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# Recent Updates to the Hart-Scott-Rodino Act

*David T. Beddow & Darren S. Tucker\**

## I. INTRODUCTION

Over the last two years, the Federal Trade Commission has made a number of notable revisions to the rules implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”).<sup>1</sup> The HSR Act requires parties to mergers and acquisitions of a certain size to observe a waiting period before consummating their transaction and to submit certain information to the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“Antitrust Division”).<sup>2</sup> The revisions include changes to certain filing thresholds, to the notification form, and to treatment of unincorporated entities.<sup>3</sup>

Perhaps the most publicized rule change is the annual increase in the thresholds that determine whether transactions are reportable under the HSR Act.<sup>4</sup> Beginning on February 17, 2006, only transactions valued in excess of \$56.7 million must be reported to the enforcement agencies before consummation.<sup>5</sup> Additionally, a number of other monetary thresholds, including the size of the parties and filing fee cutoffs have also increased.<sup>6</sup>

Several changes to the HSR form itself will make filings easier and less expensive. In early 2006, the FTC announced a new base year to report certain revenue information on the HSR notification form.<sup>7</sup> More recently, the antitrust agencies announced the roll-out of an electronic filing system that allows merging parties to submit filings

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1. Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a (2006).

2. *Id.* § 18a(b).

3. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943 (Jan. 18, 2006); *see also* Acquiring and Acquired Persons, 16 C.F.R. § 801.2 (2005).

4. 15 U.S.C. § 18a; Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. at 2943.

5. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. at 2943-44.

6. *Id.* at 2943.

7. Premerger Notification: Reporting and Waiting Period Requirements, 70 Fed. Reg. 77312, 77313 (Dec. 30, 2005).

over the Internet.<sup>8</sup> These revisions should reduce some of the burden on filing parties, particularly large, public companies and companies that prepare their own filings.<sup>9</sup>

The final and most complex set of rule changes is designed to treat unincorporated entities more like corporate entities.<sup>10</sup> More transactions involving partnerships, limited liability companies, and other unincorporated entities will be reportable under the HSR Act, although some previously reportable transactions will now be exempt.<sup>11</sup>

Generally speaking, the acquisition of non-corporate interests is now reportable if the acquisition results in a change of control of the unincorporated entity.<sup>12</sup> The formation of a new unincorporated entity is now reportable if any person will control the new entity.<sup>13</sup> In both cases, certain jurisdictional thresholds involving the size of the transaction and the size of the parties must also be met to trigger a filing obligation.<sup>14</sup>

This Note provides an overview of the HSR Act and its recent updates. In Part II, the Note provides a background to the HSR Act. Part III explains the revisions related to filing thresholds and Part IV delineates the changes to the notification form. Part V provides a detailed look at the treatment of unincorporated entities prior to the recent rules changes and the recent rules changes relating to unincorporated entities. Finally, Part VI concludes by summarizing the changes and providing a forward look to what is on the horizon for the HSR Act.

## II. BACKGROUND OF THE HSR ACT

The HSR Act requires parties to notify the FTC and the Antitrust Division of certain contemplated mergers or acquisitions and to observe a waiting period before consummating the transaction.<sup>15</sup> As part of the notification, both parties must submit information about their respective businesses and the proposed transaction.<sup>16</sup>

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8. Premerger Notification: Reporting and Waiting Period Requirements, 71 Fed. Reg. 35995, 35996 (June 23, 2006).

9. *Id.*

10. Premerger Notification: Reporting and Waiting Period Requirements, 70 Fed. Reg. 11502 (Mar. 8, 2005).

11. *Id.*

12. Acquiring and Acquired Persons, 16 C.F.R. § 801.2(f)(1) (2005).

13. Formation of Unincorporated Entities, 16 C.F.R. § 801.50(b) (2005).

14. *Id.* See generally 16 C.F.R. § 801.2(f)(1).

15. Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a(a)-(b) (2006).

16. *Id.* § 18(d)(1).

The goals of the HSR Act are to give the antitrust agencies sufficient time to conduct a meaningful review of proposed transactions prior to consummation, provide information needed to conduct a meaningful review, and afford the ability to obtain additional information for potentially problematic transactions.<sup>17</sup> The HSR Act was enacted in large part for two reasons. The first was due to a perception of large “midnight mergers” closing before the antitrust agencies could investigate them. The second was the extensive length of time needed to unwind anticompetitive mergers through federal court litigation.<sup>18</sup>

A proposed transaction is potentially reportable under the HSR Act if both the size-of-the-parties test and the size-of-the-transaction test are satisfied.<sup>19</sup> Both tests are based on certain monetary thresholds, which are adjusted each year based on changes in the gross national product.<sup>20</sup> The size-of-the-transaction test is satisfied if as a result of the transaction,<sup>21</sup> the acquiring person would hold voting securities or assets of the acquired person with a total value of more than \$56.7 million.<sup>22</sup> The size-of-the-parties test is satisfied if one per-

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17. S. REP. NO. 94-803, at 10 (1976) [hereinafter “Senate Report”]; H.R. REP. NO. 94-1373, at 5 (1976) [hereinafter “House Report”]; see also 1 STEPHEN M. AXIN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT § 1.02 (rev. ed. 2005).

