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Counsel's Guide to HSR

What You Should Know About the Hart-Scott-Rodino Act

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About Our Practice

Mayer Brown's Antitrust & Competition practice offers up-to-the minute guidance concerning merger control, cartel investigations, distribution and licensing issues, alleged abusive conduct by dominant firms and state aid. Our group, which includes former US and European enforcement agency officials, has members located in our offices in the Americas, Asia and Europe as well as correspondent and other relationships with antitrust counsel throughout the world that enable us to provide truly global coverage. Our global resources and experience enable us to represent clients in high-stakes litigation, including litigation before the US Supreme Court and the European Courts of Justice; and represent clients in criminal and civil investigations. Further, our antitrust lawyers in Hong Kong and China are skilled at navigating the range of competition laws in the region, and offer clients the benefit of extensive China antitrust filing experience and strong relationships with key competition agencies. Our global capacity also allows us to manage multi-jurisdictional merger filings and advise on the applicability of national merger control regulations and to secure merger control clearances throughout the world.

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For any attorney with a client contemplating a merger or acquisition, familiarity with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a (the "HSR Act" or the "Act"), is essential. Failure to understand and comply with the requirements of the HSR Act can result in delays in consummating a transaction, make eventual compliance more burdensome and, in the case of noncompliance, result in rescission of the transaction and significant civil fines. The purpose of this brochure is to provide a brief overview of the requirements of the HSR Act and the implementing regulations that have been promulgated by the Federal Trade Commission ("FTC"). *See* 16 C.F.R. §801 *et seq*. While by no means a comprehensive review, this brochure should help inform counsel of important deadlines in the HSR process and the scope of his or her client's compliance burden.

What is the HSR act?

The HSR Act requires parties to a merger or acquisition that meets certain dollar thresholds to file premerger notification reports with the Federal Trade Commission and the Department of Justice, and to wait statutorily prescribed periods before consummating the transaction. The HSR Act is designed to give the federal agencies time to conduct antitrust reviews of the proposed acquisition and, if deemed appropriate, to challenge the transaction under Section 7 of the Clayton Act, 15 U.S.C. §18, before the transaction is consummated. The fact that a transaction raises no possible antitrust issue does not, in and of itself, exempt the transaction from the Act. Any transaction meeting the Act's threshold requirements triggers a filing unless one of several specific exemptions applies.

Which transactions require HSR filings?

Filing Thresholds. In general, there are two thresholds that must be satisfied before a transaction is reportable under the HSR Act—the "size of the persons" test and the "size of the transaction" test.[1] The "size of the persons" test refers to the size of the parties to the transaction. Generally, the test is satisfied where there is, on one side of the transaction, a "person" with $126.2 million or more in total assets or annual net sales and, on the other side of the transaction, a "person" with $12.6 million or more in total assets or annual net sales. *See* 15 U.S.C. §18a(a)(2). Where the acquired person is not engaged in manufacturing, the threshold applicable to that person is $12.6 million in total assets or $126.2 million in annual net sales. *See id.*

The "person" for purposes of this test is the ultimate parent of the entity making the acquisition or the entity whose assets or voting securities are being acquired, and includes any other entities controlled, directly or indirectly, by that ultimate parent. For purposes of the Act, "control" is defined as, (i) with respect to a corporation or other entity that issues voting securities, holding 50 percent or more of the outstanding voting

securities, or having a contractual right to designate 50 percent or more of the board of directors, or (ii) with respect to a partnership, limited liability company ("LLC"), or other noncorporate entity, having the right to 50 percent or more of its profits or assets upon dissolution. *See* 16 C.F.R. §801.1(b).

Annual net sales and total assets of a "person" are those appearing on the ultimate parent's last regularly prepared, consolidated annual statement of income and expense, and on its last regularly prepared, consolidated balance sheet. *See* 16 C.F.R. §801.11.

The "size of the transaction" test refers to the value of voting securities or assets held as a result of the acquisition. A merger or acquisition is reportable only if the buyer will, as a result of the transaction, hold assets or voting securities of the seller, or any combination of the seller's assets and voting securities, valued at more than $63.1 million. *See* 15 U.S.C. §18a(a)(2). Transactions valued at more than $252.3 million are reportable regardless of the size of the persons.

