

Two Recent Transactions Highlight that Pulling-and-Re-filing is Anything But a Sure-Fire Way to Avoid a Second Request

The parties to two separate transactions reportedly received pre-Christmas gifts from the U.S. antitrust officials by way of the issuance of requests for additional information, often referred to as Second Requests. This, despite that the parties in both transactions had pulled-and-re-filed their pre-merger notification filings ("HSR filing") required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). Whether the parties expected to receive the Second Requests is hard to say, but, the very fact of their issuance is a reminder that, while pulling-and-re-filing is a helpful tactic for many transactions, it is certainly not a sure-fire way to avoid a Second Request.

Recent amendments to the HSR Act codified a long-standing permitted practice of pulling-and-re-filing an HSR filing. By doing so, the parties stop the original 30-day waiting period and begin a new one, essentially extending the waiting period up-to 60-days (depending upon weekends, holidays, and when the parties re-file). The Premerger Notification Office of the Federal Trade Commission, which oversees compliance with the HSR Act, for years had informally permitted parties to pull-and-re-file their HSR filings without paying a new filing fee. Under the relatively new codified rules, the practice of pulling-and-re-filing is permitted without the parties incurring a new filing fee so long as (1) there are not any material changes to the transaction; (2) within 30-days from its initial filing the buyer formally notifies the U.S. antitrust authorities of its intent to pull-and-re-file their pre-merger notification; (3) the buyer updates its filing with any new information, particularly any additional Item 4 documents; and (4) the buyer submits a new filing within two business days. This allows the agencies additional time to review the transaction. Parties are only permitted to pull-and-re-file without paying the filing fee one time.

For transactions that raise potential anticompetitive concerns, the tactic of pulling-and-re-filing often benefits both the government and the parties:

- For the U.S. antitrust agencies, pulling-and-re-filing provides additional time to review the transaction, including contacting customers and potentially interviewing business personnel. This may be particularly important for transactions that face clearance disputes between the Department of Justice and Federal Trade Commission as to which agency should review the transaction. Such disputes can often absorb 7-14 days of the initial 30 day waiting period.

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- For the parties to the transaction, pulling and re-filing provides extra time to persuade the agencies that a transaction does not raise anticompetitive concerns, and in so doing potentially avoid a Second Request.

However, for the parties to two recent transactions, pulling and re-filing did not avoid a Second Request.

- In October 2014 NetScout Systems, Inc. announced that it was acquiring the communications business of Danaher Corporation for \$2.6 billion. The deal allegedly will increase the network and application management and security operations of NetScout. Both parties to the transaction submitted their necessary HSR filings to the U.S. antitrust authorities on October 24, 2014. Then, NetScout pulled and re-filed its HSR filing on November 26, 2014, extending the governments' period to review the transaction for an additional 30 days.
- In a completely separate transaction, on October 15, 2014, Ingredion Inc. announced that it had entered into an agreement to acquire Penford Corporation for \$340 million in cash. Ingredion and Penford are two of the six largest global producers of modified food starches, a commodity used in things from food and beverages to paper products. The parties made their HSR filings on October 27, 2014, subsequently pulling and re-filing on November 26, 2014.

Despite the parties' attempts in both transactions to provide the U.S. antitrust authorities additional time to review and clear the transactions, all four were apparently issued Second Requests on December 24, 2014.

Receiving a Second Request despite pulling-and-re-filing is not a new phenomenon for transacting parties. A recent study conducted by the Antitrust Law section of the American Bar Association and compiled by Charles River Associates examined information for mergers receiving Second Requests between 2011 and 2013. Of the respondents, in nearly one-third of those transactions that received Second Requests the parties had pulled-and-re-filed.

Therefore, while the issuance of the Second Requests in these two recent transactions is not novel, it should be a reminder of two important facts for companies. First, pulling-and-re-filing does not guarantee that the U.S. antitrust authorities will fail to issue a Second Request; rather, it may merely pro-long the inevitable. This highlights the second fact: pulling-and-re-filing is not the only option.

One alternative is for the parties to the transaction to hold the U.S. antitrust agencies' toes to the fire and refuse to pull-and-re-file. Unfortunately, more than likely, such conduct will result in a Second Request. Also, taking this path could create hostility between the U.S. antitrust agencies and the parties. Nevertheless, if the parties are willing to accept these risks and the agencies issue a Second Request, they would do so at least 30-days sooner than if the parties pull-and-re-file. Depending upon how quickly the parties could comply with the Second Request, this could ultimately result in a sooner closing date.

When considering the U.S. antitrust clearance portion of a transaction, particularly for those transaction that may raise anticompetitive concerns, parties should consider early on how they may react if the U.S. agencies request a pull-and-re-file; or, if the parties should suggest, *sua sponte*, that they will pull-and-re-file to try and avoid a Second Request. If, however, the parties ultimate decide to pull-and-re-file, they should do so knowing that they may still receive a Second Request.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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