18. See H.R. REP. NO. 94-1373, at 10-11; S. REP. NO. 94-803, at 64-65; see also Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 52-54 (2004) (“Congress enacted the HSR Act to eliminate the deleterious effects of post-consummation challenges.”); Gary L. Reback & Christopher O. B. Wright, *Government Review of High Technology Mergers*, 9 NO. 6 COMPUTER LAW. 1, 6 (1992) (HSR Act “intended to outlaw so-called ‘midnight mergers’ consummated before the Government even learned about the transaction”); *United States v. Computer Assoc. Int’l Inc.*, 2002-2 Trade Cases ¶ 73,883 (D.D.C. 2002) (competitive impact statement) (“The HSR Act was designed to strengthen antitrust enforcement by preventing the consummation of large mergers before they were investigated by the enforcement agencies.”).

Some have subsequently questioned whether “midnight mergers” were as widespread and problematic as the legislation’s sponsors claimed. See, e.g., Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 878 & n.48 (Spring 1997) (“it was not at all clear that the horror stories advanced by the legislation’s sponsors were in fact so horrible”).

19. 15 U.S.C. § 18a(a)(2)(A)-(B); see also 15 U.S.C. § 18a(a)(1) (noting that, in addition to the size tests, either the acquiring person or the acquired person must be engaged in interstate commerce or in an activity affecting interstate commerce).

20. See *id.* § 18a(a)(2); see also *infra* Part II.

21. In certain circumstances, previously acquired voting securities, assets, and non-corporate interests must be included in determining whether the threshold is satisfied. See 16 C.F.R. § 801.13.

22. See 15 U.S.C. § 18(a)(2); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2,943 (Jan. 18, 2006).

son<sup>23</sup> has annual net sales or total assets of \$113.4 million or more and the other has annual net sales or total assets of \$11.3 million or more.<sup>24</sup> The size-of-the-parties test does not apply to transactions valued in excess of \$226.8 million.<sup>25</sup> These jurisdictional thresholds adjust annually and were increased to their current level on February 17, 2006.<sup>26</sup>

The HSR Act and the rules implementing the Act exempt certain types of acquisitions from the requirements of the HSR Act, even when meeting the threshold criteria.<sup>27</sup> The most common exemptions include (1) acquisitions of goods and realty in the ordinary course of business;<sup>28</sup> (2) acquisitions of certain types of real property;<sup>29</sup> (3) acquisitions of no more than ten percent of the voting securities of an issuer solely for the purpose of investment;<sup>30</sup> (4) certain intra-person transactions;<sup>31</sup> (5) acquisitions of convertible securities;<sup>32</sup> and (6) acquisitions of foreign voting securities or assets that lack a sufficient economic nexus to the United States.<sup>33</sup>

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23. A person is defined as "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. § 801.1(a)(1) (2006). Thus, a person will include all entities controlled by its ultimate parent entity. *See id.*

24. *See* 15 U.S.C. § 18a(a)(2)(B); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2,943. The test is limited to total assets for any acquired person not engaged in manufacturing. *See* 15 U.S.C. § 18a(a)(2)(B)(ii)(II).

25. 15 U.S.C. § 18a(a)(2)(A); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943.

26. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943 at 2944.

27. 15 U.S.C. § 18a(c); 16 C.F.R. § 802.1 (2005).

28. 15 U.S.C. § 18a(c)(1); 16 C.F.R. § 802.1; *see also* 16 C.F.R. §§ 802.2-802.5 (exemptions for certain acquisitions of real property assets, oil and mineral reserves, rental property, and securities of a company holding such assets).

29. 16 C.F.R. § 802.2 (describing classes of real property assets that are exempt under certain circumstances including new facilities, used facilities, unproductive real property, office and residential property, hotels and motels, recreational land, agricultural property, and retail rental space and warehouses). In addition, acquisitions of certain investment rental property assets and carbon-based mineral reserves are exempt from reporting requirements. *See id.* §§ 802.3, 802.5. The rules also exempt acquisitions of companies holding the assets described in this footnote. *See id.* § 802.4.

30. 15 U.S.C. § 18a(c)(9); 16 C.F.R. § 802.9 (2005). The FTC is considering revising the passive investor exemption but has not made a formal announcement.