Assets must be valued at the higher of the acquisition price or fair market value. *See* 16 C.F.R. §801.10. In an asset acquisition, the acquisition price includes the value of any consideration paid for the assets plus the value of any assumed liabilities. *See id.* at §801.10(c)(2).

The fair market value must be determined by the board of directors of the acquiring person's ultimate parent, or the board's designee, acting in good faith. *See id.* at §801.10(c)(3).

The rules for valuing voting securities differ depending on whether the securities are publicly traded. If the securities are traded on a national securities exchange or are authorized to be quoted on an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission (the "SEC"), the voting securities are valued at the higher of the market price or the acquisition price. *See id.* at §801.10(a)(1). If the securities are not traded on such exchanges (*e.g.,* for a private, closely held corporation), the voting

securities are valued at the acquisition price, if determined, or the fair market value. *See id.* at §801.10(a)(2).

Note that acquisitions of "nonvoting" securities (*i.e.,* securities that do not confer the right to vote for the board of directors or similar body) are not covered by the HSR Act. *See* 15 U.S.C. § 18a(c)(2).

Secondary Acquisitions. Whenever, as a result of an acquisition, an acquiring person obtains control of a corporate or noncorporate entity that holds voting securities of another issuer that the entity does not control, the indirect acquisition of the other issuer's voting securities is considered a "secondary acquisition" that is separately reportable if it independently meets the Act's jurisdictional thresholds. *See* 15 U.S.C. §801.4. Note that secondary acquisitions of noncontrolling interests in noncorporate entities (*e.g.,* an indirect acquisition of a 30 percent interest in a partnership as a result of acquiring control of the corporation or unincorporated entity that holds that interest) are not reportable, because acquisitions of interests in noncorporate entities are reportable only if they confer control.

Which acquisitions are exempt from the HSR act?

The HSR Act and the regulations implementing the statute provide that many acquisitions meeting the "size of the persons" and "size of the transaction" tests are nonetheless exempt from the Act's premerger filing and waiting period requirements. Some of the more frequently invoked exemptions from the HSR Act are described below.

The "Investment Purposes Only" Exemption. The HSR Act provides that any person may acquire up to 10 percent of an issuer's voting securities (regardless of the value of those securities) without making a premerger filing if the acquisition is "solely for the purpose of investment." 15 U.S.C. §18a(c)(9); *see also* 16 C.F.R. §802.9. The exact scope of the "investment purposes only" exemption is unclear, but it is not available to a party that seeks to acquire control of the issuer,

intends to influence the basic management decisions of the issuer (*e.g.*, by holding a management position with the issuer) or intends to obtain a seat on the issuer's board of directors (including by exercising a right to nominate or appoint a director). An acquiring party may intend to vote its shares and still have an "investment only" intent. A party may acquire stock subject to the investment only exemption and then change its investment intent. No filing would be required for previously acquired stock. A filing would be required before any further acquisitions. *See* 16 C.F.R. §802.9, ex. 3. This exemption also is not available if the acquiring person is a competitor of the issuer. *See* FTC Informal Staff Opinion Letter #9201002 (January 10, 1992).

The "Ordinary Course of Business" Exemption. Section 18a(c)(1) of the HSR Act exempts acquisitions of goods or realty transferred in the ordinary course of business. *See* 15 U.S.C. §18a(c)(1).

Upon this statutory basis, Rule 802.1 exempts acquisitions of: (i) new goods; (ii) inventory and supplies held for consumption, resale or lease; (iii) used durable goods held solely for resale or lease; (iv) used durable goods, where those goods have been or will be replaced by the seller within six months of the transaction; or (v) durable goods used by the seller solely to provide management and administrative support services for its business operations, where the seller has contracted in good faith with another person to obtain services substantially similar to those provided by the goods being sold. *See* 16 C.F.R. §802.1.

Rule 802.1 specifically excludes from the exemption acquisitions of goods as part of an acquisition of all or substantially all the assets of an "operating unit." *See* 16 C.F.R. §802.1(a). An "operating unit" is defined as "a business undertaking in a particular location or for particular products or services." Id. An "operating unit" may be a single store or production facility and need not be a separate legal entity. *See id.*

Property Exemptions

Non-income Producing Property. Pursuant to Section 18a(c)(1) of the HSR Act, Rule 802.2 exempts the acquisition of several types of real property described below. *See* 16 C.F.R. §802.2. Likewise, Rule 802.5 provides a broad exemption for acquisitions of investment rental property. *See id.* at §802.5. Note that, with respect to each of the exemptions contained in Rules 802.2 and 802.5, the acquisition of any assets not covered by the particular exemption remains subject to the HSR Act as if those assets were being acquired separately and will be reportable if valued at more than $63.1 million, unless another exemption applies.

