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**M&A** ACHN/ALXN: Pre-HSR Strategy May Help Companies Narrow or Avoid Second Request

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**Takeaways**

- Alexion Pharmaceuticals and Achillion Pharmaceuticals have likely engaged in pre-HSR conversations with the FTC. These discussions would be aimed at avoiding a second request, or at least narrowing the scope of a second request.
- When the companies announced their transaction in October 2019, they also disclosed plans to delay filing HSR paperwork until the current month of January.
- A spokesperson for Alexion declined to say whether the companies have filed their merger with the FTC. “We believe we’re still on track for the transaction to close in the first half of 2020 but haven’t provided details on specific activities beyond that,” the spokesperson said.
- Although a three-month delay between merger announcement and HSR filing is unusual, pre-HSR discussions allow the government to begin making phone calls and investigating the transaction. “If you know what the concerns are, [the parties] can start working on them before there is a clock,” said Jay Levine, co-chair of the antitrust and consumer protection practice group at Porter Wright.

The planned delay by Alexion Pharmaceuticals and Achillion Pharmaceuticals in making their HSR filings is likely aimed at creating a window for voluntary FTC discussions that will help the companies avoid a second request, according to antitrust attorneys.

At the time of their deal announcement in October 2019, Alexion and Achillion said they intended to file HSR paperwork sometime in the current month of January. They also said the deal was projected to close in the first half of this year.

A spokesperson for Alexion declined to say whether the companies have already filed their transaction with the FTC. “We believe we’re still on track for the transaction to close in the first half of 2020 but haven’t provided details on specific activities beyond that,” the spokesperson said. Achillion did not respond to requests for comment.

An attorney specializing in M&A said that the companies’ projection to close by the end of June likely indicates they do not expect a second request. An extension of the FTC review process could result in back-and-forths that would push the closing date into the second half of this year, the attorney said.

With respect to the expected delay in HSR filings, the attorney speculated that the Achillion/Alexion transaction may have come together quickly. Typically, lawyers working on a merger can begin putting together HSR paperwork while the parties are still in pre-deal discussions, this attorney said. A rush for the companies to merge may have created a lag in preparing for HSR.

However, this scenario likely would have created a delay of a few weeks at most, according to Jay Levine, co-chair of the antitrust and consumer protection practice group at Porter Wright.

More likely, the companies are using the planned delay to engage in conversations with the FTC, in the hopes of either avoiding a second request or narrowing the scope of the second request, Levine said. Although a three-month delay between merger announcement and HSR filing is unusual, there are times when it makes sense to have the government open an investigation pre-HSR, he said.

“If you know what the concerns are, [the parties] can start working on them before there is a clock,” said Levine. For example, the agency can begin making phone calls to gather information about the transaction’s effects.

In some respects, the planned HSR delay by Alexion and Achillion may be similar to last year's failed attempts by Roche and Spark Therapeutics to delay an FTC second request. In that instance, Spark/Roche pulled and refiled their HSR paperwork several times. At the time, outside attorneys said it was seen as potentially problematic for the companies that they may have been providing information on only a voluntary basis.

Although this objection might also apply to Achillion/Alexion, here the companies could be coordinating with the government prior to filing their merger. Also, the current transaction may be considered less complex from an antitrust perspective than Spark/Roche, which raised novel questions related to gene therapy.

Even in the event of an extended FTC review for Alexion and Achillion, a narrow second request would not necessarily prevent the companies from closing their transaction in the first half of this year, Levine predicted.

-- Ryan Lynch

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