31. 16 C.F.R. § 802.30 (2005). Examples of intra-person transactions include a corporation's merger of two of its wholly-owned subsidiaries, creation of a new wholly-owned subsidiary, repurchase of its own securities, and redemption or retirement of its own securities. *See id.*

32. 16 C.F.R. § 802.31 (2001); *see also id.* § 801.1(f) (2006) (explaining that a convertible voting security is a security that lacks voting rights until conversion). *But see id.* § 801.32 (2005) (stating that conversion of a non-voting security to a voting security is a potentially reportable transaction).

33. 16 C.F.R. § 802.50 (2005); 16 C.F.R. § 802.51 (2005).

If a proposed transaction is reportable under the HSR Act and no exemption applies, each party must submit a Notification and Report Form<sup>34</sup> to the Federal Trade Commission and the Antitrust Division of the Department of Justice and observe a waiting period.<sup>35</sup> The notification form identifies the structure and value of the transaction, as well as the persons involved.<sup>36</sup> The form also includes financial information about each party and its corporate structure and holdings.<sup>37</sup> The parties must identify and provide additional information regarding any overlapping lines of business, including any prior acquisitions of similar businesses.<sup>38</sup> Perhaps most important, each party must submit so-called “4c” documents, which are certain planning and evaluation documents prepared in connection with the proposed transaction.<sup>39</sup>

For most transactions, the parties must submit an affidavit with the notification attesting to the execution of a contract or letter of intent and the party’s good faith intention of completing the proposed transaction.<sup>40</sup> Notification is complete upon the acquiring company’s payment of a filing fee, which varies from \$45,000 to \$280,000, depending upon the size of the transaction.<sup>41</sup>

Parties to a reportable transaction must observe a waiting period prior to consummating their transaction.<sup>42</sup> The waiting period is fifteen days for cash tender offers and acquisitions of assets out of Chapter 11 proceedings, and thirty days for all other reportable transactions.<sup>43</sup> For most transactions, the waiting period begins after all required parties submit notification forms and the filing fee has been paid.<sup>44</sup> For certain third party and open-market transactions, the waiting period begins after the acquirer submits its notification form and pays the filing fee.<sup>45</sup>

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34. Notification and Report Form for Certain Mergers and Acquisitions, 16 C.F.R. app. pt. 803 (2001), *available at* <http://www.ftc.gov/bc/hsr/hsr.htm>.

35. 16 C.F.R. pt. 803 (2001).

36. 16 C.F.R. app. pt. 803 (2001), *available at* <http://www.ftc.gov/bc/hsr/hsr.htm>.

37. *Id.*

38. *Id.*

39. *Id.*

40. 16 C.F.R. § 803.5(a)(1) (2006).

41. 16 C.F.R. § 803.9 (2005) (acquiring person is responsible for filing fee); *see also* 15 U.S.C. §18a note (b) (2001) (Assessment and Collection of Filing Fees).

42. 15 U.S.C. § 18a(b) (2006).

43. 15 U.S.C. § 18a(b)(1)(B); 11 U.S.C. § 363(b)(2) (2006); 16 C.F.R. § 803.10(b)(1) (2006). A waiting period that ends on a weekend or legal public holiday is extended to the next regular business day. 16 C.F.R. § 803.10(b)(3).

44. 15 U.S.C. § 18a(b)(1)(A)(i); 16 C.F.R. § 803.10(a).

45. 16 C.F.R. § 803.10(a)(1).

Any filing party may request early termination of the waiting period, which, if granted, permits the parties to close the transaction prior to the end of the statutory waiting period.<sup>46</sup> Early termination is granted for the majority of transactions for which it is requested.<sup>47</sup>

Before the expiration of the waiting period, either agency may initiate a more extensive investigation by issuing to each party a Request for Additional Information and Documentary Materials, also known as a Second Request.<sup>48</sup> A Second Request extends the waiting period for thirty days (ten days for cash tender offers) from the date of compliance with the request.<sup>49</sup> Complying with a Second Request, which typically contains two to three dozen interrogatories and document requests, can be expensive and time consuming.

Failure to file a notification form, filing an incomplete notification form, or closing a reported transaction prior to expiration of the waiting period may result in the imposition of civil penalties of up to \$11,000 for each day in violation of the HSR Act.<sup>50</sup> In practice, the agencies typically decline to seek penalties from parties that inadvertently fail to file but will seek penalties for a second mistake or for other types of violations.<sup>51</sup>

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46. 15 U.S.C. § 18a(b)(2).

47. In 2005, early termination was requested for 82% of reported transactions and granted 72% of the time when requested. See FED. TRADE COMM'N & DEP'T OF JUSTICE, ANN. REP. TO CONGRESS, FISCAL YEAR 2005, at 6 (2006), available at <http://www.ftc.gov/reports/hsr05/P989316twentyeighthannualhsrreport.pdf>. In these authors' experience, two weeks from filing is a typical time to receive early termination for transactions that do not raise competitive concerns on their face; although, one week is not unusual for particularly straightforward notifications.

48. 15 U.S.C. § 18a(e)(1)(A).

