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*Antitrust Law Update*

***Interim HSR Rules Published***

*Amendments to HSR Act Take Effect February 1, 2001*

The Federal Trade Commission ("FTC") today published the Interim Rules that will govern all filings made as of February 1, 2001, under the legislative amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (Section 7A of the Clayton Act, 15 U.S.C. § 18a) (the "HSR Act"). (See WCP Memorandum to Clients: "HSR Filing Threshold Raised to \$50 Million," December 21, 2000.) The FTC has also issued a revised HSR Notification and Report Form with revised Instructions; all HSR filings made on or after February 1, 2001 must use this new Form.

The FTC's announcement of the Interim Rules and links to the text of the Rules are available at [www.ftc.gov/opa/2001/01/hsrreform.htm](http://www.ftc.gov/opa/2001/01/hsrreform.htm). The revised HSR Form and Instructions are also available for downloading and printing through links at that site.

The Interim Rules are subject to public comment for 45 days from their effective date. The rule changes will significantly affect HSR reporting obligations in several ways, which the attached memorandum describes. If you would like more information about the proposed Rules or would like our help in analyzing their effects on your current or potential future transactions or in drafting public comments regarding the new Rules, please contact me or another member of the WCP Antitrust Group listed at the end of the memo.

The following discussion summarizes the changes that will take place on February 1, 2001, under the amendments to the HSR Act and the Interim Rules.

Janet Ridge

## ***Significant Changes in HSR Reporting Rules***

### ***Multiple Size-of-Transaction Notification Thresholds***

Under the Interim Rules, there will be five size-of-transaction notification thresholds. The Interim Rules will require an HSR filing whenever an acquisition will result in a person holding any of the following:

<i>Threshold</i>	<i>Description of threshold</i>
<b>\$50 million</b>	An aggregate total amount of voting securities and assets of the acquired person with a value greater than \$50 million but less than \$100 million.
<b>\$100 million</b>	An aggregate total amount of voting securities and assets of the acquired person with a value of at least \$100 million but less than \$500 million.
<b>\$500 million</b>	An aggregate total amount of voting securities and assets of the acquired person with a value of at least \$500 million.
<b>25%, if over \$1 billion</b>	Twenty-five percent of the voting securities of an issuer, if the acquiring person's holdings have a value greater than \$1 billion.
<b>50%, if over \$50 million</b>	Fifty percent of the voting securities of an issuer, if the acquiring person's holdings have a value greater than \$50 million.

The size-of-person thresholds remain unchanged for transactions between \$50 million and \$200 million. (These thresholds require that one party to the transaction have at least \$100 million in total assets or annual net sales and that another party have at least \$10 million in total assets or annual net sales.) **The size-of-person threshold is, however, eliminated for all transactions valued at \$200 million or more.**

The Interim Rules add intermediate size-of person thresholds that do not exist under the current regime and are not required under the HSR Act amendments.<sup>1</sup> The amendments require only the \$50 million and 50%-if-over-\$50 million thresholds and have eliminated altogether the 15% threshold contained in the current Rules. The Interim Rules retain the 25% threshold from the current Rules, but have greatly reduced its application by limiting it to transactions resulting in the acquiring person holding assets and/or voting securities worth more than \$1 billion. The \$100 million and \$500 million

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<sup>1</sup> The existing HSR Rules have only four notification thresholds: \$15 million, 15%-if-over-\$15 million, 25%, and 50%.

thresholds do not apply if the acquiring person has previously filed an HSR notification and report form with respect to an acquisition of at least 50% of the voting securities of the acquired person. The Interim Rules also eliminate the “minimum-dollar-value” exemption by deleting existing HSR Rule §802.20.

The intermediate size-of-transaction notification thresholds may be the single most important feature introduced by the Interim Rules. The new \$100 million and \$500 million notification thresholds, **if they survive public comment**, may lead to a significant increase in the reporting burdens. The HSR Act amendments introduced these thresholds, but solely for the purpose making the size of the filing fee dependent on the size of the transaction (see below). The Interim Rules, however, propose to require separate HSR filings at multiple dollar value thresholds; but the value of voting securities held as a result of a transaction is based on current market value, which may fluctuate greatly. Combined with the elimination of the “minimum-dollar-value” exemption, these changes may have the unexpected result of requiring notifications for some very small transactions, and may lead to potentially unwieldy and unduly burdensome filing requirements.<sup>2</sup>

All of the new thresholds will be indexed for inflation. Beginning in 2005, each of these thresholds will be adjusted annually to reflect changes in the GNP.

### ***Graduated Filing Fees***

The HSR amendments substitute a tiered fee structure for the existing uniform \$45,000 filing fee. Under the new legislation, the fee that the acquiring person must pay will be based on the value of the voting securities and/or assets held as a result of the transaction. The fees will range from \$45,000 to \$280,000, as follows.

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<sup>2</sup> Example (1): The acquisition of \$95 million worth of voting securities would require an HSR filing and a \$45,000 filing fee; but under the Interim Rules the subsequent acquisition by the same person of only \$5 million worth of voting securities from the same issuer may require a second HSR filing and an additional \$125,000 filing fee.

Example (2): A party may file an HSR report for the acquisition of \$75 million of voting securities, and subsequently purchase voting securities or even an asset worth only \$1 million from the same issuer. If the market value of the voting securities in the original acquisition has increased meanwhile to some amount in excess of \$100 million, the \$1 million acquisition may require a second HSR filing and an additional \$125,000 filing fee.