New Facilities. The acquisition of new facilities is exempt from the reporting requirements of the HSR Act. *See* 16 C.F.R. §802.2(a). A new facility is one that has produced no income and was either constructed by the seller for resale or held by the seller solely for resale. *See id.* Also exempt are acquisitions from lessors by lessees that have had sole and continuous use of a facility since it was new. *See id.* at §802.2(b).

Unproductive Real Property. Likewise, acquisitions of unproductive real property are exempt from the HSR Act. *See* 16 C.F.R. §802.2(c). In general, unproductive real property is real property, including natural resources and improvements (but excluding equipment), that has not generated total revenues in excess of $5,000,000 in the previous 36 months. *See id.* at §802.2(c)(1). This does not include (i) facilities that have not yet begun operation; (ii) facilities that were in operation any time in the previous 12 months; or (iii) real property that is adjacent to or used in connection with productive real property that is included in the acquisition. *See id.* at §802.2(c)(2).

Office and Residential Property. Acquisitions of office and residential property are exempt. *See* 16 C.F.R. §802.2(d). To qualify, the property must be used "primarily" for office or residential purposes. *See id.* at §802.2(d)(2). Although the Rule does not define "primarily," the comments accompanying the Rule indicate that the FTC will interpret this term to mean that at least 75 percent of the space in the property being sold is used for offices and/or residences. *See* 61 Federal Register ("Fed. Reg.") 13666, 13676 (1996). In making this calculation, the total space being measured should consist of real property, the acquisition of which is not exempted by any other provision of the HSR Act or Rules. For example, any portion of the building consisting of retail rental property, the acquisition of which is exempt under Rule 802.2(f), should not be included. Assets incidental to the ownership of office and residential property (*e.g.,* cash, prepaid taxes or insurance, rental receivables, and common areas) also are covered by the exemption. *See* 16 C.F.R. §802.2(d)(2). Note that, if the acquisition includes a business that is conducted on the property, the value of the portion of the property used by that business is not exempt. *See id.* at §802.2(d)(3).

Hotels and Motels. Acquisitions of hotels and motels, including improvements such as golf, health, restaurant, and parking facilities, are exempt. *See* 16 C.F.R. §802.2(e). This exemption does not cover the acquisition of a ski facility, however. *See id*; *see also* 61 Fed. Reg. at 13676. This exemption also covers acquisitions of assets incidental to the ownership and operation of a hotel or motel, including management contracts and licenses to use trademarks. *See id.* Comments accompanying the Rule, however, state that acquisition of a hotel management business or the trademark itself, such as in the acquisition of one hotel chain by another, would not fall within this exemption. *See* 61 Fed. Reg. at 13677. Those assets would have to be separately valued and aggregated with any other nonexempt assets in order to determine whether the $63.1 million threshold has been exceeded and a filing is required. *See id.* The FTC's Premerger Notification Office ("PMNO") has taken the position, however, that

acquisition of a management company used solely to manage the property being acquired is included in the exemption. Finally, any hotel that includes a gambling casino is excluded from this exemption. *See* 16 C.F.R. §802.2(e)(2).

Recreational Land. Acquisitions of recreational land, including assets incidental to the ownership of such land, are exempt. *See* 16 C.F.R. §802.2(f). Such acquisitions would include the purchase of land used primarily as a golf, swimming or tennis club facility. *See id.* According to comments accompanying the Rules, and consistent with Rule 802.2(e), recreational land does not include ski facilities, multipurpose arenas, stadiums, racetracks, and amusement parks. *See* 61 Fed. Reg. at 13677.

Agricultural Property. Acquisitions of agricultural property, including assets incidental to the ownership of agricultural property, are exempt. *See* 16 C.F.R. §802.2(g). Agricultural property does not include slaughtering, processing or packing facilities, or property adjacent to or used in connection with such facilities. *See id.* at §802.2(g)(1). While "associated agricultural assets," such as inventory (*e.g.,* livestock, eggs, and crops), structures that house livestock raised on the property, fertilizer, and animal feed, were included in the exemption when it was enacted in 1996, such associated agricultural assets were removed from the exemption effective April 2002 and are now separately reportable. *See* 67 Fed. Reg. 11898 (2002).