49. *Id.* § 18a(e)(2); 16 C.F.R. § 803.10(b)(2); 16 C.F.R. § 803.20(c)(2)(ii) (2005).

50. 15 U.S.C. § 18a(g)(1); see also Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461 note (Supp. 1999) (indexing the fine to inflation); Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended by the Debt Collection Improvement Act of 1996, 65 Fed. Reg. 69665, 69666 (Nov. 20, 2000) (setting fine at \$11,000 per day).

51. For examples of recent enforcement actions, see *United States v. Qualcomm Inc.*, 2006-1 Trade Cases (CCH) ¶ 75,195 (D.D.C. 2006) (challenging failure to observe waiting period); *United States v. Smithfield Foods, Inc.*, 2004-2 Trade Cases (CCH) ¶ 74,614 (E.D. Va. 2004) (challenging use of investment only exemption); *United States v. Manulife Fin. Corp.*, 2004-1 Trade Cases (CCH) ¶ 74,426 (D.D.C. 2004) (challenging use of investment only exemption); *United States v. Gates*, 2004-1 Trade Cases (CCH) ¶ 74,417 (D.D.C. 2004) (challenging use of investment only exemption; second violation); *United States v. Gemstar-TV Guide Int'l, Inc.*, 2003-2 Trade Cases (CCH) (D.D.C. 2003) (challenging failure to observe waiting period); *United States v. Computer Assocs. Int'l Inc.*, 2002-2 Trade Cases (CCH) ¶ 73,883 (D.D.C. 2002) (challenging failure to observe waiting period); *United States v. Hearst Corp.*, 2001-2 Trade Cases (CCH) ¶ 73,451 (D.D.C. 2001) (challenging failure to submit 4c documents); *United States v. Blackstone Capital Partners II Merch. Banking Fund L.P.*, 1999-1 Trade Cases (CCH) ¶ 72,484 (D.D.C. 1999) (challenging failure to submit 4c documents).

### III. NEW FILING THRESHOLDS

As described in the previous section, mergers and acquisitions are potentially reportable under the HSR Act if they cross certain monetary thresholds.<sup>52</sup> The FTC is required to adjust the thresholds annually to reflect changes in gross national product.<sup>53</sup> Effective February 17, 2006, these thresholds were revised upward and will be effective for approximately one year, at which point they will be revised again.<sup>54</sup>

A notification may be required if a transaction hits the jurisdictional thresholds in one of two ways.<sup>55</sup> Notification is required if the transaction is valued in excess of \$56.7 million and total assets for one party exceed \$113.4 million and for the other party exceed \$11.3 million.<sup>56</sup> Previously, this test was satisfied if the transaction was valued in excess of \$53.1 million and the parties' assets were \$106.2 million and \$10.7 million, respectively.<sup>57</sup> Alternatively, notification is required if the transaction is valued in excess of \$226.8 million, regardless of the size of the parties.<sup>58</sup> The prior threshold for this test was \$212.3 million.<sup>59</sup>

The filing fees continue to range from \$45,000 to \$280,000 but the thresholds for each fee stratum have increased.<sup>60</sup> For transactions valued between \$56.7 million and \$113.4 million, the fee is \$45,000; for transactions valued up to \$567 million, the fee is \$125,000; and for larger transactions, the fee is \$280,000.<sup>61</sup>

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52. 15 U.S.C. § 18a(a)(2).

53. *Id.*; see also Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943 (Jan. 18, 2006).

54. *Id.* at 2944.

55. 15 U.S.C. § 18a(a)(2). The increased monetary thresholds affect a number of other HSR regulations. For example, the threshold for foreign issuers and foreign assets increased to \$56.7 million. See 16 C.F.R. §§ 802.50, 802.51; Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943. Also adjusted upward were the thresholds for the five notification thresholds, which determine whether a subsequent acquisition of additional voting securities from the same issuer will require another HSR filing. See 16 C.F.R. § 801.1(h).

56. 15 U.S.C. § 18a(a)(2)(A); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. at 2943.

57. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 70 Fed. Reg. 5020 (Jan. 31, 2005).

58. 15 U.S.C. § 18a(a)(2)(A); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. at 2943.

59. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 70 Fed. Reg. 5020.

60. See 15 U.S.C. § 18a note (establishing filing fees assessment value and collection methods); Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. 2943.

61. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 71 Fed. Reg. at 2944.



