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Amendments to Hart-Scott-Rodino Act Notification Thresholds and Filing Fees

Congress has recently passed and the President has signed significant amendments to the premerger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the “HSR Act”). The new amendments mark the first significant modification to the Act’s coverage since its passage. Prior to the new amendments, acquisitions of \$15 million or more in assets or voting securities, or control of an entity with at least \$25 million in sales or assets, were usually subject to the HSR notification and waiting period requirements (unless they qualified for an exemption). The new legislation increases the basic size-of-transaction filing threshold to \$50 million, with some qualifications, as explained below. This change should significantly reduce the number of notifications required to be filed.

The new legislation also makes several other significant changes. The existing \$45,000 filing fee is increased for transactions valued at \$100 million or more. The new amendments further provide for annual inflation-indexed adjustments to the reporting thresholds beginning in Fiscal Year 2005 and modify certain procedures relating to requests for additional information or documentary material, commonly known as Second Requests.

The amendments were included as section 630 of the FY 2001 appropriations bill for the Departments of Justice, Commerce, and State, which the President signed on

December 21, 2000. The statutory changes will take effect on February 1, 2001. The Federal Trade Commission (“FTC”) has indicated that it will soon publish new regulations responding to the statutory modifications, including ones aimed at reconciling and, possibly, completely reformulating the percentage (*i.e.*, 15%, 25% and 50%) notification thresholds in the HSR Rules. (However, the FTC’s Premerger Notification Office informs us that any such HSR Rule changes will not affect the new, absolute exclusion of acquisitions resulting in holdings of \$50 million or less.) The most significant new features of the HSR Act are discussed in more detail below.

I. Filing Thresholds

The new legislation increases the size-of-transaction threshold triggering the Act’s notification provisions. The new test, set out in the amended 15 U.S.C. § 18a(a), has two alternatives, based on the size of the acquisition. First, the Act requires HSR notification for all non-exempt transactions involving the acquisition of more than \$200 million in assets or voting securities. Second, for acquisitions in excess of \$50 million, but no more than \$200 million, the HSR Act now requires notification if the original statutory size-of-person test is also met.¹ Third, acquisitions resulting in holdings of \$50 million or less are no longer subject to HSR reporting requirements under the amended Act. *However, as in the past, the key HSR issue is not the value or percentage of what one is acquiring but, rather, the value or*

¹ Under the statutory size-of-person test, the parties must meet one of three tests: (1) the acquired party is engaged in manufacturing and has annual net sales or total assets of at least \$10 million, and the acquiring party has annual net sales or total assets of at least \$100 million; or (2) the acquired party is not engaged in manufacturing (*i.e.*, generating revenues in SIC major groups 20-39) and has total assets of at least \$10 million, and the buyer has annual net sales or total assets of at least \$100 million; or (3) the acquired party has annual net sales or total assets of at least \$100 million, and the acquiring party has annual net sales or total assets of at least \$10 million, whether or not engaged in manufacturing.

percentage of an acquired person's assets or voting securities that the acquiring person will hold as a result of the acquisition.

Existing FTC regulations on valuing assets and voting securities, and the available statutory and regulatory exemptions from the filing and waiting requirements, are unaffected by this legislation. However, the FTC has indicated that it may soon propose several changes to the existing regulatory exemptions that, while not required by the new statutory amendments, are nonetheless deemed to flow logically from them.

II. Increase in Filing Fee for Large Acquisitions

The legislation also increases the filing fee for acquisitions over a certain threshold. The present fee of \$45,000 will still apply to acquisitions resulting in holdings of less than \$100 million of assets or voting securities. For acquisitions resulting in holdings of at least \$100 million but less than \$500 million in value, the filing fee has been increased to \$125,000. For acquisitions resulting in holdings of \$500 million or more, the required filing fee will now be \$280,000. The legislation provides that these new size-of-transaction thresholds, but not the filing fees, shall be indexed for inflation beginning in FY 2005.

III. Reform of Second Request Procedures and Other Changes

Importantly, the legislation also modifies the procedures by which the agencies implement their merger enforcement programs. Section 630(c) of the new statute requires the Antitrust Division and the FTC each to appoint a senior agency official not directly involved with the enforcement review of a transaction to address and resolve petitions from Second Request recipients who consider their supplemental demands for additional information and documentation to be “unreasonably cumulative, unduly burdensome, or

duplicative,” or believe that their supplemental submissions have “substantially complied” with the Second Requests as required by the HSR Act.

Such appeal procedures are not an entirely new development. Both the Antitrust Division and the FTC have pre-existing informal policies or guidelines for resolving appeals arising from Second Request disputes. However, under the new legislation, the agencies are required to codify these procedures in their regulations and conduct a formal internal review aimed at identifying and implementing ways to achieve a more effective and efficient merger review process. Each agency must report to Congress on their progress in implementing the amendments’ reforms within 180 days of enactment, i.e., by June 2001.

Finally, the legislation makes two important changes in the current HSR Act regarding the timing of the review process. First, following “substantial compliance” by the parties with their respective Second Requests, the reviewing agency will now have 30 — as opposed to 20 days — to decide whether to challenge a proposed acquisition, except in all cash tender offer situations where the shorter time periods still apply. Second, where an initial or extended waiting period falls on a weekend or legal holiday, the waiting period will now be extended until the end of the following business day — rather than the prior business day as had been the rule since 1978.

If you have questions concerning filing requirements under the revised Act, please contact [Rick Rule](#), Chair of the Antitrust Practice Group, at (202) 662-5119 or rrule@cov.com; [George Chester](#), Vice-Chair, at (202) 662-5198 or gchester@cov.com; [Harvey Applebaum](#) at (202) 662-5626 or happlebaum@cov.com; [Charlie Buffon](#) at (202) 662-5542 or cbuffon@cov.com; [Jim Atwood](#) at (202) 662-5298 or jatwood@cov.com;

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