

New Hart-Scott-Rodino Legislation

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The New Legislation, effective February 1, 2001, raises the minimum reportable transaction size to \$50 million and filing fees significantly for larger transactions.

Introduction

On December 21, 2000, President Clinton signed into law new legislation (the "New Legislation") designed to reform certain portions of the Hart-Scott Rodino Act of 1976 (the "Act"). 15 U.S.C. 18a. The New Legislation, which is the first significant change to the Act since its inception in 1976, takes effect on February 1, 2001. The New Legislation is designed to transfer the burden of compliance with the Act from smaller to larger companies and to update the Act's dollar thresholds, which had remained unchanged for twenty-four years. This memorandum summarizes the changes to the Act and the potential rules changes that may be necessary to implement the New Legislation.

The size of the transaction threshold is increased to \$50 million.

Under the current law, the size of the transaction test is satisfied if the proposed transaction will result in the acquiring person holding more than \$15 million of the acquired person's voting securities and/or assets; or, regardless of the purchase price, at least 50% of the voting securities of an issuer with annual net sales or total assets of \$25 million or more. Under the New Legislation, the size of the transaction test threshold is increased from \$15 million to \$50 million and the 50% threshold with regard to the acquisition of voting securities has been eliminated. This means that the \$50 million threshold will be an absolute floor. No transaction resulting in the acquiring person holding less than \$50 million of assets or voting securities of an acquired person will be reportable. The increase of the threshold from \$15 million to \$50 million, which reflects both inflation and GNP growth since 1976, will eliminate the reporting requirement for many smaller transactions.

Transactions valued at greater than \$200 million will be reportable without regard to the "size of the person."

Pursuant to the New Legislation, any acquisition in which the acquiring person will hold an aggregate total amount of the voting securities and assets of the acquired person in excess of \$200 million must be reported regardless of the size of either person. The size of the person test is eliminated if the deal is valued at greater than \$200 million. The current size of the person test, which requires one person to the transaction to have sales or assets in excess of \$100 million and the other person to have sales or assets in excess of \$10 million, will continue in place for transactions valued from \$50 million to \$200 million. Therefore, for transactions over \$200 million, the effect of the new legislation will make reporting virtually automatic, but will leave the size of the person test unchanged with regard to transactions valued from \$50 million to \$200 million.

Each dollar threshold will be adjusted each fiscal year beginning in the Federal Government's Fiscal Year ("FY") 2005, for changes in Gross National Product ("GNP") during the previous FY.

In an effort to keep the dollar thresholds commensurate with economic growth and inflation, each dollar threshold, above, will be adjusted and published for each of the Federal Government's fiscal years beginning after September 30, 2004. The thresholds will be adjusted to reflect the percentage change in the GNP for such FY compared to the GNP for the previous FY.

A tiered fee structure will be implemented.

Currently, the acquiring person in all reportable transactions must pay a \$45,000 filing fee. Under the New Legislation, a graduated fee structure will be implemented and the tiers will also be adjusted annually, beginning in FY 2005, for changes in GNP during the previous year. The fee that the acquiring person must pay will be based on the value of the voting securities or assets acquired as a result of the transaction. The tiers are as follows:

Size (value) of transaction -- Fee

\$50 million to less than \$100 million -- \$45,000

\$100 million to less than \$500 million -- \$125,000

\$500 million or more -- \$280,000

The New Legislation's tiers have no effect on the filing fee for transactions valued at less than \$100 million, but the fees required for larger transactions will be raised significantly. Fees charged to clients engaged in transactions valued at \$100 million or more but less than \$500 million will nearly be tripled by the New Legislation, and clients engaged in transactions valued at \$500 million or more will pay fees over six times the current fees.