## IV. REVISIONS TO THE NOTIFICATION FORM

The Notification and Report Form (HSR form) requires the submission of certain revenue data for the most recent fiscal year as well as a base year.<sup>62</sup> Previously, filers reported revenue data using the 1997 North American Industry Classification System ("NAICS") and the 1997 Numerical List of Manufactured and Mineral Products.<sup>63</sup> Beginning December 30, 2005, filers are required to use the 2002 version of the NAICS and manufacturing codes to report economic data.<sup>64</sup> In addition, the base year switched from 1997 to 2002.<sup>65</sup> The FTC explained that these revisions were intended to take advantage of substantial revisions to the NAICS codes within certain sectors.<sup>66</sup>

The HSR form also requires the submission of paper copies of annual reports, annual audit reports, regularly prepared balance sheets, and certain Securities and Exchange Commission filings.<sup>67</sup> Effective January 11, 2006, filers may provide an Internet address to the required documents in lieu of providing paper copies.<sup>68</sup> The FTC explained that the purpose of the revision was to relieve some of the burden in submitting an HSR form.<sup>69</sup>

In June 2006, the antitrust agencies announced an Electronic Filing System, under which parties have the option of submitting their notification filings electronically via the Internet.<sup>70</sup> Submitted filings are accessible to both antitrust agencies through a shared, secure database.<sup>71</sup> Filing parties may continue to submit filings in paper form or to submit only the documentary attachments in paper form.<sup>72</sup> The agencies claim that electronic filing will result in faster processing

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62. Notification and Report Form for Certain Mergers and Acquisitions, 16 C.F.R. app. pt. 803 (2001), available at <http://www.ftc.gov/bc/hsr/hsr.htm>.

63. NAICS replaced the U.S. Standard Industrial Classification (SIC) system. See *Premerger Notification; Antitrust Improvements Act Notification and Report Form*, 66 Fed. Reg. 35541 (July 6, 2001). NAICS was developed jointly by the U.S., Canada, and Mexico to provide new comparability in statistics about business activity across North America. *Id.*

64. See *Premerger Notification; Reporting and Waiting Period Requirements*, 70 Fed. Reg. 77312 (Dec. 30, 2005).

65. *Id.*

66. *Id.* at 77313.

67. 16 C.F.R. app. pt. 803 (2001), available at <http://www.ftc.gov/bc/hsr/hsr.htm>.

68. *Premerger Notification; Reporting and Waiting Period Requirements*, 70 Fed. Reg. 73369 (Dec. 12, 2005) (codified at 16 C.F.R. § 803.2). If the Internet link is inoperative, the filing will be considered deficient unless the filer provides an operative Internet link or paper copies within one business day following a request by the FTC or DOJ. *Id.*

69. *Id.*

70. *Premerger Notification; Reporting and Waiting Period Requirements*, 71 Fed. Reg. 35995 (June 23, 2006).

71. *Id.* at 35996.

72. *Id.*

time, improved data entry, and the elimination of expensive and time-consuming duplication of documents.<sup>73</sup>

Although the changes to the notification form appear to be ministerial, they will relieve some of the burden on companies required to submit notifications under the HSR Act. The change in base year from 1997 to 2002 will be particularly beneficial. For some large and mid-sized companies, compilation of revenue data in the required format can require dozens or hundreds of man-hours, in part due to the difficulty of reconstructing financial records from 1997. Eliminating the need to submit paper copies of documents readily available on the Internet is also a sensible, cost-saving measure.

While we applaud the agencies' effort in developing an electronic filing system, we expect most practitioners will continue to rely on the old paper-based system. We have found the electronic system to be more complex<sup>74</sup> and time-consuming with no corresponding benefit. We understand that outside counsel have so far continued to submit filings on paper for this reason.

## V. TREATMENT OF THE UNINCORPORATED ENTITIES

### A. *Treatment of Unincorporated Entities Prior to the 2005 Rule Change*

The HSR Act, by its own terms, only applies to acquisitions of voting securities and assets.<sup>75</sup> Prior to a rule change in 2005, neither the statute nor the implementing rules addressed whether interests in unincorporated entities were to be considered voting securities or assets.<sup>76</sup> The FTC did, however, provide formal and informal guidelines to practitioners.<sup>77</sup>

The treatment of partnership interests under the FTC's old guidelines was straightforward. The FTC took the position that partnership interests were neither voting securities nor assets. As a result, an acquisition of partnership interests was not a reportable transaction un-

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73. *Id.*

74. For example, the filing person must obtain an External Certification Authority (ECA) certificate and download various other software in advance of the filing. *See generally* Fed. Trade Comm'n & Dep't of Justice, Hart-Scott-Rodino Electronic Filing System, ECA Digital Certificate - Getting Started, <https://www.hsr.gov/gettingstarted.htm> (last visited Nov. 21, 2006); Fed. Trade Comm'n & Dep't of Justice, Hart-Scott-Rodino Electronic Filing System, E-Filing FAQs, <https://www.hsr.gov/hsrfaq.htm> (last visited Nov. 21, 2006).

75. 15 U.S.C. § 18a(a).

