CLIENT
MEMORANDUM

HART-SCOTT-RODINO ACT AMENDED FOR TRANSACTIONS INVOLVING FOREIGN PERSONS AND WITH RESPECT TO THE "TRANSITION" RULE

The Federal Trade Commission (the "FTC") has recently announced certain amendments to the rules promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). The HSR Act requires premerger notification to the FTC and Department of Justice ("DOJ") for certain mergers and acquisitions of voting securities or assets. The amendments pertain to (i) transactions involving the acquisition of foreign assets or stock of foreign entities and (ii) the "transition rule," which may apply to a proposed acquisition of voting securities where an acquiring person has previously filed notification under the HSR Act with respect to the issuer whose voting securities it intends to acquire. These new rules will become effective April 17, 2002. Finally, the FTC and DOJ have recently entered into a memorandum of agreement allocating primary responsibility for substantive antitrust matters between the two agencies.

Acquisitions of Foreign Assets or Stock of Foreign Issuers

Acquisitions of Foreign Assets: Effective April 17, 2002, pursuant to amended Section 802.50 of the Rules to the HSR Act, acquisitions of foreign assets will be exempt from notification requirements so long as sales in or into the U.S. generated by such assets did not exceed $50 million during the acquired person's last fiscal year.

Even if sales in or into the U.S. exceeded $50 million, an acquisition may nonetheless still be exempt if:

(i) both the acquiring person and acquired person are foreign;

(ii) aggregate sales of both persons in or into the U.S. were less than $110 million during the last fiscal year;

(iii) aggregate total assets (excluding investment assets) of both parties in the U.S. are less than $110 million; and

(iv) the transaction is valued at less than $200 million.

Acquisitions of Voting Securities of Foreign Issuers: Under amended Section 802.51 of the Rules to the HSR Act, the specific test relevant to acquisitions of voting securities of foreign issuers depends upon whether the acquiring person is a foreign person or a U.S. person.

a. *Acquisitions by U.S. Persons*: An acquisition of voting securities of a foreign issuer by a U.S. person will be exempt from notification requirements unless the acquired issuer (directly or indirectly) either:

- holds assets located in the U.S. (excluding investment assets) valued in excess of $50 million; or

- made aggregate sales in or into the U.S. in excess of $50 million in its last fiscal year.

b. *Acquisitions by Foreign Persons*: An acquisition of voting securities of a foreign issuer by a foreign person will be exempt unless the acquisition will confer control of an issuer which (directly or indirectly) either:

- holds assets located in the U.S. (excluding investment assets) valued in excess of $50 million; or

- made aggregate sales in or into the U.S. in excess of $50 million in its last fiscal year.

Like acquisitions of foreign assets, even if the $50 million threshold is exceeded, an acquisition may nonetheless be exempt if:

(i) both the acquiring person and acquired person are foreign;

(ii) aggregate sales of both persons in or into the U.S. were less than $110 million during the last fiscal year;

(iii) aggregate total assets (excluding investment assets) of both parties in the U.S. are less than $110 million; and

(iv) the transaction is valued at less than $200 million.

Note that if interests (or controlling interests, if the acquiring person is foreign) in multiple foreign issuers are being acquired from the same acquired person, the assets and sales of all such issuers must be aggregated to determine if a transaction surpasses the $50 million or $110 million threshold.

The Transition Rule

The HSR Act requires notification only where an acquiring person would cross a "notification threshold" specified by the rules to the HSR Act as a result of an acquisition. Some of these thresholds are measured by dollar value and others by percentage of voting securities to be held. Thus, under certain circumstances, a person may acquire additional voting securities of an issuer in which it presently has a position without submitting HSR notification so long as (a) the relevant parties had previously submitted HSR notifications and (b) the acquiring person would not cross a higher notification threshold as a result of the proposed acquisition. In February 2001, amendments to the Rules to the HSR Act materially altered the relevant notification thresholds. Since the relevant thresholds have changed, the FTC has promulgated a "transition

rule" to reconcile the old thresholds with the new thresholds, and allow parties to enjoy maximum benefit from HSR notifications filed under the rules in effect prior to the February 2001 amendments.