Retail Rental Space & Warehouses. Acquisitions of retail rental space (including shopping centers) and warehouses, including assets incidental to the ownership of such properties, are exempt from the Act. *See* 16 C.F.R. §802.2(h). This exemption will not apply, however, where the acquisition includes a business that is conducted on the property. *See id.* Such acquisitions might include the acquisition of a department store located in a shopping center or a wholesale distribution business conducted in a warehouse. In such cases, the value of the portion of the property used by that business is not exempt,

though this exemption still will apply to the remaining portions of the property that qualify for the exemption (*e.g.,* other portions of the shopping center not used by the department store).

Investment Rental Properties. Acquisitions of investment rental properties (*i.e.,* real properties that will be held solely for rental or investment purposes) and assets incidental to the ownership of such properties (*e.g.,* cash, prepaid taxes and insurance, and rental receivables) are exempt. *See* 16 C.F.R. §802.5. Rentals must be to parties not controlled by the buyer, other than rental of space for the sole purpose of maintaining, managing or supervising the operation of the property. *See id.* Note that the intent of the buyer, rather than the current use of the property, controls the availability of this exemption.

REIT Exemption. While not codified in the HSR regulations, PMNO has applied Section 18(a)(c)(1) to exempt certain acquisitions by Real Estate Investment Trusts ("REITs") that are consistent with a REIT's special tax status under the Internal Revenue Code, including the acquisition by one REIT of another REIT. This exemption does not apply, however, to the acquisition of a REIT by a non-REIT, which is governed by Rules 802.2 and 802.5, as well as Rule 802.4, which is discussed below.

Carbon-Based Mineral Reserves. Acquisitions of reserves (or rights to reserves) of oil, natural gas, shale or tar sands are exempt if their value does not exceed $500,000,000. *See* 16 C.F.R. §802.3(a). Similarly, acquisitions of reserves (or rights to reserves) of coal are exempt if their value does not exceed $200,000,000. *See id.* at §802.3(b). The exemption covers associated exploration and production assets, as long as those assets are dedicated to the reserves in question. *See id.* at §802.3(a),(b). The exemption does not apply to any pipeline or pipeline system or processing facility that transfers or processes oil and gas after it passes through the meters of a producing field located within reserves being purchased, or to any pipeline or pipeline system that

receives gas directly from wells for transportation to a natural gas processing facility or other destination. *See id.* at §802.3(c).

Voting Securities or Noncorporate Interests in Entities Holding Certain Assets the Acquisition of Which is Exempt. The exemptions provided by 16 C.F.R. §§802.2, 802.3 and 802.5, discussed above, apply only to acquisitions of assets. Rule 802.4, however, also exempts acquisitions of the voting securities or noncorporate interests in any entity that holds assets, the direct acquisition of which is exempted by the Act or the Rules, including exemptions that apply to real estate, certain foreign assets, cash, acquisitions made in the ordinary course of business, and acquisitions made solely for the purpose of investment, so long as the entity does not hold more than $63.1 million in nonexempt assets. *See* C.F.R. §802.4. For purposes of this Rule, the assets of all issuers and unincorporated entities controlled by the acquired entity are included in determining if the limitation for nonexempt assets is exceeded. *See id.*

Acquisition of Stock Options, Warrants, and Convertible Voting Securities. Acquisitions of stock options, warrants and convertible voting securities are generally exempt from the filing requirements of the HSR Act. While options, warrants and convertible voting securities are defined as "voting securities" under the Act, see 16 C.F.R. §801.1(f), acquisitions of voting securities that do not confer present voting rights are exempt. *See* 16 C.F.R. §802.31. However, the exercise of an option or warrant, or the conversion of a convertible security, is considered an acquisition within the meaning of the Act and is reportable if, as a result of the conversion, the acquiring person will hold voting securities of an issuer valued at more than $63.1 million. *See* 16 C.F.R. §801.32.

Acquisitions by Securities Underwriters. Acquisitions of voting securities by a securities underwriter—in the ordinary course of the underwriter's business and in the process of underwriting—are exempt. *See* 16 C.F.R. §802.60.

