

CLIENT ALERT

Second-Request Timing Agreements Do Not Extend the HSR Waiting Period

May 14, 2019

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The Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) invite parties to a business combination transaction to enter into “timing agreements” in connection with the Hart-Scott-Rodino (“HSR”) “Second Request” merger review process. Although timing agreements affect when the parties may close a transaction, they do not delay the expiration of the relevant waiting period under the HSR Antitrust Improvements Act (“HSR Act”). That distinction should be carefully considered in drafting closing conditions and termination provisions in merger and acquisition agreements.

A typical HSR closing condition in a transaction agreement reads as follows:

All waiting periods applicable to the transactions contemplated by this Agreement under the HSR Act shall have expired or been terminated early.

In the event that the parties to the transaction enter into a timing agreement with the FTC or DOJ, the aforementioned closing condition could be satisfied notwithstanding the parties’ agreement with the FTC or DOJ not to consummate the transaction prior to a specified date, as a timing agreement does *not* extend the waiting period under the HSR Act. To address that concern, parties should consider adding language such as the following to the closing conditions in transaction agreements:

All applicable waiting periods, any extensions thereof, and any commitments by the parties not to close before a certain date under a timing agreement entered into with the Antitrust Authorities [to be defined] shall have expired or otherwise been terminated.

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Mergers and acquisitions exceeding thresholds specified by the HSR Act and updated annually by the Premerger Notification Office of the FTC must file an HSR pre-merger notification form with the Antitrust Division of the DOJ and FTC (each, an “Agency”). That filing starts an initial, 30-day waiting period (15 days in the case of a cash tender offer or a bankruptcy) during which an Agency can investigate any potential anticompetitive implications of the transaction.

If the investigating Agency is unable to resolve all competitive concerns within the initial 30-day waiting period, the acquiring party can “pull and refile” its HSR notification form before the expiration of the initial 30-day waiting period. The “pull-and-refile” procedure restarts the initial 30-day waiting period, providing the Agency with effectively 60 days to resolve competitive concerns. Notably, the pull-and-refile procedure requires that the acquiring party update its HSR notification form with any Item 4(c) or 4(d) documents that have been generated during the first 30-day waiting period and after the initial filing.

If the Agency believes that further investigation is necessary, the Agency will issue a Request for Additional Information (“Second Request”) to both parties, which typically consists of a request for the production of voluminous documents, data, and other information. Parties can also choose not to “pull-and-refile,” which often results in the issuance of a Second Request before the expiration of the initial 30-day waiting period, thereby extending the statutory bar to closing the transaction.

After both parties substantially comply with the Second Request, a second 30-day waiting period begins to run in which the Agency must assess the information produced by the parties to determine if the Agency will sue to prohibit the transaction. (In the case of a cash tender offer or bankruptcy, the Agency has 10 days to complete its review, and the time begins to run as soon as the acquiring party has substantially complied with the Second Request.)

The Agency invites the parties, upon receipt of a Second Request, to meet with Agency staff to negotiate the scope and implementation of the Second Request and to agree on timing during the Second Request process. Such a timing agreement typically includes a commitment by the parties not to close the transaction for a specified number of days (60–90 days in the DOJ and FTC Model Timing Agreements) after both parties have substantially complied with the Second Request or have certified their substantial compliance. Such agreements are designed to permit more time to negotiate a possible remedy with the Agency and for the Agency to determine whether to sue or close its investigation.

Importantly, a timing agreement cannot extend the waiting period under the HSR Act. The timing agreement represents only a contractual undertaking by the parties to the Agency that they will not close the transaction even though, after the waiting period expires, no statutory bar prevents the parties from closing the transaction:

[A] timing agreement does not affect the statutory expiration of the Hart-Scott-Rodino waiting period. Regardless of the commitments made in the timing agreement, the HSR waiting period

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expires 30 days after the parties certify substantial compliance with the Second Request. (These periods may differ in a cash tender or bankruptcy filing.) Additional time provided by the parties beyond this 30-day waiting period is by agreement, and does not alter this statutory provision.

Bruce Hoffman, Bureau of Competition, FTC, “Timing is Everything: The Model Timing Agreement” (Aug. 7, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement>. See also Premerger Notification Office Staff, Bureau of Competition, “Getting in Sync with HSR Timing Considerations” (Aug. 31, 2017) (“**Timing agreements do not extend or otherwise toll the waiting period provided by the HSR Act.**”) (emphasis in original), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations>.

Therein lies a potential contractual issue. The typical transaction agreement requires the closing of the transaction to occur within a specified number of days following the satisfaction of the closing conditions, which, as noted above, often refer to the expiration of waiting periods. In many cases in which Second Requests are issued, such a clause would require closing even though the parties have contractually agreed in a timing agreement with the Agency to forbear from closing despite the expiration of the relevant waiting period.

A party to the transaction agreement (especially one that no longer views the transaction as desirable) could argue that the other party’s failure to close the transaction, given the passage of the requisite number of days following the expiration of the second waiting period, constitutes a breach of the agreement that permits termination. In addition, the parties should be mindful of the outside termination (or drop-dead) date when entering into a timing agreement with an Agency. Those issues can become even more acute if the agreement has a reverse termination fee, requiring the acquiring party to pay a fee upon a termination prior to the receipt of HSR approval or due to a breach by the acquiring party.

Alternatively, following the expiration of the HSR waiting period, the party to be acquired could seek to require the acquiring party to close the transaction notwithstanding the existence of the timing agreement, as all conditions to closing would be satisfied. Absent an injunction against closing obtained by the Agency, the acquiring party might be compelled by the transaction agreement to consummate the transaction in violation of the timing agreement.

Various defenses may be available, as both parties to a transaction are expected to sign the timing agreement. However, a Delaware court has recently found that entering into a timing agreement by both parties to a merger agreement did not constitute a notice under the merger agreement that extended the outside termination date. *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, No. 2018-0927-SG, 2019 WL 1223026, at *14–17 (Del. Ch. Mar. 14, 2019). The emphasis by the *Vintage Rodeo Parent* decision on the operative language of the transaction agreement counsels parties to draft that language to reflect accurately the regulatory clearance process that is applicable to the transaction.

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Drafting the relevant clauses to account for the operation of timing agreements can avoid ambiguities or even expensive litigation.

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