Under the transition rule, if an acquiring person filed HSR notification under the rules in effect prior to the February 2001 amendments, an acquiring person may make additional acquisitions within five years from the expiration of the waiting period relevant to the prior acquisition without submitting HSR notification so long as the acquiror would not cross the next highest notification threshold in effect at the time of the prior notification. Accordingly, in the event an acquiring person intends to acquire voting securities of an issuer in which it already has a position and for which HSR notification was required, it will be important to understand the prior HSR notification history with respect to that issuer.

Allocation of Antitrust Clearance Matters Between the FTC and DOJ

The FTC and the DOJ have recently entered into a memorandum of agreement that allocates primary responsibility for merger reviews (as well as other antitrust enforcement and clearance efforts) between the two agencies by industry. While traditional allocation practices were based upon historical experience in a relevant industry, the boundaries between commercial sectors have blurred as a result of technological innovation and deregulation of certain industries. As a consequence, with increasing frequency, each agency has claimed principal jurisdiction over transactions (and investigations) in certain sectors. This has led to an increasing number of clearance disputes, which, in turn, has led to unnecessary inefficiency and delay.

While certain industry lines will inevitably remain ambiguous as the United States economy continues to evolve, the agreement allocates various industry segments between the FTC and DOJ, and sets forth procedures to resolve future clearance disputes. The agencies anticipate that the memorandum will minimize disputes and result in improved efficiency, greater cooperation between the agencies, fewer delays, greater certainty for the business community, and faster commencement and resolution of investigations.

In broad terms, the agreement allocates to the FTC airframes; autos and trucks; building materials; chemicals; computer hardware; energy; grocery manufacturing; the operation of grocery stores; healthcare; industrial gases; munitions; pharmaceuticals and biotechnology; professional services; the operation of retail stores; satellite manufacturing and launch vehicles; and textiles.

The agreement allocates to the DOJ aeronautics; agriculture and associated biotechnology; avionics; beer; computer software; cosmetics and hair care; defense electronics; financial services, insurance, and stock, option, bond, and commodity markets; flat glass; health insurance; industrial equipment; media and entertainment; metals, mining, and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber; telecommunications services and equipment; travel and transportation; and waste.

Other provisions of the agreement address:

- the development of a clearance manual that will be posted on each agency's website;
- the maintenance of a common database to track HSR filings and clearance matters;
- the designation of a dedicated clearance officer at each agency;
- weekly meetings and reports to review the clearance process and ongoing matters;
- expedited time frames for review, together with "negative option" provisions that prompt each agency to act quickly on clearance disputes or forfeit those matters to the other agency;
- clearly designated levels of review for clearance disputes;
- provisions for obtaining input from a neutral evaluator in the rare instances in which the agencies are otherwise unable to resolve a clearance dispute; and
- ongoing review of the agreement, and specifically the allocation of industries.

The FTC's notice of Final Rules regarding acquisitions of foreign stock or assets and the "transition" rule is located online at www.ftc.gov/os/2002/03/frn16cfrparts801and802.htm and its announcement of the Memorandum of Agreement is located online at www.ftc.gov/opa/2002/03/clearance.htm.

If you have any questions or require assistance with any matter related to the filing rules under the HSR Act, please contact either Steven J. Gartner ((212) 728-8222 or sgartner@willkie.com) or Jonathan J. Konoff ((212) 728-8627 or jkonoff@willkie.com). For inquiries related to the Memorandum of Agreement, please contact David L. Foster ((212) 728-8220 or dfoster@willkie.com), William H. Rooney ((212 728-8259 or wrooney@willkie.com), Kelly M. Hnatt ((212) 728-8672 or khnatt@willkie.com) or Mr. Konoff.

Willkie Farr & Gallagher is headquartered at 787 Seventh Avenue, New York, NY 10010. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Web site is located at www.willkie.com.

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