

Client Alert: Changes to Hart-Scott-Rodino Premerger Notification Requirements

Significant changes to the Hart-Scott-Rodino Antitrust Improvements Act, 18 U.S.C. § 18a, (“HSR Act”) become effective on February 1, 2001 as a result of legislation signed into law by the President on December 21, 2000. The HSR Act requires the filing of premerger notification with the Bureau of Competition of the Federal Trade Commission (FTC) and the Department of Justice, Antitrust Division (DOJ) prior to the consummation of many corporate transactions. Changes in the rules and regulations issued by the FTC implementing the HSR Act, 16 C.F.R. Parts 801, 802 and 803 to parallel the changes in the law will follow shortly. The new law and forthcoming rules, regulations and interpretations by the FTC will have a significant impact on premerger notification requirements applicable to corporate transactions. The changes apply to any transaction closing on or after February 1, 2001.

The main changes include an increase in the size-of-transaction threshold for reportability; changes to the size-of-person test in larger transactions; a tiered filing-fee schedule with increased fees for larger transactions; extensions of the waiting period in certain limited situations; and a streamlined and expedited procedure to deal with issues related to requests for additional information. The new law also provides for adjustment of all dollar thresholds and filing-fee tiers annually beginning in 2005 for changes in the gross national product during the previous year.

The Size-of-Transaction Threshold

The size-of-transaction threshold triggering reportability under the HSR Act is now increased from a transaction value greater than \$15 million to a transaction value greater than \$50 million. In addition to raising the minimum dollar threshold, the new law also eliminates the 15% size of transaction threshold. Thus, the former rule requiring a transaction be reported if it is valued at over \$15 million or if the acquisition is of 15% or more of the assets or voting securities of the acquired person is abolished. The new rule establishes an absolute floor of \$50 million – under no circumstances will a transaction valued at \$50 million or less be reportable under the HSR Act, no matter what the percentage of assets or voting securities to be acquired.

It is estimated that this new threshold will effect a 50% reduction in the number of filings under the HSR Act.

The Size-of-Person Threshold

The new law eliminates the size-of-person threshold for all transactions valued at greater than \$200 million. Formerly, transactions did not need to be reported under the HSR Act unless one person to the transaction had total assets or net sales of \$100 million or more and the other had total assets or net sales of \$10 million or more. As of February 1, 2001, all transactions valued at over \$200 million will be reportable without regard to the \$10 million/\$100 million size-of-person analysis.

For transactions valued at over \$50 million but less than \$200 million, the size-of-person test remains applicable. In other words, for such transactions, one person must have total assets or net sales of \$100 million or more and the other must have total assets or net sales of \$10 million or more, otherwise the deal will not be subject to premerger notification.

The elimination of the size-of-person test for transactions valued at greater than \$200 million is aimed at technology and internet companies which have not previously been subject to premerger filings for high value transactions due to low total assets or net sales.

New Filing Fee Structure

The new law imposes a tiered filing-fee structure which varies depending on the value of the transaction. The flat filing fee of \$45,000 has been eliminated. Although the acquiring person bears the obligation to pay the filing fee, the parties are, as always, free to agree to apportionment of the filing fee between themselves.

The new filing fees are as follows:

<u>Value of Transaction</u>	<u>Filing Fee</u>
Less than \$100 million	\$45,000
\$100 million to less than \$500 million	\$125,000
\$500 million or more	\$280,000

Extension of Waiting Periods

There are two changes in the law that have extended the length of applicable waiting periods. The first change affects the expiration date of any waiting period under the HSR Act. If the expiration of any waiting period falls on a Saturday, Sunday or legal public holiday, it is extended to the next regular business day. Thus, it is no longer the case that the waiting period expires on the 30th day after filing of the premerger notification if that 30th day is a Saturday, Sunday or legal public holiday. The change applies equally to expiration of the applicable waiting period after substantial compliance with a request for additional information (a so-called “second request”). In essence, this change (depending on the timing of the filing) may allow the agencies slightly more time to consider whether to issue a second request or whether to challenge a transaction after certification of substantial compliance with a second request by the parties.

The second timing change extends in the government’s favor the length of the waiting period after substantial compliance with a second request in all transactions other than cash tender offers. Under the former law, the agencies had 20 days after substantial compliance to review additional information received and determine whether or not to challenge a transaction. That 20-day period has now been extended to 30 days.

With respect to cash tender offers, however, the shorter 10-day waiting period after substantial compliance with a second request remains unchanged.

Challenges to Second Requests

The process by which second requests are challenged as “unreasonably cumulative, unduly burdensome, or duplicative” is modified by the new legislation. After a second request is issued, the DOJ and the FTC are now directed to each designate a senior official without direct enforcement responsibility for the transaction to hear any petition by a party to the transaction challenging the request for additional information. The official will also determine whether the parties have substantially complied with the request if a dispute as to that issue arises. The new legislation calls for expedited review of such petitions to avoid undue delay of the merger process.

Potential Rules Changes

The changes to the HSR Act require parallel changes to the rules, regulations, and interpretations of the FTC, as well as minor changes in the actual Notification & Report Form. The FTC is now in the process of drafting the changes, and anticipates that they will take effect on February 1, 2001.

In addition, the FTC anticipates that by mid-year, it will change the base year for reporting industry and product code information from 1992 to 1997. Along with the change in base year, the FTC will change the manner in which revenue is reported from the Standard Industrial Classification (SIC) system used since 1978 to the North American Industry Classification System (NAICS). In order to facilitate possible future filings, companies should begin conversion of their revenue data to the NAICS.

For Additional Information

The changes to the procedures regarding premerger notification under the HSR Act have important implications in the corporate transactional area. If you have any questions regarding the potential impact of the changes or their applicability to a particular transaction, please contact:

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