Intraperson Transactions. An acquisition in which the acquiring and at least one of the acquired persons are the same by virtue of a controlling interest in voting securities or noncorporate interests is exempt. The FTC applies the exemption in the same manner to both corporate and noncorporate entities. Thus, a transfer of voting securities, assets, or noncorporate interests between two corporate or noncorporate subsidiaries in which the acquiring person has a controlling interest (50 percent or more) is exempt. The exemption also applies if at least one of the acquiring persons is the same as the acquired person. For example, if A and B each own 50 percent of corporation C, and A contributes assets to C valued in excess of the statutory threshold, A is exempt from filing because it is both an acquiring and acquired person, but B must file because it is an acquiring person but not an acquired person. *See* 16 C.F.R. §802.30.

Stock Dividends and Splits; Reorganizations. Rule 802.10 exempts acquisitions of voting securities pursuant to stock splits and pro rata stock dividends. Rule 802.10 also exempts acquisitions of interests in unincorporated entities or voting securities where an entity is being converted into a new entity if (a) no new assets will be contributed to the new entity as a result of the conversion, and (b) either (i) the transaction does not increase the acquiring person's per centum holdings in the new entity relative to its per centum holdings in the original entity, or (ii) the acquiring person controlled the original entity.

Acquisition of Noncorporate Interests in Financing Transactions. There is an exemption for acquisitions of noncorporate interests that confer control of a new or existing unincorporated entity where the acquiring person is contributing only cash for the purpose of providing financing, and the terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return. *See* 16 C.F.R. 802.65.

Acquisition of Non-U.S. Interests. A number of exemptions also are available with respect to acquisitions of foreign assets or the voting securities of foreign issuers. In general, applicability of these exemptions is determined by the extent to which the transaction has a connection to U.S. commerce. *See* 16 C.F.R. §§802.50, 802.51.

Acquisitions of Foreign Assets. A transaction in which a U.S. or non-U.S. person is acquiring assets located outside the United States is exempt if (a) there are no sales in or into the United States attributable to the assets, or (b) U.S. sales are attributable to the assets, but the acquiring person will not hold assets of the acquired person to which more than $63.1 million in U.S. sales are attributable as a result of the transaction. *See* 16 C.F.R. §802.50(a).

Where the foreign assets being acquired had more than $63.1 million in sales in the most recent fiscal year, the acquisition is nevertheless exempt if:

both the acquiring and acquired persons are foreign;

- the aggregate sales of the acquiring and acquired persons in or into the U.S. were less than $138.8 million in their respective most recent fiscal years;
- the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than $138.8 million; and
- the transaction is not valued at more than $252.3 million. *See* 16 C.F.R. §802.50(b).

Acquisitions of Voting Securities of a Foreign Issuer by a U.S. Person. A transaction in which a U.S. person is acquiring voting securities of a foreign issuer is exempt unless the issuer, including all entities it controls, (a) holds assets located in the United States having an aggregate fair market value of over $63.1 million (not including cash, government-issued securities and certain other investment assets), or (b) made aggregate sales in or into the United States of over $63.1 million in its most recent fiscal year. *See* 16 C.F.R. §802.51(a).

Acquisitions of Voting Securities of a Foreign Issuer by a Foreign Person. A transaction in which a foreign person is acquiring voting securities of a foreign issuer is exempt unless the transaction will (a) confer control of the issuer, and (b) the issuer either (i) holds assets located in the United States that have an aggregate fair market value of over $63.1 million (not including cash, government-issued securities and certain other investment assets); or (ii) made aggregate sales in or into the United States of over $63.1 million in its most recent fiscal year. *See* 16 C.F.R. §802.51(b)(1). If controlling interests in multiple foreign issuers are being acquired from the same ultimate parent, the assets located in the U.S. and sales in or into the U.S. of all the issuers must be aggregated to determine whether either $63.1 million threshold is exceeded. *See* 16 C.F.R. §802.51(b)(2).

Where the thresholds of 802.51(b)(1) are exceeded, the acquisition is nevertheless exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales of the acquiring and acquired persons in or into the U.S. were less than $138.8 million in their respective most recent fiscal years;
- the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than $138.8 million; and
- the transaction is not valued at more than $252.3 million. *See* 16 C.F.R. §802.51(c).

