

REVISED JURISDICTIONAL THRESHOLDS TO HART-SCOTT-RODINO ACT

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The Federal Trade Commission ("FTC") announced revised thresholds to the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") based on the change in the gross national product.

Revisions to the Jurisdictional Thresholds

The most significant revisions deal with the "size-of-person" and "size-of-transaction" thresholds. Generally, the HSR Act requires a premerger notification filing for acquisitions that result in the acquiring person holding assets and/or voting securities of the acquired person valued between \$50 million and \$200 million (the "size-of-transaction threshold"), providing that the annual net sales or total assets of either the acquiring or acquired person are at least \$100 million and the annual net sales or total assets of the other person are at least \$10 million (the "size-of-person threshold"). The HSR Act also requires a filing for an acquisition that results in the acquiring person holding assets and/or voting securities of the acquired person valued in excess of \$200 million, regardless of the whether the size-of-person threshold is met. The new rules increase the size-of-transaction threshold to between \$53.1 million and \$212.3 million and the size-of-person threshold to \$106.2 million and \$10.7 million, respectively. Acquisitions that result in the acquiring person holding assets and/or voting securities of the acquired person valued in excess of \$212.3 million will be reportable, regardless of the whether the size-of-person threshold is met.

Impact on HSR Filing Fees

The amounts of the filing fees applicable to reportable transactions will not be affected by the new rules, but the thresholds that determine those filing fees will be revised. Under the new rules, acquiring persons are required to pay filing fees of \$45,000 for reportable transactions valued above \$53.1 million up to \$106.2 million; \$125,000 for transactions valued from \$106.2 million up to \$530.7 million; and \$280,000 for transactions valued at \$530.7 million or more.

Revisions to the Notification Thresholds

The new rules also adjust the notification thresholds that specify the levels of ownership of voting securities that cannot be attained or exceeded as a result of an additional purchase of voting securities of the same acquired person without making a new filing under the HSR Act. The current notification thresholds are \$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. The new rules will adjust these thresholds to \$53.1 million; \$106.2 million; \$530.7 million; and 25% of the voting securities of an issuer if valued at greater than \$1,061.3 million; and 50% of the voting securities of an issuer if valued at greater than \$53.1 million.

Acquisitions of voting securities that do not meet or exceed the next notification threshold for a period of five years after expiration or termination of the HSR waiting period if the acquiring person crossed the prior threshold within the first year of expiration or termination of the HSR waiting period are exempt. Under the new rules, an acquiring person has one-year to reach the notification threshold in place at the time that it filed, even though the notification threshold may have subsequently been adjusted during that year. However, an acquiring person could then acquire up to the next greater adjusted notification threshold (as opposed to the next notification threshold in place at the time of the filing) during the five years following expiration or termination of the waiting period.

Foreign Commerce Exemptions

The current Rules exempt the acquisition of assets located outside the United States to which no more than \$50 million of sales in or into the United States are attributable, and certain acquisitions of voting securities of a foreign issuer that does not have assets located in the United States valued at more than \$50 million and did not make sales in or into the United States of more than \$50 million in its most recent fiscal year. The new rules will adjust the \$50 million limitations in the current rules to \$53.1 million.

The Rules also currently exempt an acquisition of foreign assets or voting securities of a foreign issuer if both the acquiring and acquired persons are foreign; the aggregate sales of the acquiring and acquired persons in or into the United States were less than \$110 million in their respective most recent fiscal years; the aggregate total assets of the acquiring and acquired persons located in the United States are less than \$110 million; and the size of the transaction is valued at \$200 million or less. The new rules will adjust the \$110 million and \$200 million limitations in the current rules to \$116.8 million and \$212.3 million, respectively.

Formations of Joint Venture Corporations and Unincorporated Entities

The current Rules impose filing requirements where two or more persons form a corporation, and those persons and the newly-formed corporation meet a modified size-of-person test. There is a three-way size-of-person test for acquisitions by such persons of the voting securities that are issued by the newly-formed corporation and are valued at \$200 million or less, but more than \$50 million. The three-way size-of-person test looks to the annual net sales and total assets of any two of such persons and to the anticipated total assets of the newly-formed corporation. Either the newly-formed corporation or at least one of such persons must have annual net sales or total assets of \$100 million or more, and the other two parties must have annual net sales or total assets of \$10 million or more. For acquisitions valued at

more than \$200 million, the three-way size-of-person test is disregarded. Under the new rules, the \$100 million and \$10 million thresholds of the three-way size-of-person test will be adjusted to \$106.2 million and \$10.7 million, respectively. If the size-of-transaction exceeds \$212.3 million, the three-way size-of-person test will be disregarded under the new rules.

In April 2004, the FTC issued proposed rules for public comment that, among other things, would extend the HSR Act's filing requirements to formations of certain unincorporated entities and to acquisitions of interests that confer control of certain unincorporated entities. It is expected that final rules will be issued in February 2005 and become effective 30 days thereafter. The proposed rule, which will make formations of certain partnerships, limited liability companies, and other unincorporated entities reportable, has a two-way size-of-person test, which is applicable where the value of a controlling interest in the newly-formed unincorporated entity is valued at \$200 million or less, but more than \$50 million. The two-way size-of-person test looks to the annual net sales and total assets of the person acquiring a controlling interest in the newly-formed unincorporated entity and to the anticipated total assets of the newly-formed unincorporated entity. Either the person acquiring a controlling interest in the newly-formed entity or the newly-formed entity must have annual net sales or total assets of \$100 million or more, and the other party must have annual net sales or total assets of \$10 million or more. The proposed two-way size-of-person test will also be adjusted to \$106.2 million and \$10.7 million, respectively. Again, if the size-of-transaction exceeds \$212.3 million, the two-way size-of-person test will be disregarded under the new rules.

Section 802.4 Exemption

Section 802.4 of the Rules exempts acquisitions of voting securities of issuers whose assets would be exempt if acquired directly. The exemption is available as long as the issuer does not hold "non-exempt assets" valued at more than \$50 million. The current exemption is generally limited to the acquisition of voting securities of issuers whose assets consist of exempt real property. The proposed Rules would expand the exemption to acquisitions of both voting securities of corporations and controlling interests in unincorporated entities, where the underlying assets of those entities could be directly acquired under any exemption available under the HSR Act or Rules. The new rules will adjust the \$50 million limitation in this exemption for "non-exempt assets" to \$53.1 million.

Rules Unaffected by the Revisions

There are other Rules where dollar amounts are indicated, but the FTC has chosen not to adjust them.

Section 802.3(a) of the Rules exempts acquisitions of reserves of oil, natural gas, shale or tar sands, and certain associated exploration or production assets, so long as the total value of the assets being acquired does not exceed \$500 million. Section 802.3(b) of the Rules provides a similar exemption for acquisitions of reserves of coal and certain associated exploration or production assets valued at no more than \$200 million. The dollar thresholds for these exemptions will not be adjusted under the new rules.

Section 802.2(c) of the Rules exempts the acquisition of certain real property, including raw land that has not generated total revenues of more than \$5 million during the 36 months preceding the acquisition. The \$5 million threshold will not be adjusted under the new rules.

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The new rules were published in the Federal Register on January 31, 2005 and will become effective on March 2, 2005. The revised thresholds will apply to all transactions that close on or after the effective date. 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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