76. *Id.*

77. The FTC's Premerger Notification Office administers the HSR Act's premerger notification program.

less 100 percent of the partnership interests were acquired.<sup>78</sup> Formations of partnerships were never reportable events.<sup>79</sup> According to the FTC, the “treatment of partnerships was originally adopted, in part, because of the difficulty of monitoring compliance with HSR reporting obligations since many partnerships can be formed informally or by implications in many typical business arrangements.”<sup>80</sup>

The FTC’s treatment of limited liability companies was considerably more complex. Initially, the FTC treated LLCs the same as corporations, which led to a large number of filings that presented no competitive concerns.<sup>81</sup> Beginning in 1994, the FTC advised that LLCs should be treated based on whether the interest being acquired was more like a voting security interest or more like a partnership interest.<sup>82</sup>

The FTC revised its treatment of LLCs again in 1998; amendments followed in 1999 and 2001.<sup>83</sup> Under the final version of these guidelines, formations of LLCs were reportable if two or more pre-existing, separately controlled businesses were contributed to the new LLC and at least one of the members would control the LLC.<sup>84</sup> A person had “control” of an LLC if it had the right to fifty percent of the profits of the LLC or fifty percent of the assets of the LLC upon dissolution.<sup>85</sup>

The acquisition of a membership interest in an existing LLC was similar to the treatment of acquisitions of partnership interests.<sup>86</sup> An acquisition of an LLC was a reportable event only if the acquiring person would acquire 100% of the membership interests.<sup>87</sup> In this

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78. See 66 Fed. Reg. 16241, 16244. Throughout this Note, we refer to “reportable” transactions or events as those acquisitions subject to the requirements of the HSR Act. The size-of-the-transaction and size-of-the-parties test must also be satisfied to trigger a notification requirement. See *id.*

79. *Id.*

80. *Id.*

81. *Id.* at 16242 & n.3 (describing early LLC rules).

82. See *id.* at n.4 (describing early LLC rules).

83. See Premerger Notification; Reporting and Waiting Period Requirements, 63 Fed. Reg. 54713 (Oct. 13, 1998); Premerger Notification; Reporting and Waiting Period Requirements, 64 Fed. Reg. 5808 (Feb. 5, 1999); Premerger Notification; Reporting and Waiting Period Requirements, 64 Fed. Reg. 34804 (June 29, 1999); Premerger Notification; Reporting and Waiting Period Requirements, 66 Fed. Reg. 16241 (Mar. 23, 2001).

84. See 66 Fed. Reg. at 16242.

85. See *id.* A “business” for these purposes was “assets that are operated as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.” *Id.* at 16243 & n.7 (ellipses omitted) (quoting 16 C.F.R. § 802.1(a)) (defining operating unit). A “business” also included any exclusive interest in intellectual property. See *id.* at 16243.

86. *Id.* at 16242.

87. *Id.*

case, the acquisition would be reportable as the acquisition of all of the assets of the LLC.<sup>88</sup>

Acquisitions of additional businesses by an existing LLC that resulted in a change in the percentage membership interests of any member was deemed a formation of a new LLC, which could trigger reporting obligations even if the original LLC had been notified.<sup>89</sup> All other acquisitions by existing LLCs were potentially reportable as the acquisition of assets or voting securities by the LLC.<sup>90</sup>

The FTC's treatment of unincorporated entities resulted in a number of anomalies that did not occur with corporations. As LLC's popularity grew, these anomalies became increasingly apparent to the FTC and the private bar.

The first problem with the FTC's prior guidelines is that they often did not require notification at the most meaningful time for antitrust review: a change in control. For example, an acquisition of a 99% interest in an unincorporated entity would not be reportable, yet an acquisition of a 100% interest would.<sup>91</sup> Although the two transactions have similar antitrust significance because both confirm control, only one is reportable. As another example, a person having a 75% interest that acquired the remaining 25% interest would have to file, despite already controlling the entity.<sup>92</sup> For this transaction, the antitrust review comes too late.

The second problem with the old LLC rules was the lack of an exemption for intraperson transfers. For corporate entities, acquisitions where the acquiring and acquired persons were the same were exempt from reporting.<sup>93</sup> The intraperson exemption applied, for example, to (a) a transfer of assets between two corporate subsidiaries or two corporations owned by the same person, (b) the acquisition of the remaining corporate interests in a 50/50 joint venture, and (c) the transfer of assets from a corporation to its majority shareholder.<sup>94</sup> Similar transactions involving unincorporated entities would be reportable, leading both to inconsistent results and reporting of transactions with minimal competitive implications.<sup>95</sup>

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88. *Id.*

89. *Id.* at 16243-44.

90. *Id.* at 16244.

91. Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. 11502, 11503 (Mar. 5, 2005).

92. *Id.*

93. See 16 C.F.R. 802.30 (2005).

94. See *id.* (citing additional examples of intraperson transactions).

95. Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. at 11503.

