

Commentary:

The 'Pull and Trigger': A Simple Way to Side-Step the Dreaded HSR Second Request

By Gordon Schnell, Esq.

Nobody wants to receive a "second request" from the government under its Hart-Scott-Rodino Act¹ premerger review authority. They're expensive, time consuming, disruptive, and have the significant potential to undermine even the most solidly grounded deals. From a regulatory standpoint, next to an actual lawsuit brought by the government to block the proposed transaction, there is nothing more worrisome to merging parties than the mighty second request.

But, thanks to an often overlooked, informal government policy, there is a very simple way for parties to avoid this oppressive regulatory hurdle: the "pull and trigger." And, in light of the government's recently announced merger review process initiative, there has never been a better time for parties to take advantage of this regulatory tool.

Under the HSR Act, the Federal Trade Commission or Department of Justice will review in advance of closing all mergers or acquisitions involving at least \$50 million worth of assets or voting securities (assuming certain thresholds for the size of the parties are reached and

no exemptions apply). A transaction that is reportable under the HSR Act may not close until the FTC or DOJ has "cleared" it.²

While the initial HSR waiting period is typically only 30 days from the date of filing, this period can be extended indefinitely through the government's issuance of a second request (more formally referred to as a "request for additional information or documentary material"). The second request waiting period is also only 30 days.³ However, this period does not commence until the government determines that the parties have "substantially complied" with the government's request. Such compliance can take several months or longer, cost tens of millions of dollars in legal and related fees, and result in significant disruption of the parties' operations.⁴

Even after substantial compliance has been reached, the government may seek to extend the 30-day second request waiting period. While the parties have the right to refuse this extension, they seldom do. It is almost always advisable to give the government all the time it needs to satisfy its concerns. But, no matter how much time the government takes and no matter how reasonably the parties behave, there is no guarantee of clearance. Indeed, last year the government challenged, through an actual or threatened lawsuit, over 80 percent of the transactions for which it issued a second request.⁵

It is no wonder that merging parties want to avoid the second request at all costs. The "pull and trigger" is a very easy, but seldom-used tool to accomplish this. Here's how it works.

At any point within the initial 30-day HSR waiting period, the acquiring entity may withdraw its HSR filing (pull the old) and refile (trigger the new) within two business days.⁶ As long as the deal has not changed substantively, the acquiring entity may rely almost entirely on its original filing. It need not submit a new filing. And, it need not pay an additional filing fee. The only materials that it must submit are newly signed and dated signature pages (*i.e.*, the certification and affidavit pages), and any relevant "Item 4" documents that did not exist at the time of the original filing (*i.e.*, certain Securities and Exchange Commission documents, financial statements, and transaction analyses). The acquired entity is not required to submit anything.

The effect of employing this informal regulatory procedure is to "reset" the initial 30-day HSR waiting period. That may not seem like much. But, it may provide the government with the extra time it needs to finish reviewing the deal without issuing a second request.

For many transactions, the government's pre-merger analysis involves more than simply reviewing the materials the parties submit with their HSR filings. The government may also want to question the parties' customers, suppliers, and competitors; interview the parties' key executives and employees; analyze the overlap in the parties' businesses; study the parties' sales and product data; and review the parties' business and strategic plans. The parties may also want to supplement this information with a "white paper" and supporting economic data explaining why the proposed deal poses no threat to competition.

All of this takes time. The initial 30-day waiting period is often simply too short to get it all done. Rather than acquiesce in the face of unresolved questions or concerns about the deal, the government may feel it has no choice

but to issue a second request to give it more time to address these questions and concerns. The “pull and trigger” gives the government this extra time by restarting the clock of the initial review period.

There is one potential pitfall associated with the use of this regulatory device. The government may be unable to complete its pre-merger review within the additional 30 days the “pull and trigger” affords. In that event, the parties may end up back where they started—or worse.

The problem is that the “pull and trigger” can be used only once. So, if the government needs additional time beyond the renewed 30-day review period, the parties must pull their HSR filings a second time and submit entirely new filings. This includes the payment by the acquiring entity of a new filing fee, which can be as much as \$280,000.⁷ Alternatively, the government will issue a second request—30 days later than it would have otherwise issued it had the “pull and trigger” not been used.

In either case, the parties run the risk of spending additional funds or time without getting any closer to securing clearance. Indeed, a party that has pulled its filing and triggered a refiling more than once may find that it could have secured clearance more quickly if the government had issued a second request during the initial waiting period of the original filing.⁸

However, in light of the Justice Department’s recently announced merger review process initiative,⁹ this potential downside has been significantly reduced.

Under this initiative, which the department announced this past October, the government hopes to be more efficient in rooting out those transactions that do not warrant extended pre-merger re-

view. In this regard, the initiative provides for regulators to be more aggressive during the initial 30-day waiting period in their efforts to obtain and digest the information they need to clear the deal, or narrow the issues with which they have outstanding concerns.¹⁰

It remains to be seen what, if any, impact this new initiative will have on the rigor of pre-merger antitrust enforcement. But, at the very least, the government has sent a strong signal that it is willing to work with merging parties to facilitate a more efficient and effective pre-merger review. The “pull and trigger” may be the perfect vehicle through which parties can cash in on the government’s reinvigorated goal of greater cooperation and expedience in the HSR review process.

Notes

¹ 15 U.S.C. § 18a (as amended).

² Technically, the parties may close a deal without government clearance if the applicable HSR waiting period has expired. However, the only instance in which the expiration of the waiting period and government clearance does not coincide is in the case of an actual or threatened lawsuit by the government to block the deal.

³ For cash tender offers, the initial and second request waiting periods are only 15 and 10 days, respectively.

⁴ This disruption in business can be particularly severe for the acquired entity, which is typically prohibited under the merger agreement from engaging in any conduct that would materially change its business.

⁵ According to the FTC/DOJ Annual HSR Report to Congress, for the fiscal year 2000. The FTC and DOJ issued 43 and 55 second requests, respectively. The FTC ultimately challenged 32 transactions leading to 18 consent orders, 9 abandoned transactions, and 5 preliminary injunction proceedings. The DOJ ultimately challenged 48 transactions leading to 18 consent decrees, and 29 abandoned or restructured transactions.

⁶ To avoid potential complications and confusion with the refiling, it is advisable to withdraw and refile at the same time.

⁷ Under the recently amended HSR rules, the filing fee has been increased from \$45,000 for all transactions to the following schedule of fees depending on the dollar value of the deal: \$45,000 for deals valued between \$50 million and \$100 million; \$125,000 for deals valued between \$100 million and \$500 million; and \$280,000 for deals valued at \$500 million or more. These fees will be adjusted beginning in 2005 for changes in the gross national product.

⁸ This scenario assumes a rather narrow second request with which the parties could substantially comply within a month or so.

⁹ A copy of the initiative can be found at the DOJ Web site, <http://www.usdoj.gov/atr>.

¹⁰ The initiative specifically calls for government regulators to take the following actions as soon as possible during the initial 30-day review period: (i) request from the parties preliminary information such as a description of all overlap and other potentially relevant products, product and marketing brochures, business plans, market studies, strategic plans, sales data, information on market shares and competition, and a list of competitors, suppliers, and customers; (ii) meet with the parties to discuss the transaction and any significant concerns or questions about it; (iii) interview the parties, and (iv) interview and solicit limited submissions from customers, competitors, and complainants. See pages 2-3 of initiative.

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