

Tips on Withdrawing and Refiling an HSR Premerger Notification Filing

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On August 9, 2013, the FTC issued a final rule amending the premerger notification rules, 16 C.F.R. Parts 801, 802, and 803, to establish procedures for the withdrawal and refiling of an HSR premerger notification filing. The new rule, 16 C.F.R. 803.12, formalizes the long-standing position of the FTC's Premerger Notification Office (PNO) on this issue.

Section 803.12 contains three parts:

- **Section 803.12(a)** permits an acquiring person, or in the case of non-801.30 transactions, an acquired person, to voluntarily withdraw its notification at any time.
- **Section 803.12(b)** provides for the automatic withdrawal of an HSR filing if any SEC filing is made announcing the expiration, termination, or withdrawal of a tender offer, or the termination of an agreement or letter of intent.
- **Section 803.12(c)** permits filings that are withdrawn by the acquiring person under (a) or (b) to be refiled without incurring a new filing fee, if the filing was withdrawn prior to the expiration or early termination of the waiting period and prior to the issuance of a Second Request.

When using the withdraw and refile procedure under Section 803.12(c), review the requirements and examples found in the rule and keep the following in mind:

- Refiling under Section 803.12(c) is only available to the acquiring person. If the acquired person withdraws in a non-801.30 transaction, refiling is not available under the rules.
- When the acquiring person withdraws and refiles, the acquired person does not need to do anything.
- Refiling under Section 803.12(c) is only available where the filing was withdrawn **before** the waiting period expired or early termination was granted **and** before the issuance of a Second Request.
- The acquiring person must notify the PNO and the Premerger Unit of DOJ's Antitrust Division ("the agencies") in writing of its withdrawal under either Section 803.12(a) or (b) and its intention to refile under Section 803.12(c), even if notice has been given to one of the FTC's or DOJ's litigation shops.
- The notice letter must specify the effective date of the withdrawal and the date, within two business days, when refiling is expected. (This notice is also required in the case of a withdrawal with no intent to refile and must specify the effective date of the withdrawal).
- Refiling without incurring a new filing fee is only available one time, and only if the proposed acquisition does not change in any material way.
- The refiled notification must be received within two business days after withdrawal and include:
 - A new certification
 - A new affidavit
 - Any updates to Item 4 and new attachments – if there is nothing new to submit, only a new certification and affidavit are required