Finally, certain acquisitions to or from foreign governments, and certain foreign banking transactions are exempt. *See* 16 C.F.R. §§802.52 (foreign governments) and 802.53 (foreign banking).

Acquisitions by Creditors. Certain acquisitions by a creditor, including acquisition of collateral or receivables, foreclosures, loan work-outs, acquisitions upon default, and acquisitions in connection with the establishment of a lease financing, are exempt if the acquisition constitutes a bona fide credit transaction entered into in the ordinary

course of the creditor's business. *See* 16 C.F.R. §802.63. Similarly, an acquisition made by an insurer pursuant to a condition in a contract of insurance relating to fidelity, surety or casualty obligations is exempt if made in the insurer's ordinary course of business. *See id.*

Acquisitions by Institutional Investors. Acquisitions of voting securities by certain institutional investors (including, but not limited to, banks, bank holding companies, savings and loans, trust companies, insurance companies, investment companies registered with the SEC, finance companies, broker-dealers, pension trusts, and certain nonprofits) are exempt, provided a number of conditions are met, including that the acquisitions are made in the ordinary course of business, solely for the purpose of investment, will not result in the acquiring person controlling the issuer, and will result in the acquiring person holding 15 percent or less of the voting securities of the issuer. *See* 16 C.F.R. §802.64.

This exemption does not apply if the acquisition is of the voting securities of an institutional investor of the same type as any included in the acquiring person, or if an entity within the acquiring person that is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired. *See id.*

When are acquisitions by newly formed entities, formation of corporations and noncorporate entities, and acquisitions of noncorporate interests exempt?

Acquisitions by Newly Formed Entities. Under certain circumstances, an acquisition by a newly formed entity valued between $63.1 million and $252.3 million does not require premerger filings under the HSR Act because the newly formed entity does not satisfy the "size of the persons" test. As noted above, for acquisitions in this range, one party to the acquisition must be a $12.6 million "person" and one party must be a $126.2 million "person" in order for the acquisition to be

reportable. If the buyer does not have $12.6 million in annual net sales or total assets, no acquisition by that entity can trigger a filing.

Because acquisitions by a corporation, partnership, or other noncorporate entity (*e.g.,* LLC) are considered to be acquisitions by the individual or firm, if any, that controls the corporation or noncorporate entity, the initial question when determining the size of a newly formed entity is whether there is a "controlling person." The assets and sales of any "person" that controls or is controlled by the entity must be included in calculating the size of a newly formed entity.

A corporation or other entity that issues voting securities is controlled by any shareholder that holds 50 percent or more of the corporation's voting securities, or by any individual or firm with the contractual right to designate at least 50 percent of the corporation's board of directors. *See* 16 C.F.R. §801.1(b).

A partnership or other noncorporate entity (*i.e.,* an entity that does not issue voting securities) is controlled by any person who has a right to 50 percent or more of the entity's profits or assets upon dissolution of the entity. *See id.* Thus, a general partner in a limited partnership is not deemed to control the partnership for HSR Act purposes unless the general partner has a right to 50 percent or more of the partnership's profits or assets.

The difference in the control tests for corporations and noncorporate entities may have some bearing on the structure of an acquisition. For instance, a partnership acquisition vehicle is sometimes preferred because a general partner can retain wide discretion over partnership decisions without being held to "control" the partnership for HSR purposes. But an acquisition may not be structured in a particular way solely to avoid an HSR filing. *See* 16 C.F.R. §801.90. Any transaction entered into for the purpose of avoiding an HSR filing will be disregarded, and the FTC will apply the HSR Act and rules to the substance of the transaction in determining whether a filing is required. *See id.*

Note that, for both the corporation and noncorporate entity tests, where the voting securities or noncorporate interests are held by a natural person, holdings by spouses and minor children must be aggregated in determining whether the 50 percent threshold has been met. *See* 16 C.F.R. §801.1(c)(2).

Assuming that a newly formed entity is not controlled by any individual or firm, and that it controls no other entities, the next question is whether the newly formed entity has $12.6 million in assets (a new entity formed solely through contributions of cash would not have annual sales; on the other hand, a new entity may have annual sales where it is formed in whole or part through the contribution of one or more previously existing entities). The amount of assets of a newly formed entity is determined by reference to the entity's last regularly prepared balance sheet. A newly formed entity that has no regularly prepared balance sheet must prepare an initial balance sheet to determine whether the entity meets the $12.6 million size of the person's test.

