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New Proposed Rules Could Change the Hart-Scott-Rodino Reporting Landscape, and Not for the Better

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Practitioners and dealmakers have lived under the Hart-Scott-Rodino (HSR), reporting requirements for a long time and have developed a pattern and practice for assessing reporting obligations and managing compliance and risk. Major disruptions to the regimen are typically unwelcome – especially where they come with new and expanded reporting obligations. They may be on the way under a proposed rulemaking which would expand reporting requirements in several significant ways, and potentially implement a new exemption.

Under the HSR Act, parties to certain mergers and acquisitions are required to notify antitrust enforcers prior to completion, and to observe a statutory waiting period to allow time for a review of the transaction and its potential for anticompetitive impact. The Act's implementing rules set out how thresholds and exemptions direct which transactions are subject to reporting, and which are not.

Under the proposed new rules, the agency would expand reporting requirements and potentially implement a new exemption addressing certain minority investments. The changes include the following:

- The new proposed rules would require disclosure of additional information from investment firms as it relates to firmwide investments. This "associate" reporting in the parlance of the HSR rules is currently limited to instances where a related fund under common management has an investment of more than 5% in a portfolio company that competes with the target investment.
- The new rule would expand this requirement to require financial statements, revenue reporting and information related to prior acquisitions for certain controlled portfolio companies of the firm – even when not housed within the fund making the acquisition or filing.
- The new rule would also require funds to aggregate holdings among commonly managed funds for purposes of assessing reporting obligations and disclosure

requirements.

- Beyond expanded disclosures, the proposed rule change to how a “Person” is defined to include its associated funds is likely to trigger reporting requirements for transactions that may presently be exempt under the current rules – primarily for new funds and newly formed entities that may not meet the size-of-person thresholds under the current rules.
- Second, the agency has proposed an exemption with respect to acquisitions of 10 percent or less of a company in cases where the investor does not have a “competitively significant relationship” with the target company.
- The limited exemption would apply where the investor would hold 10 percent or less of the target company; does not hold an interest of more than 1 percent in a competitor of the target company; does not have board representation with respect to the target company or any of its competitors; and, with limited exceptions, the parties are not in an existing vendor-vendee relationship.
- The rule, while welcomed by some active investors ineligible for the traditional passive investor exemption, may have limited application, for instance for sector funds that deploy their expertise within a particular industry.

The agency has also issued an Advance Notice of Public Rulemaking to gather information on additional topics that may be the subject of amendments to the HSR rules and interpretations. The agency is reviewing potentially making changes to how the size-of-transaction is calculated for analysis of reporting obligations; treatment of real estate investment trusts, which presently enjoy fairly a broad set of exemptions; treatment of “non-corporate” entities such at limited partnerships and limited liability companies, which also enjoy a broad set of exemption under the current rules; potential additional exemptions relating to minority or de minimis acquisitions; treatment of non-voting interests; devices for avoidance; and potential changes to the filing process. The agency is in the early stages of reviewing potential changes in these areas, and final rules may not be seen for some time.

In a separate guidance note (which the agency periodically publishes as blog posts) the agency's premerger notification office also has clarified its position with respect to certain transactions that may be viewed devices for avoidance under the rules. Without a change to the existing avoidance rule, which provides that transactions employing devices for avoidance can be construed as reportable, the agency has updated its prior guidance on the use of special dividends. Under prior guidance, the use of special dividends in advance of closing to reduce a party's size to below the reporting threshold was not considered as an avoidance device. The agency will no longer take that formalistic view, and has said that it will conduct a "more holistic" review of special dividends and other features of the transaction when evaluating whether the transaction was structured to avoid or delay an HSR filing.

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