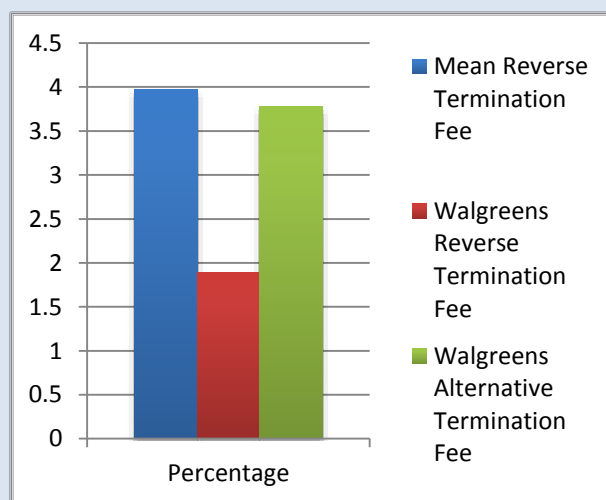




## **Come Hell or High Water: Approving the Walgreens/Rite Aid Merger**

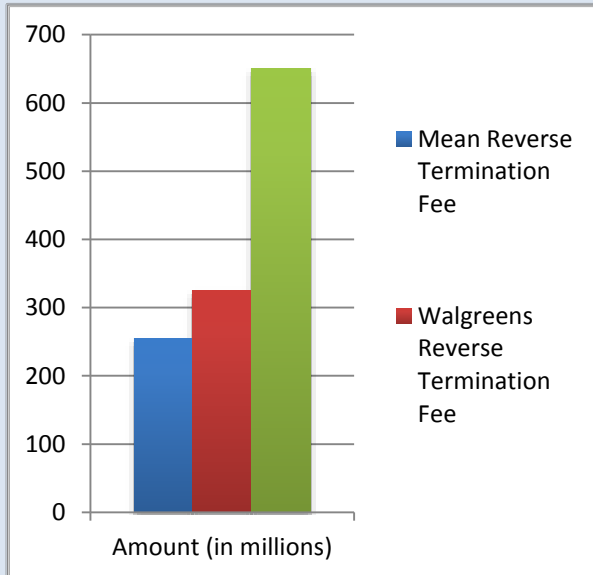
Last fall, Walgreens Boots Alliance and Rite Aid announced that they had entered into a merger agreement whereby Walgreens was to acquire all of the outstanding common stock of Rite Aid for \$9.00 per share in cash, which represents a total enterprise value of \$17.2 billion. The merger is subject to antitrust approval under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which is likely to come only with heavy scrutiny considering that Walgreens and Rite Aid are the No. 1 and 3 retail pharmacy chains in the U.S. Given that Walgreens has agreed to the highest standard in terms of best efforts to ensure success including a divestiture of assets, it will be interesting to see whether the merger be completed.

The merger agreement requires the parties to use their reasonable best efforts to take all actions necessary to consummate the merger and obtain governmental approvals, including antitrust approval. The reasonable best efforts standard is the predominant standard used, 83%, of the public merger transactions filed in 2015 and 2016 with a transaction value of \$200 million or more. Not only does the merger require a reasonable best efforts standard to obtain governmental approvals, it also contains a hell or high water provision. The hell or high water provision requires the parties to take extraordinary measures to resolve objections that might be raised by government regulators. Of the 218 public merger transactions that required a reasonable best efforts standard to obtain governmental approvals, 131 (or 60%) of them also contained a hell or high water provision.



Specifically, in the Walgreens/Rite Aid merger, in the event a proceeding is commenced or threatened by a government regulator, the parties are required to use their reasonable best efforts to contest, resist, oppose and resolve the proceeding and have any proceeding lifted or vacated. In addition to these general types of constraints, they are required to sell or divest their assets, if necessary, to allow the merger to be approved by regulators. There are, however, limitations on the divestiture requirement. Neither party is required to divest its assets if the divestiture results in more than 1,000 total retail stores having to be sold. In addition, Walgreens is only required to take any divestiture actions if those actions would not result in an impact exceeding \$100 million in the aggregate as a result of the divestiture of non-earnings generating assets, properties or businesses

(in each case with such impact calculated as the fair market value of such assets, properties or businesses so divested), or the divestiture of earnings generating assets, properties or businesses, or any other adverse impact on the assets, businesses, liabilities or financial condition of the parties (in each case calculated by multiplying any reduction of adjusted EBITDA on an annual basis resulting from the divestitures by twelve). Limitations on hell or high water provisions are found in 90% of the transactions where a hell or high water provision is present.



The Walgreens/Rite Aid merger agreement contains additional limitations and constraints that are controlled by Walgreens, such as Walgreens being able to determine which stores of either party are to be sold and Walgreen’s approval of any divestiture action by Rite Aid. Moreover, in the event that the merger agreement is terminated for failure to obtain required regulatory approvals, Walgreens is required to pay Rite Aid a \$325 million termination fee, which will be increased to \$650 million if Walgreens enters into, consummates or announces certain acquisitions within eight to twelve months of the date of the merger agreement.

The Walgreens/Rite Aid merger includes intricate regulatory provisions that are likely to be analyzed and implemented as the government regulators try to determine how the merger can be approved in a manner that is beneficial to consumers without giving undue power to Walgreens in the retail pharmacy marketplace.

Citation: Matterhorn Transactions, Inc. Research Report, “Approving the Walgreens/Rite Aid Merger: Come Hell or High Water” (June 2016), available at <http://www.matterhorndata.com/publications/>.

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