M&A ONCE/RHHBY: Roche, Spark Therapeutics' Third HSR Pull and Refile Raises Potential Timing, Substantive Issues

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Takeaways

- Absent any clear indication from Roche and Spark Therapeutics, there are numerous possibilities relating to the companies' unusual decision to pull and refile HSR paperwork a third time, according to antitrust attorneys with experience handling pharmaceutical transactions.
- Theories about the parties' motivations in pulling and refiling are attributable to two overlapping categories: timing and substance. On the timing side, it seems likely the companies are aiming to close their deal quickly.
- The more meaningful questions for Roche and Spark involve not just timing, but also the substance of their transaction and the parties' willingness to make divestitures and consummate the transaction.
- As Reorg M&A previously reported, Roche's second pull and refile of its HSR premerger notification could be related to the FTC's review of Spark's hemophilia A products. Under the terms of the merger agreement, Roche is not required to agree to the divestiture of Spark's leading hemophilia A product candidates, or its own Hemlibra product, were the FTC to seek such actions.
- Roche has stated that the companies expect the transaction to be completed in the first half of this year.

Absent any clear indication from Roche and Spark Therapeutics, there are numerous possibilities relating to the companies' unusual decision to pull and refile HSR paperwork a third time, according to antitrust attorneys with experience handling pharmaceutical transactions.

Perhaps the most important unknown is whether the parties are dedicated to consummating the transaction, or alternatively if either party would seek to exit the deal in the face of regulatory scrutiny at the FTC. The merging parties have made limited disclosures about the FTC process, and neither company responded to requests for comment.

Theories about the parties' motivations in pulling and refiling are attributable to two overlapping categories: timing and substance. On the timing side, it seems likely the companies are aiming to close their deal quickly. Although they have incurred fees for both the second and third pull and refiles, these fees are "peanuts" in comparison to the cost of a second request, said Jay Levine, co-chair of the antitrust and consumer protection group at the law firm Porter Wright Morris & Arthur. Current FTC guidance allows for one pull and refile without having to pay a new filing fee. The fee for any additional pull and refile is $280,000.

According to a pharma antitrust attorney, the decision to pull and refile a third time is "very reasonable" in that it may reflect a common view between the FTC and the parties that a second request is avoidable. While the agency likely has significant concerns, the FTC may have signaled that it has not yet decided whether a second request is needed. The additional time from pulling and refiling allows for the negotiation of a remedy, this attorney said.

It is possible, according to the same attorney, that the companies faced initial delays at the FTC because the agency may have been prioritizing other matters after the U.S. government shutdown, which ended Jan. 25. Although Roche and Spark announced their transaction on Feb. 25, the FTC likely had a period of at least several weeks in February during which the agency needed to address matters that were essentially on hold during the shutdown, the attorney said.

A benefit of pulling and refiling, according to an antitrust attorney who specializes in government investigations, is that it keeps the FTC continuously engaged in reviewing the transaction. An initial complication could have been that the parties had some incompleteness in their HSR filing. However, that issue likely would have been addressed in the first pull and refile.

While unlikely, it is possible that the second and third pull and refiles are related to a deliberate effort by the parties to create small delays, this attorney said. For instance, Roche and Spark may be able to leverage useful information - a new study or FDA findings related to drug development, for instance - that was not available to them at the beginning of the FTC review, the attorney said.

Although the decision to pull and refile is frequently connected to a clearance battle between the FTC and DOJ, that is almost certainly not the case with this transaction. The FTC has virtually exclusive federal jurisdiction over pharma mergers, and the agency has a long history of allowing pharma deals to proceed with or without divestiture. Other than the industry deals which faced regulatory scrutiny during the Obama Administration because of tax inversion issues and Treasury Department guidelines, pharma transactions are a relatively clear-cut regulatory proposition. A recent exception was Akorn/Fresenius, in which Fresenius exited the transaction ostensibly because of FDA-related issues at Akorn.

Pharma transactions are "very amenable to divestiture," said the antitrust attorney who specializes in government investigations. Pharma companies typically have experience with buying and selling products, and the FTC has a defined process both for identifying overlaps and vetting divestiture buyers. This straightforward approach contrasts with other areas of healthcare such as hospital deals, which are frequently challenged by the FTC in part because of the difficulty in making divestitures for those transactions, this attorney said.

The more meaningful questions for Roche and Spark involve not just timing, but also the substance of their transaction and the parties' willingness to make divestitures and consummate the transaction. One question, according to Levine, is whether the pull and refiles have also involved any deal restructuring. It is possible that relatively minor changes to the transaction would not need to be disclosed to the SEC.

As Reorg M&A previously reported, Roche's second pull and refile of its HSR premerger notification could be related to the FTC's review of Spark's hemophilia A products. Under the terms of the merger agreement, Roche is not required to agree to the divestiture of Spark's leading hemophilia A product candidates, or its own Hemlibra product, were the FTC to seek such actions.

According to the antitrust attorney who specializes in government investigations, it is not unusual for a buyer to specify in the merger agreement that it would not need to make divestitures in a specific area. Although such a specification puts the buyer in the driver's seat for the transaction, it is possible that Roche's clear reluctance to divest its Hemlibra product had the unintended effect of drawing the FTC's attention to that potential overlap, the attorney said. However, even when a buyer prefers not to make certain divestitures, that does not mean the buyer would be unwilling to do so if required for regulatory approval, the attorney said.

In terms of termination rights, Roche and Spark have customary limited termination rights, including the right to terminate for (1) mutual agreement, (2) the Dec. 31 termination date (subject to either party's right to extend to Jan. 31, 2020), (3) any final non-appealable regulatory restraint, or (4) for Merger Sub's failure to accept Spark common stock pursuant to the tender offer due to any of the offer conditions having failed to be satisfied.

Roche can also terminate if (1) the Spark board effects a change in recommendation, (2) Spark breaches the merger agreement, or (3) Spark breaches the non-solicitation provision. Spark can terminate (1) to enter into a superior proposal, (2) if Roche breaches the merger agreement, or (3) if Merger Sub fails to accept for payment the shares of Spark common stock when required to do so.

Spark will be obligated to pay Roche a $144 million termination fee if Roche terminates the agreement for (a) the Spark board effecting a change in recommendation or (b) Spark's breach of the non-solicitation provision.

Roche has stated that the companies continue to expect the transaction to be completed in the first half of this year.

Reorg M&A's previous coverage of this transaction can be found **HERE**.

--Ryan Lynch and Patrick Flavin
