

ANTITRUST ALERT

HART-SCOTT-RODINO: MAJOR RULE CHANGE FOR UNINCORPORATED ENTITIES; PARTNERSHIP FORMATIONS NOW POTENTIALLY REPORTABLE



The Federal Trade Commission (FTC) yesterday announced major amendments to the regulations governing the Hart-Scott-Rodino premerger notification program. These amendments change the Hart-Scott treatment of interests in partnerships and LLCs, and expand exemptions for certain voting securities acquisitions. The rules will take effect 30 days following publication in the Federal Register, expected to occur next week. A copy of the FTC's press release announcing the amendments, including a link to the Federal Register Notice, can be found at <http://www.ftc.gov/opa/2005/02/fyi0516.htm>.

Below is a summary of some of the key rule changes. The amendments both give and take away. Some transactions now reportable will be exempt, and some transactions now exempt will be reportable. But one constant is that the Hart-Scott regulations remain extremely complex, with potential penalties for noncompliance of up to \$11,000 per day. The new regulations consume 35 single-spaced pages. Any decision not to file should be based on consultation with experienced Hart-Scott counsel and a careful review of the regulations in the context of the specific transaction at issue.

Creation of LLCs and Partnerships

- **Old Rules** – the formation of a partnership was never reportable, and the formation of an LLC was reportable only in narrow circumstances.
- **New Rules** – a formation filing may be required where one person receives 50 percent or more of the partnership or LLC interests and other persons contribute to the partnership or LLC nonexempt assets valued at more than \$53.1 million. Percentage interests in an LLC or partnership are determined, as now, by percentage right to profits or percentage right to assets upon dissolution. However, the new rules spell out potentially complex calculation procedures where these percentage rights are variable and not fixed.

Acquisition of Partial Interests in Existing Partnerships and LLCs

- **Old Rules** – an acquisition that resulted in the acquiring person holding less than 100 percent of the interests in an existing partnership or LLC was never reportable.

- **New Rules** – an acquisition that results in the acquiring person holding 50 percent or more of the interests in a partnership or LLC potentially triggers a filing requirement if the value of the interests held as a result of the acquisition exceeds \$53.1 million. (Once a person holds 50 percent or more of the interests in a partnership or LLC, he may acquire the remaining 50 percent without having to file.) This new filing requirement is consistent with the definition of “control” in the regulations, which provides that a person “controls” a partnership or LLC if he holds 50 percent or more of the economic interests (right to profits or right to assets upon dissolution) of the entity.

Transfers Between Parents and LLCs or Partnerships

- **Old Rules** – transfers of assets between a partnership or LLC and a less-than-100 percent parent were potentially reportable.
- **New Rules** – such transactions will now be exempt where the parent holds at least a 50 percent interest.

Acquiring Stock of Corporations Holding Exempt Assets

- **Old Rules** – very narrow exemption for acquiring voting securities of corporations holding assets the direct acquisition of which would be exempt from filing requirements. Significantly, cash, bank deposits and minority voting securities interests held solely for purposes of investment did *not* generally qualify as exempt holdings under the rule.
- **New Rules** – in a substantial expansion, the new rules will exempt acquisitions of voting securities of corporations (or controlling interests in noncorporate entities) holding assets whose direct acquisition would be exempt under *any* statutory or regulatory exemption—unless the corporation holds other nonexempt assets with a fair market value of more than \$53.1 million. Assets such as cash, bank deposits and voting securities qualifying for the investment-only exemption will qualify as exempt holdings. As a practical matter, evaluating the exempt and nonexempt character and fair market value of assets held by a corporation or noncorporate entity will become a routine part of Hart-Scott practice.

CONTACT INFORMATION

If you have any questions about these amendments, or about Hart-Scott-Rodino and merger antitrust issues generally, please contact any of the Akin Gump attorneys listed below.

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