

FINAL RULES TO HART-SCOTT-RODINO ACT

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As we explained in our previous memorandum dated January 29, 2001, the Federal Trade Commission ("FTC") issued interim and proposed rules to comply with certain amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The interim rules became effective on February 1, 2001; the proposed rules were subject to public comment and did not take effect at that time. Earlier this week, the FTC made final an amendment to one of the interim rules and adopted the previously published proposed rules as final with certain amendments in response to the public comments received.

AMENDMENT TO INTERIM RULE

Changes to the Transitional Rule as to Former Notification Thresholds

One of the most significant interim rules dealt with the new notification thresholds regarding the levels of ownership of assets and/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. As of February 1, 2001, the notification thresholds 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 of an issuer if valued at greater than \$50 million. An acquiring person is required to indicate in its filing the threshold it intends to cross and then has one year from the expiration or termination of the waiting period to consummate the transaction. Once the acquiring person has acquired a sufficient number of voting securities to meet or exceed the threshold for which it filed (or a lower threshold), it may acquire additional voting securities of that same issuer without refiling for a period of 5 years from the expiration or termination of the waiting period so long as it does not meet or exceed a higher threshold than the one it crossed within that initial one-year period.

In order to address filings made under the former notification thresholds, the FTC issued a transitional rule that permitted acquiring persons who filed under the former notification thresholds and who had met or crossed the threshold for which they had filed within a year of the waiting period's expiration, but whose five-year period for making additional acquisitions had not expired as of February 1, 2001, to make additional acquisitions of voting securities until February 1, 2002 or the end of the original five-year period, whichever came first, to acquire up to what was the next reporting threshold at the time they filed, without

making another filing under the HSR Act, even though they might cross one of the “new” notification thresholds.

The final rule amends the transitional rule and restores to transitional filers (i.e., persons who filed prior to February 1, 2001) the full five-year period following the expiration or termination of the waiting period to make additional acquisitions of voting securities without filing another notification, up to the next notification threshold that was in effect at the time they filed, even though they might cross a new notification threshold. This final rule will become effective on the date of its publication in the Federal Register and will apply retroactively to February 2, 2002.

**AMENDMENTS TO
PROPOSED RULES**

Foreign Acquisitions

As discussed in our previous memorandum, the most significant proposed revision to the current rules concerned the exemptions for acquisitions of foreign assets and voting securities of foreign issuers. The proposed changes to the existing rules consisted 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. The final rules largely adopt the proposed rules with certain minor changes concerning the appropriate measure of sales in or into the United States.

Under the final rules, the acquisition of foreign assets are 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 recently completed fiscal year (not the sum of the most recent fiscal year’s sales and sales to date since the end of the most recent fiscal year, as originally proposed).

The acquisition of voting securities of a foreign issuer by a U.S. person will 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 recently completed fiscal year.

The acquisition of voting securities of a foreign issuer by a foreign person will 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 recently completed fiscal year.

Even if the above tests are met, the acquisition nevertheless will 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; (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 valued at \$200 million or less.

The final rules also amend the proposed rules in order to clarify that when voting securities of multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether the \$50 million thresholds are exceeded, regardless of whether the acquiring person is foreign or domestic.

These final rules will become effective 30 days after the date of publication in the Federal Register.

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Although the FTC has finalized the proposed rules and the transitional rule, it is still considering whether to make the remaining interim rules final. Additional changes may be made to the interim rules and we will provide you with those changes if or when they are announced. If you have any questions, please call Joseph Tringali (212-455-3840; jtringali@stblaw.com), Jack D'Angelo (212-455-2722; jdangelo@stblaw.com) or Kenneth Ehrhard (212-455-2403; kehrhard@stblaw.com) of the firm's antitrust practice group.

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