

AMENDMENTS AND PROPOSED RULES TO HART-SCOTT-RODINO ACT

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As we previously explained, certain amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"), will become effective on February 1, 2001.

The most significant amendments to the HSR Act are:

1. the threshold for HSR notification will be raised from \$15 million to \$50 million regardless of the percentage of voting securities or assets being acquired (i.e., the 15% size of transaction threshold will be eliminated);
2. the size of the person requirement (i.e., the requirement that one side of the transaction has sales or assets of \$10 million or more and the other side has sales or assets of \$100 million or more) will be eliminated for transactions valued in excess of \$200 million. As a result, transactions that were not previously reportable under the HSR Act because, by way of example, one side of the transaction was a newly formed entity and did not have sales or assets (excluding the cash held to finance the transaction) in excess of \$10 million will no longer apply and HSR notification will now be required in those cases;
3. the \$45,000 filing fee will remain for transactions valued at less than \$100 million; for deals valued at \$100 million or more but less than \$500 million, the filing fee will increase to \$125,000; for transactions valued at \$500 million or more, the filing fee will increase to \$280,000;
4. the length of the waiting period following substantial compliance with a Request for Additional Information (a "Second Request") will be 30 days instead of the present 20 days (the 10 day period for cash tenders and bankruptcy transactions is not changed) and the end of any time period that would be a Saturday, Sunday or legal public holiday will be the next regular business day; and
5. the FTC and the DOJ adopted official review procedures to expedite the resolution of disputes regarding Second Requests when the filing parties believe that the requested information is unduly burdensome and not reasonably necessary for the federal antitrust enforcement agencies to decide whether to challenge a transaction.

In addition to these new amendments to the HSR Act, the Federal Trade Commission ("FTC") has issued interim rules to comply with the new amendments and has also published certain proposed rules. The interim rules will become effective on February 1, 2001; the proposed rules are subject to public comment and will not become effective until at least after the comment period expires on March 19, 2001.

A. INTERIM RULES

1. *New Notification Thresholds*

One of the more significant interim rules deals with the new notification thresholds that specify the levels of ownership of assets or voting securities that cannot be attained or exceeded without making a filing under the HSR Act. The former notification thresholds were \$15 million; 15% of the voting securities; 25% of the voting securities; and 50% of the voting securities. The notification thresholds will be changed to \$50 million; \$100 million; \$500 million; 25% of the voting securities of an issuer if valued at greater than \$1 billion; and 50% of the voting securities. Similar to the former rules, acquisitions between these levels not meeting or exceeding the next threshold for a period of five years after expiration or termination of the HSR waiting period for the transaction that initially crossed the prior threshold are exempt from filing under the HSR Act.

2. *Transitional Rule as to Former Notification Thresholds*

The FTC also issued a transitional rule in order to address filings made under the former notification thresholds. Acquiring persons who filed under the former notification thresholds and who have met or crossed the threshold for which they have filed within a year of the waiting period's expiration, but whose five-year period for making additional acquisitions has not expired as of February 1, 2001, will have until February 1, 2002 or the end of the original five-year period for making additional acquisitions, whichever comes first, to acquire up to what was the next reporting threshold at the time they filed, and they may do so without making another filing under the HSR Act, even though they might cross one of the "new" notification thresholds.

3. *Changes to Formation of Joint Venture or Other Corporation*

The FTC has also eliminated the size of person threshold for acquisitions of voting securities made in connection with the formation of a joint venture or other corporation (i.e., the requirement that the acquiring person has sales or assets of \$100 million or more, the joint venture or other corporation has sales or assets of \$10 million or more and at least one other acquiring person has sales or assets of \$10 million or more or the acquiring person has sales or assets of \$10 million or more, the joint venture or other corporation has sales or assets of \$100 million or more and at least one other acquiring person has sales or assets of \$10 million or more) if the value of the voting securities to be acquired is valued at greater than \$200 million.

4. *Institutional Investor Exemption*

The FTC has modified the former rule exempting acquisitions of voting securities by certain institutional investors in order to be consistent with the increase in the size of transaction threshold to \$50 million. The modified rule now exempts acquisitions of voting securities by certain institutional investors that are valued in excess of \$50 million but represent 15% or less of the total issued and outstanding voting securities of a company if made in the ordinary course of business and solely for the purpose of investment.

B. PROPOSED RULES

1. *Foreign Acquisitions*

The FTC has also proposed certain revisions to the existing rules. The most significant revision to the current rules concerns the exemptions for acquisitions of foreign assets and voting securities of foreign issuers. The major changes to the existing rules consist of (1) raising both the former \$15 million and \$25 million thresholds that trigger filing obligations for foreign transactions to \$50 million and (2) extending reportability to certain acquisitions of foreign assets by foreign persons.

Under the proposed rules, the acquisition of foreign assets would be exempt from the HSR Act's filing requirements unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the United States exceeding \$50 million during the acquired person's most recent fiscal year, combined with such sales to date since the end of the most recent fiscal year.

The acquisition of voting securities of a foreign issuer by a U.S. person would be exempt from the HSR Act's filing requirements unless the foreign issuer (including all entities controlled by the issuer) either: (1) holds assets located in the United States having an aggregate total value (i.e., fair market value as opposed to book value) exceeding \$50 million or (2) made aggregate sales in or into the United States exceeding \$50 million during the issuer's most recent fiscal year, combined with such sales to date since the end of the most recent fiscal year.

The acquisition of voting securities of a foreign issuer by a foreign person would be exempt from the HSR Act's filing requirements unless the acquisition will confer control (i.e., holding 50% or more of the issued and outstanding voting securities of the issuer) of the foreign issuer and the foreign issuer (including all entities controlled by the issuer) either: (1) holds assets located in the United States having an aggregate total value (i.e., fair market value as opposed to book value) exceeding \$50 million or (2) made aggregate sales in or into the United States exceeding \$50 million during the issuer's most recent fiscal year, combined with such sales to date since the end of the most recent fiscal year.

In addition, where the thresholds described above are exceeded for foreign assets being acquired and/or the foreign issuer whose securities are being acquired, the acquisition

nevertheless would be exempt from the HSR Act's filing requirements if: (1) both the acquiring and acquired persons are foreign; (2) the aggregate sales of the acquiring and acquired persons in or into the United States are less than \$110 million in their respective most recent fiscal years, combined with such sales to date since the end of those fiscal years; (3) the aggregate total assets of the acquiring and acquired persons located in the United States are less than \$110 million; and (4) the size of the transaction is not valued in excess of \$200 million.

2. *"Mixed" Transactions*

The FTC is also proposing to revise the rules regarding "mixed" transactions. A mixed transaction is an acquisition of assets or voting securities that has some portion that is exempt from HSR filing because they are subject to regulatory agency premerger competitive review and approval (e.g., The Gramm-Leach-Bliley Act exempts certain mergers and acquisitions involving banking institutions and thrifts that receive advance antitrust review by federal bank regulatory agencies) and another portion that does not require such review. The proposed rule provides that the portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is reportable under the HSR Act as if it were a separate transaction, if the HSR Act's thresholds are met and there is no other applicable exemption.

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The interim rules and the proposed rules are both currently open for public comment until March 19, 2001. It is expected that additional changes will be made to both the interim and proposed rules and we will provide you with those changes as soon as they are announced. If you have any questions, please call Joseph Tringali (212-455-3840; j_tringali@stblaw.com) or Jack D'Angelo (212-455-2722; j_dangelo1@stblaw.com) of the Antitrust Practice Group.

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