Clients currently engaged in transactions that will result in a larger filing fee as of February 1, 2001 may want to file notifications under the Act as soon as possible. The fee required is determined by the date the waiting period begins (which is the date of filing under the Act), not the date of closing. Because the effective date of the New Legislation is February 1, 2001, only transactions with a waiting period that begins on or after that date are subject to the new fee structure. However, the reportability of a transaction is determined by the date of closing, not by the date of the waiting period begins. Thus, clients engaged in current transactions valued at below \$50 million may avoid all reporting under the Act if the closing occurs on or after February 1, 2001. However, if a client files or has filed a notification based on a proposed closing date prior to February 1, 2001, but the transaction is delayed and closes after February 1, 2001, the transaction will remain reportable and the filing fee will not be refunded because the transaction was reportable on its face when submitted for filing under the Act.

In light of the reduced number of filings to be caused by increasing the reportable transaction threshold to \$50 million and the significant increase in fees for larger transactions, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") may devote more resources to reviewing transactions that otherwise would not have faced such scrutiny.

The length of the waiting period that follows substantial compliance with second requests will be 30 days for most transactions.

Under the current law, the waiting period that follows substantial compliance with second requests is 20 days for most transactions. Pursuant to the New Legislation, the new waiting period is 30 days. The 10-day period for cash tenders and bankruptcy transactions remains unchanged.

Rules changes may be necessary to implement the New Legislation.

Subject to approval by the FTC and the Assistant Attorney General, several rules changes will be made in order to implement the New Legislation. The rules changes are likely to take effect on February 1, 2001. According to information provided by the FTC, these rules changes may include:

- modification of the "notification thresholds" in Section 801.1(h) of the Premerger Notification Rules (the "Rules") to make them consistent with the New Legislation.
 - a transition rule to address filings made under the "old" thresholds that continue to use some of the five year period for additional purchases remaining under Section 802.21 of the Rules.
 - a rule regarding the new graduated fee schedule.
 - a revised Hart-Scott-Rodino Notification and Report Form (the "Form") and Instructions incorporating some changes prompted by the New Legislation. Item 8 of the Form (Vendor-Vendee relationships) is eliminated.
- Conclusion

The New Legislation, in part, was motivated by Congress' realization that the economic changes of the past two decades made compliance with the Act a needless burden for smaller transactions. The New Legislation will free those smaller transactions, which are less likely to pose a significant antitrust threat, from the burdens of the Act, and allow the FTC and DOJ to focus more on larger transactions, which more realistically could affect competition. The New Legislation should reduce the number of Hart-Scott-Rodino filings submitted to the FTC and the DOJ each year. For clients (large or small) engaged in transactions under \$50 million with a closing date on or after February 1, 2001, the New Legislation eliminates the hurdle of government approval under the Act. However, for larger transactions, clients will be subjected to substantial increases in filing fees and potentially more onerous review by the FTC and the DOJ. In addition, the new tiered filing fee structure makes filing expeditiously for pending larger transactions desirable because the increased filing fees can be avoided by filing under the Act prior to February 1, 2001.

Endnotes

1/ Pursuant to the Act as originally enacted, for the Act to apply to a proposed transaction, all of its three jurisdictional tests must be met: the commerce test, the size-of-the-parties test, and the size-of-the-transaction test. The commerce test is met if either the "acquired person" or the "acquiring person" is engaged in commerce or any activity affecting commerce, and is virtually always met. The size-of-the-parties test generally is met when one party and all of its affiliates have annual net sales or total assets of \$100 million or more and the other party and its affiliates have annual net sales or total assets of \$10 million or more. However, if the seller is the smaller person and is not engaged in manufacturing, it must have total assets of \$10 million or more, regardless of its annual net sales. The size-of-the-transaction test is satisfied if the proposed transaction will result in the acquiring person holding more than \$15 million of the acquired person's voting securities and/or

assets; or, regardless of the purchase price, at least 50% of the voting securities of an issuer with annual net sales or total assets of \$25 million or more. If all three jurisdictional tests are satisfied, the parties must comply with the Act and make a filing (with which the acquiring person must pay a \$45,000 filing fee), unless a specific exemption in the Act applies to the transaction. Failure to comply with Act requirements could result in a civil penalty of up to \$11,000 per day imposed on the non-complying party, and rescission of the transaction.

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