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NEW U.S. REGULATIONS GOVERNING ANTITRUST MERGER NOTIFICATION REQUIREMENTS

AN EURO-AMERICAN LAWYERS GROUP BRIEFING ARTICLE

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Background

Pursuant to federal anti-trust legislation commonly referred to as the “Hart-Scott-Rodino” Act, entities that are parties to certain types of mergers or acquisitions must notify both the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) before consummating a proposed transaction. The purpose of the Act is to enable the FTC and the DOJ to determine which acquisitions are likely to be anticompetitive and to challenge such transactions before they are consummated.

There is a two-part test to determine whether a proposed transaction will be subject to the Act: (i) if one of the entities involved in the proposed transaction has USD\$100 million or more in annual net sales or total assets while another entity to the proposed transaction has USD\$10 million or more in annual net sales or total assets (“size of the person test”); and (ii) if as a result of the transaction the acquiring entity will hold an aggregate amount of voting securities and/or assets of the acquired entity valued in excess of USD\$50 million (“size of the transaction test”). Acquisitions valued in excess of USD\$212.3 million are required to be reported even if the foregoing tests are not met.

The notification procedure requires the filing of a Notification and Report Form and the payment of a filing fee. After submitting the Form and the fee, the parties must observe a statutory waiting period during which the parties may not consummate the proposed transaction. The waiting period is typically thirty (30) days, although a fifteen (15) day period applies to acquisitions utilizing cash tender offers. If neither the FTC nor the DOJ believes the proposed transaction will substantially reduce the competition in the market, then no further action will be recommended and the parties will be free to consummate the transaction upon expiration of the waiting period.

Recent Developments

The FTC has recently adopted new rules under the Act that: (i) increase the threshold amounts under the two-part test; and (ii) substantially revise the treatment of unincorporated entities under the Act.

Under the new rules, the size of the person test’s threshold is increased from USD\$100 million to USD\$106.2 million and from USD\$10 million to USD\$10.7 million. The size of the transaction test’s threshold has been increased from USD\$50 million to USD\$53.1 million.



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The new rules also remove the preference formerly available to unincorporated entities over those that are incorporated. Under the old rules unincorporated entities rarely came within the Act while incorporated entities with the same levels of ownership and control did. The essence of the new rules is consistent treatment of transactions involving corporations and unincorporated entities. With the advent of the new rules, proposed transactions involving entities such as general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and certain business trusts will more easily trigger the requirements under the Act.

The importance of structuring a transaction where possible so as to avoid the need to satisfy the Act cannot be overstated. In addition to the waiting period prior to effecting a proposed transaction, the filing fee can be substantial. The filing fee is tiered and is determined according to the following schedule: (i) USD\$45,000 for transactions valued at more than USD\$50 million but less than USD\$100 million; (ii) USD\$125,000 for transactions valued greater than or equal to USD\$100 million but less than USD\$500 million; and (iii) USD\$280,000 for transactions valued at USD\$500 million or more.

The new rules became effective on April 7, 2005.

The following attorneys contributed their expertise and are available to answer questions regarding the above article: Marshall N. Lester, Kyle Taylor and Chris Celano. For additional details, please contact them at Warsaw, Burstein, Cohen, Schlesinger & Kuh, LLP, New York, New York. <http://www.wbcsk.com>

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