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A Month Of Important Guidance On HSR Filings

Law360, New York (July 12, 2013, 1:43 PM ET) -- The U.S. antitrust agencies have issued decisions and guidelines in the past month that are important for companies completing transactions that require U.S. merger control filings pursuant to the Hart-Scott-Rodino Act. Most transactions involving assets, sales or shares in or into the U.S. valued at more than $70.9 million are subject to HSR, which in most cases requires the parties to observe a 30-day waiting period before a transaction can be consummated.

"Pull and Refile" Rule Allows for Second Waiting Period

On June 28, 2013, the Federal Trade Commission codified its long-standing practice allowing filing companies that withdraw and then promptly refile HSR filings to obtain a second 30-day waiting period without having to pay an additional filing fee. If an HSR filer withdraws its notification and then refiles the same notification within two business days, the waiting period restarts. This "pull and refile" strategy is employed if it appears the agency has limited concerns about the transaction and that those concerns can be resolved within an additional 30-day window; it also avoids a costly and time-consuming "second request," which the agencies will issue if the competition concerns have not been resolved at the end of the initial waiting period. Allowing parties to voluntarily pull their HSR filings also saves government resources involved with drafting and pursuing a second request that might not be necessary if additional time is allowed.

The changes to the regulations have three elements:

- New §803.12(a): An HSR filer may withdraw its HSR filing by notifying the FTC and Antitrust Division of the U.S. Department of Justice in writing. Doing so terminates any waiting period and any second request in progress. If the transaction was granted early termination or the initial waiting period expired, the one-year period to consummate the transaction immediately terminates. If the parties wish to revisit their transaction, a new HSR must be filed, and a new waiting period must be observed.

- New §803.12(b): If parties are required to submit filings with the U.S. Securities and Exchange Commission notifying that a transaction has been terminated, any associated HSR filing automatically will be withdrawn as of the date of the SEC filing. Parties must inform the FTC and DOJ in writing of the SEC filing.

- New §803.12(c): If a party withdraws an HSR under new §§803.12(a) or (b), the party may resubmit the HSR prior to the close of the second business day after withdrawal without paying an additional filing fee.

The new rules reflect a recognition that there are many cases in which a transaction raises substantive issues where a "pull and refile" strategy can be mutually beneficial to both the parties and the reviewing agency. The new rules are consistent with the policies of the FTC and Department of Justice that the reviewing agency and the parties should work together cooperatively to minimize the time and cost of a merger investigation. The new rules also reinforce that counsel and the filing parties should consider whether a "pull and refile" strategy is appropriate to their particular transaction under investigation.

In addition, the revised rules harmonize SEC and FTC treatment of terminated transactions: HSRs for transactions in which there is an SEC notification of the termination are deemed to have been withdrawn as of the date of the SEC notification, although parties are required to notify the agencies by letter when the SEC filing is made. It is suspected that the reason for this part of the rule change involved the FTC's investigation of the Hertz/Dollar Thrifty merger, in which Hertz submitted an HSR and the FTC issued a second request on the basis of an exchange offer that ultimately expired.

Under the new rules, an HSR filing in this circumstance automatically would be withdrawn as of the date of the expiration. It should be noted that Hertz still pursued the transaction and ultimately acquired Dollar Thrifty; but the possibility still exists that without these new rules the FTC or DOJ could end up investigating "hypothetical" transactions that are terminated prior to completion of the agency's investigation.

Commissioner Joshua Wright dissented with this rules change, arguing that there was no evidence that an automatic withdrawal procedure remedies an existing problem. In the absence of any benefit, Commissioner Wright asserted that the FTC should not create new regulations. It should be noted, however, that only one party (a law student from UC Hastings) filed a comment; the lack of negative commentary from the legal community reflects the widespread acceptance of the "pull and refile" practice.

Continued Enforcement of HSR Filing Violations

The agencies also signaled again that they will pursue companies or individuals that fail to comply with their obligations to file, even if there is no substantive competition issue, and particularly when the failures have been repeated. On June 19, 2013, the DOJ filed a complaint and charged a fine of $720,000 — equivalent to the maximum fine of $16,000 for each day the company was out of compliance — against MacAndrews & Forbes Holdings Inc. for violating premerger notification requirements because it failed to submit an HSR filing and observe the required waiting period prior to its June 2012 acquisitions of voting securities of Scientific Games Corporation. This violation followed a failure to file and a corrective filing by MacAndrews in 2011.

Since then, the Antitrust Division of the DOJ brought another complaint and consent decree, this time against Barry Diller for violating HSR notice and waiting requirements. Diller agreed to pay a fine of $480,000 for failing to file an HSR and observe the waiting period relating to purchases of voting securities of The Coca Cola Company.

In its complaint, filed in the U.S. District Court for the District of Columbia, the DOJ alleged that Diller first acquired voting securities of Coke in 2010 without filing a required HSR and observing the waiting period. Diller continued to make additional acquisitions of voting securities of Coke without filing HSRs or observing waiting periods until May 2012, when Coke in-house counsel asked Diller if an April 2012 acquisition of voting securities required an HSR filing. In May 2012, Diller submitted corrective filings for all of the Coke voting securities he had acquired. The DOJ alleged that Diller was in continuous violation of HSR filing requirements from his first acquisition in 2010 until June 2012, when the waiting period on Diller's May HSR expired.

As with MacAndrews, Diller had a prior HSR violation for failure to notify and observe the waiting period. Diller had failed to submit a filing in 1998, an error which he subsequently corrected. At that time, Diller received a warning from the FTC that he was responsible for instituting a program to ensure full compliance with HSR requirements.

These recent HSR enforcement actions drive home two significant points for investors acquiring voting securities. First, the FTC and DOJ have not brought enforcement actions for a first failure to file where it appears that failure was inadvertent, but a second failure often causes the agencies to seek relief. Second, while acquisitions of voting securities for investment purposes generally involve no substantive issue, it is important for investors to monitor the timing of filings and share values to ensure that a new, routine acquisition of securities will not occur outside the exemption period (which was an issue in the McAndrews case) or above a threshold that triggers a filing requirement.

Conclusion

While most HSR filings proceed smoothly through the review process and do not raise substantive competition concerns, the actions of the agencies over the past month reinforce both the importance of ensuring that a filing is made where required and that strategic options are available when the transaction being reported raises substantive issues.

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