Money borrowed to make an acquisition is not an asset in determining whether the $12.6 million test is met. *See* 16 C.F.R. §801.11(e). Thus, if a group of executives forms an acquisition corporation to make a leveraged buyout and that corporation has no assets other than cash to be used for the acquisition, the acquisition corporation would have no assets for HSR purposes, it would not meet the "size of persons" test, and no premerger filing would be required before the buyout is consummated. As noted above, this exemption would not apply to any transaction valued in excess of $252.3 million because the "size of persons" test would not apply to such a transaction.

Formation of Corporations. The formation of a corporation (as opposed to an acquisition by a newly formed corporation) can trigger the notice and waiting period requirements of the HSR Act. Concerns arise when unrelated parties of substantial size form and take back stock in a corporation with significant assets. *See* 16 C.F.R. §801.40. In evaluating

whether the formation of a corporation is reportable, all assets contributed to the new corporation by the parties forming it are counted in calculating the size of the corporation, even those assets that will be used to make the corporation's first acquisition. *See id.* Therefore, it is possible that the formation of a new corporation being used to make an acquisition will be reportable, even though the acquisition itself will not be reportable under the exemption described above. In many instances, however, parties forming a new corporation to make an acquisition will contribute only cash in exchange for the stock they are taking back. When that is the case, formation of the corporation will be exempt under Rule 802.4 because the only assets held by the newly formed corporation will be exempt assets. See Rules 801.21 and 802.4.

Formation of Noncorporate Entities and Acquisitions of Noncorporate Interests. The formation of a partnership or other noncorporate entity (*e.g.,* LLC), or an acquisition of ownership interests in an existing partnership or noncorporate entity, are reportable if (a) the formation or other acquisition results in at least one acquiring person obtaining a controlling interest in the noncorporate entity (*i.e.,* a right to 50 percent or more of the entity's profits or assets upon dissolution), and (b) the interest that the acquiring person will hold is valued at more than $63.1 million, and the size of the persons' test, if applicable, is satisfied. *See* 16 C.F.R. §801.50 and 801.2(f). The value of the noncorporate interests acquired is the acquisition price of the interests if determined or, if the acquisition price is undetermined, the fair market value of those interests. *See* 16 C.F.R. 801.10(d). Additionally, fair market value will be used to value the acquisition of interests in a noncorporate entity when the acquiring person already holds interests in that unincorporated entity. *See id.* The total assets of a newly formed entity are determined in accordance with Rule 801.40(d), which provides that the assets of a newly formed corporation are any assets persons contributing to the formation of the corporation have agreed to contribute at any time, plus the value of any amount of credit or any

obligations of the corporation that persons contributing to the formation of the corporation have agreed to extend or guarantee at any time.

What are the requirements when a premerger filing must be made?

If a premerger filing is required, the buyer and seller must make separate filings. In a stock acquisition in which the buyer is buying stock from holders other than the issuer, such as a tender offer, the buyer must notify the issuer at the time the buyer files of the buyer's acquisition plans and of the issuer's obligation to make a filing. *See* 16 C.F.R. §803.5.

In their respective filings, the parties must provide information about the transaction (including copies of any signed letter of intent or purchase agreement), copies of documents filed with the SEC (including most recent proxy statement and Forms 10-K, 10-Q and 8-K), most recent annual audit report and most recent regularly prepared balance sheet, consolidated revenue figures broken down by lines of business using the Department of Commerce North American Industrial Classification System ("NAICS") Codes, information about subsidiaries, minority shareholders, and minority shareholdings in unaffiliated entities, a description of any geographic area of line of business overlap, and any competitive studies prepared by or for an officer or director of the acquiring or acquired person (or any of that person's subsidiaries) for purposes of evaluating the acquisition.

Filings are submitted to the FTC and the Antitrust Division of the Department of Justice. The buyer's filing with the FTC must be accompanied by a filing fee, the amount of which depends on the value of the transaction. For transactions valued at less than $126.2 million, a $45,000 fee is due; for transactions valued between $126.2 million and $630.8 million, a $125,000 fee is due; and for transactions exceeding $630.8 million in value, a $280,000 fee is due.

