wright voted against the proposed rulemaking. In Commissioner Wright's view, a new regulation is not necessary where the benefits of the regulation would not outweigh the costs. As he had not seen evidence of resources being expended on "truly hypothetical transactions," Commissioner Wright views the rule as remedying a problem that does not exist, and thus believes the rule to be unwarranted.

If you have any questions about the new rule, or the HSR Act generally, please contact Jonathan J. Konoff (212-728-8627, jkonoff@willkie.com) or the attorney with whom you regularly work.

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