<b>Size of transaction</b>	<b>Filing fee</b>
More than \$50 million, but less than \$100 million.	\$45,000
At least \$100 million, but less than \$500 million.	\$125,000
At least \$500 million.	\$280,000

One important effect of the graduated filing fee system is to place an additional burden on the acquiring party to ensure that the reported transaction is valued accurately. If any portion of a purchase price is undetermined, the acquiring person must submit an explanation of the reported value of the transaction to avoid paying a higher filing fee. There are many common situations when a purchase price is indeterminate. For instance, part of the consideration may consist of variable future payments tied to specific development or production milestones.

When part of the purchase price consists of contingent or variable future payments, the acquiring person's board of directors must prepare a written estimate of the fair market value of the assets and/or voting securities being acquired. This valuation probably should be performed according to HSR Rule §801.10(c)(3); that is, in writing, by the board of directors or its designee, and within the 60 calendar days preceding the filing (or, if the parties determine there is no filing requirement, within the 60 calendar days preceding the consummation of the acquisition). The FTC will make available a voluntary Valuation Worksheet to assist parties in determining an accurate valuation.<sup>3</sup>

### ***Changes to Waiting Periods***

The Interim Rules will also change the way HSR waiting periods are calculated. Waiting periods will no longer end on weekends or holidays. **For all transactions notified as of February 1, 2001, any waiting period ending on a weekend or legal holiday will be extended through the next business day.** The initial waiting periods otherwise remain unchanged.

The Second Request waiting periods have also changed. Except for cash tender offers or acquisitions in bankruptcy for the waiting period will remain ten days, **the 20-day waiting period after compliance with a Second Request is extended to 30 days.** The new waiting periods are:

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<sup>3</sup> Like the notification thresholds, the filing fee thresholds will be indexed for inflation. The Interim Rules implement an additional minor, but welcome, change that the HSR amendments did not mandate: for certain transactions involving multiple ultimate parent entities, the FTC will no longer require multiple filing fees. See Interim Rule §803.9.

	<i>Cash tender offers and acquisitions in bankruptcy covered by 11 U.S.C. §363(b)</i>	<i>All other transactions</i>
Initial waiting period (after HSR filing)	15 days	30 days
Extended waiting period (after Second Request compliance)	10 days	30 days

### ***Second Request Reforms***

In conjunction with the Interim Rules, the FTC has also amended its Rules of Practice to incorporate an internal appeals process for Second Requests it issues. The amended Second Request procedures are described at [www.ftc.gov/os/2001/01/hsrscdrqtappfrn.htm](http://www.ftc.gov/os/2001/01/hsrscdrqtappfrn.htm). To summarize:

(1) Each Second Request issued shall state that the recipient has the right to discuss modifications or clarifications of the request with an authorized FTC representative.

(2) A Second Request conference between the recipient and the FTC representative shall take place if possible within 5 business days of the issuance of the Request. The conference may address both substantive issues raised by the transaction and/or the procedures the parties will adopt for responding to the Request.

(3) The FTC representative will issue modifications of the Second Request in writing if a less burdensome Request is consistent with the needs of the investigation.

(4) An Appeals Process will permit the recipient to petition the FTC General Counsel for clarifications or modifications of the Second Request. Upon receipt of the petition, the General Counsel will have 2 days to schedule, and 7 days to hold, a conference with the petitioners. After the conference, the General Counsel will have 3 days to notify the parties of a decision.

The Department of Justice's Antitrust Division has announced similar changes. See [www.usdoj.gov/atr/public/press\\_releases/2000/4511.htm](http://www.usdoj.gov/atr/public/press_releases/2000/4511.htm).

## ***Effects of HSR Reform***

The changes in the HSR Act and Rules introduce long-awaited reforms that should reduce the number of HSR filings made each year by at least 30%. Many small transactions that would have required notification under the existing HSR Rules will no longer need to be notified. The overall effect should to ease significantly the burdens that the HSR Act imposes on businesses and to allow the antitrust agencies to shift resources to larger transactions that are more likely to require scrutiny.

The revisions do, however, add new levels of complexity to an already difficult regulatory area. The reforms may in some instances increase -- rather than reduce -- the burdens of HSR compliance. In addition to the matters discussed above, we have identified some potential “traps for the unwary” the reforms introduce:

- The exemption for acquisitions of foreign assets or voting securities (Rule §802.50) contains dollar thresholds that have not been changed, although the FTC will likely introduce changes to these Rules in the near future. The exemptions become unavailable when the acquisition includes control over at least \$15 million of assets located in the United States, or of any assets that generate at least \$25 million of sales in or into the United States.
- Similarly, the exemption for acquisitions by foreign persons (Rule §802.51) remains unchanged at least for the time being. This exemption can be lost when the acquisition includes control over at least \$15 million of assets in the United States or of any U.S. issuer that has total worldwide assets or annual worldwide revenues of at least \$25 million. Of course, to be reportable, the transaction involved must have an overall value of \$50 million or more.
- The elimination of the size-of-person threshold for transactions valued at over \$200 million will probably extend HSR reporting requirements to many joint ventures and creations of jointly-owned corporations.

If you are concerned about the effects of the proposed Rules and would like our help in drafting public comments regarding them, please contact Janet Ridge (202-663-6615) or any of the other partners or counsel in our Washington office (202-663-6000).

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