Filings are kept confidential. The agencies will not disclose the contents of one party's filing to the other party. The filings are not subject to disclosure under the Freedom of Information Act. On rare occasions, however, filings may be made available by the FTC or Department of Justice in response to a request by a Congressional committee or in the course of an administrative or judicial proceeding. *See* 15 U.S.C. §18a(h).

The two agencies' sole task is to determine whether the proposed transaction is anticompetitive. As a matter of practice, the agencies divide responsibility for conducting substantive antitrust reviews, and parties must deal with only one of the two.

The premerger waiting period

The HSR Act requires that parties to a transaction observe a statutory waiting period—usually 30 days — before closing their transaction. The 30-day waiting period does not start until both parties have filed. Where stock is purchased from a party other than the issuer (except cash tender offers), the 30-day waiting period begins after the agencies have received the buyer's filing. If the acquisition is a cash tender offer, the waiting period expires 15 days after the buyer files. In all transactions, the waiting period does not begin until the buyer has paid the filing fee. *See* 16 C.F.R. §803.10. If the final day of the waiting period falls on a weekend or legal holiday, the waiting period does not expire until the end of the next business day.

The mandatory waiting period may be terminated early if both agencies agree that the transaction poses no antitrust concerns. *See* 16 C.F.R. §803.11. Early termination notifications are published in the Federal Register. *See id.* The Federal Register listing includes the names of the ultimate parents of the buyer and seller, the name of the particular entity whose assets or voting securities are being acquired, the transaction number assigned to the acquisition by the FTC, and the date on which early termination was granted. Similar information

becomes available on the FTC web site as early as the day following the grant of early termination.

Either agency may extend the initial 30-day waiting period by issuing a request for additional information (a "second request") to the parties for the purpose of conducting a more in-depth antitrust review of the transaction. The second request waiting period adds an additional 30 days to the waiting period (10 days in the case of a cash tender offer), which begins running only after the parties have complied with the second request. Second requests, which are essentially subpoenas, generally are very broad, and compliance can take several months. The agencies have the discretionary authority to waive burdensome or irrelevant portions of second requests. If the reviewing agency insists on certain information that the parties claim would be unduly burdensome to produce, or a dispute arises with respect to whether the parties have substantially complied with the request, the parties may appeal to the Director of the Bureau of Competition at the FTC or the Deputy Assistant Attorney General for Mergers at the Antitrust Division of the Department of Justice. The agencies cannot extend the second request waiting period, but may attempt to obtain a court-ordered injunction preventing closing of the transaction. In addition, the parties may agree not to close the transaction until the reviewing agency has completed its review. If there is a genuine antitrust issue raised by a proposed transaction, the parties may wish to consider negotiating with the reviewing agency and providing additional information before a second request is issued. If, at the end of the second request period and any extension, the reviewing agency determines that the transaction will violate the antitrust laws, and the parties indicate that they still plan to go forward, the agency may seek an injunction barring consummation of the transaction. Alternatively, the acquiring party may attempt to negotiate a consent agreement with the reviewing agency, under which the proposed transaction would be modified in a manner that addresses the reviewing agency's concerns (*e.g.*, by divesting assets or licensing patents).

What are the penalties for noncompliance with the HSR act?

Fines of up to $11,000 per day may be imposed against "any person" who fails to comply with the HSR Act. Fines of up to $11,000 per day also may be assessed against officers, directors, or partners of entities in violation of the HSR Act. *See* 15 U.S.C. §18a(g).

A court may order divestiture of illegally acquired voting securities or assets or "grant other equitable relief as the court in its discretion determines necessary or appropriate." Id. Requested remedies may include rescission of the transaction.

Only the government may sue to enforce the HSR Act. Private parties may complain to the FTC and Department of Justice about alleged violations, but private parties may not enforce or obtain damages under the HSR Act. *See Hammermill Paper Co. v. Icahn*, No. 80-47-B, 1980 Dist. LEXIS 17041 (W.D. Pa. Apr. 24, 1980).

Endnotes

1 In 2000, Congress amended the HSR Act to amend the size of the transaction test. *See* 66 Federal Register 8680 (2001). Those amendments also indexed the HSR thresholds to adjust annually according to the change in Gross National Product. Current threshold figures can be obtained at the FTC's website, www.ftc.gov.

Contacts

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