The final problem with the old LLC rules was that they missed some formation transactions that could have competitive implications. Formations of unincorporated entities were not treated as reportable events, except for some LLC formations.<sup>96</sup> As a result, a majority owner of a newly-formed unincorporated entity could acquire control over assets contributed by other parties without having to file. In contrast, a similar formation involving a corporate entity would be reportable.<sup>97</sup>

### B. *Summary of 2005 Rule Changes Related to Unincorporated Entities*

The new HSR rules, which went into effect on April 7, 2005, were designed to apply the HSR Act “as consistently as possible to all forms of legal entities” and to trigger filing obligations “at the point at which control of an unincorporated entity changes.”<sup>98</sup>

The new rules introduce the concept of a non-corporate interest, which is an interest in an unincorporated entity that gives the holder the right to any profits or to any assets upon dissolution of the entity.<sup>99</sup> Non-corporate interests are distinct from voting securities and assets. “[U]nincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives,” and certain trusts.<sup>100</sup>

*Acquisitions of Non-Corporate Interests.* Under the 2005 rules, an acquisition that results in control of an unincorporated entity is reportable.<sup>101</sup> This is a significant departure from the prior rules, which required an acquisition of 100% of the interest in an unincorporated entity to be reportable.<sup>102</sup> Control of an unincorporated entity is defined as “the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity.”<sup>103</sup> The FTC’s Premerger Notification Office has provided additional guidance where the right to profits or assets

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96. *Id.*

97. See 16 C.F.R. § 801.40 (2005).

98. Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. at 11502.

99. 16 C.F.R. § 801.1(f)(1)(ii) (2006).

100. *Id.*

101. 16 C.F.R. 801.2(f)(1). The size-of-the-transaction and size-of-the-parties tests would still need to be met to trigger a filing obligation.

102. See *supra* Section IV.A.

103. 16 C.F.R. § 801.1(b)(1)(ii).

upon dissolution is governed by a formula based on variables or events that will occur in the future.<sup>104</sup>

Under the new rules, the value of an acquisition of non-corporate interests is the sum of the value of the interests to be acquired plus the value of any pre-existing interests in the same entity.<sup>105</sup> The value of the interests to be acquired is the acquisition price if determined, or if undetermined, the fair market value of the interests.<sup>106</sup> The value of any pre-existing interests in the same unincorporated entity is the fair market value.<sup>107</sup>

The new rules clarify that a contribution of assets or securities to an existing unincorporated entity is an acquisition of those contributions by the unincorporated entity (or its ultimate parent entity).<sup>108</sup> This is a reversal of the prior LLC rules, which held that the contribution of a business to an existing LLC in return for membership interests created a new LLC.<sup>109</sup>

*Formation of Unincorporated Entities.* In another significant shift from the old rules, formation of any type of unincorporated entity is now a reportable event if one or more of the forming parties will have a controlling interest.<sup>110</sup> The value of the acquisition for a party with a controlling interest is the value of all the contributions to the unincorporated entity, less the value of the contributions of that party.<sup>111</sup>

*Expanded Application of Intraperson Exemption.* The new rules exempt intraperson transfers without regard to the type of entity involved.<sup>112</sup> As described in more detail above, an intraperson transaction involves an acquisition of an entity or assets already con-

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104. See 70 Fed. Reg. at 11504-05 (stating that if either the right to profits or the right to assets upon dissolution is variable and the other is fixed, control is determined by the fixed factor). If both factors are variable, a person that has the rights to 50% or more of the assets upon dissolution at the time of the acquisition is a controlling person. *Id.* If no such person exists, no one controls the unincorporated entity as a result of the proposed transaction. *Id.*

105. See 16 C.F.R. § 801.13(c)(1) (2005).

106. 16 C.F.R. § 801.10(d) (2005).

107. *Id.*

108. See *id.* § 801.2(f)(2).

109. Note, however, that when a person acquires control of an existing non-corporate entity in exchange for a contribution made to the non-corporate entity, the acquisition of the non-corporate entity is reportable but acquisition of the contribution to the non-corporate entity is not. See 70 Fed. Reg. at 11505.

110. Formation of Unincorporated Entities, 16 C.F.R. § 801.50(b). As with any other transaction, the size-of-parties and size-of-the-transaction tests must also be met to be reportable. *Id.*

111. See *id.* § 802.30(c) (assets or voting securities contributed to a newly-formed entity are exempt with respect to the contributing party); 16 C.F.R. § 801.10(d) (stating valuation rules for unincorporated entities).

112. Premerger Notification; Reporting and Waiting Period Requirements, 70 Fed. Reg. at 11502 (Mar. 8, 2005).

trolled by the acquiring person.<sup>113</sup> As a result, the acquisition of the remaining LLC membership interests by a 60% holder is no longer reportable, nor is the transfer of assets from a partnership to a controlling partner.<sup>114</sup> The FTC also modified a prior rule to clarify that the formation of any type of wholly-owned entity is never reportable.<sup>115</sup>

*New Exemption for Certain Financial Transactions.* The 2005 rules create a new exemption for acquisitions that confer control of an unincorporated entity if the acquiring person is contributing only cash to the unincorporated entity for the purpose of providing financing and the terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return.<sup>116</sup> This type of transaction is analogous to a creditor acquiring secured debt in the unincorporated entity only long enough to obtain its return on investment – which is not a reportable event. This new provision is intended to be a narrow exception to the general rule that acquisitions of a controlling interest in an unincorporated entity are reportable.

*Expansion of Secondary Acquisition Reporting Obligations.* When as a result of an acquisition (primary acquisition), an acquiring person will obtain control of an entity that holds voting securities of an issuer which it does not control, the acquisition of the issuer's securities is a "secondary acquisition" and is reportable.<sup>117</sup> The new rules clarify that the primary acquisition may be of either a corporation or an unincorporated entity.<sup>118</sup> However, secondary acquisitions of non-corporate interests are not reportable because no change in control has occurred.<sup>119</sup>

*Acquisitions of Unincorporated Entities Holding Exempt Assets.* The FTC had previously exempted acquisitions of voting securities of issuers that only held assets the direct acquisition of which would have been exempt. The revised rules broaden the exemption in two ways.<sup>120</sup> The first is to apply the exemption to acquisitions of both

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113. 16 C.F.R. § 802.30(a).

114. In a recent transaction handled by the authors, our client sought to acquire the remaining LLC interests in an existing joint venture with another corporation. Because our client had the right to 50% of the profits of the LLC, it was deemed to already control the LLC and the intraperson exemption applied. Note that this transaction would have been reportable under the old LLC rules, and was still reportable to many foreign competition authorities.

115. 16 C.F.R. § 802.30(b).

116. 16 C.F.R. § 802.65.

117. 16 C.F.R. § 801.4 (2005).

118. *See id.*

119. *See id.*; 16 C.F.R. § 801.2(f)(1).

120. Compare 16 C.F.R. § 802.4 (2005), with 16 C.F.R. § 802.4 (2004).

voting securities and non-corporate interests. The second is to expand the class of exempt assets for these purposes.

*Other Rule Changes.* The FTC promulgated several other rule changes to codify some longstanding informal staff positions and to make minor technical corrections. These changes include revised rules for combinations of existing entities into a new parent entity,<sup>121</sup> formalizing an informal position that acquiring control of a not-for-profit corporation is reportable,<sup>122</sup> excluding timberland from the exemption for agricultural real property, and codifying an informal position that pro-rata conversions of one form of legal entity to another are exempt.<sup>123</sup> In addition, the FTC promulgated a new rule that notifications will expire after eighteen months if a second request is still outstanding.<sup>124</sup>

## VI. CONCLUSION

The new HSR rules go a long way toward the FTC's goal of reconciling the disparate treatment of corporations, partnerships, and LLCs. In addition, the new rules should reduce some of the burdens on filing parties. The revised reporting thresholds will exempt a small number of transactions from reporting requirements.

What remains to be seen is whether the new rules on unincorporated entities will inadvertently catch a large number of competitively neutral transactions. Requiring notification for some formations or changes in control of partnerships seems particularly likely to catch transactions that lack antitrust implications. The initial indications are that this concern may not be warranted. According to the FTC and the Antitrust Division, the new rules on unincorporated entities have resulted in very few additional filings.<sup>125</sup>

We also do not know whether the new rules will lead to greater compliance issues. Although the M&A bar is used to consulting with HSR counsel regarding transactions involving LLCs, that is not the case with regard to partnerships, given the longstanding view of the FTC that formations of partnerships and acquisitions of partnership

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121. 16 C.F.R. § 801.2(d).

122. *Id.* § 801.2(f)(3).

123. 16 C.F.R. § 802.10(b) (2005).

124. See *Premerger Notification; Reporting and Waiting Period Requirements*, 70 Fed. Reg. 73369, 73371 & n.4 (Dec. 12, 2005) (codified at 16 C.F.R. § 803.7).

125. See FED. TRADE COMM'N & DEP'T OF JUSTICE, ANN. REP. TO CONGRESS, FISCAL YEAR 2005 at 9 (2006), available at <http://www.ftc.gov/reports/hsr05/P989316twentyeighthannualhsrreport.pdf> ("Between February 23, 2005 (when the Commission announced adoption of the Final Rules) and the end of fiscal year 2005, a total of fifteen transactions that would not have been reportable prior to the implementation of these rules changes required HSR filings.").



interests shy of 100% were not subject to the HSR Act. Likewise, the new rules on non-corporate interests will cover many transactions by firms, particularly financial institutions that are not accustomed to thinking about the HSR Act. It would behoove the FTC to more proactively publicize these changes in a way that reaches beyond the usual suspects – i.e., antitrust counsel and in-house counsel for large corporations – by, for example, giving speeches before associations of financial institutions or publishing in periodicals read by firms in these industries.