HSR PROPOSED RULEMAKING REGARDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES

On March 30, 2004, the Federal Trade Commission (the "FTC") released proposed 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 or acquisitions of voting securities or assets. The principal intent of the amendments included in the Notice of Proposed Rulemaking, which can be accessed at http://www.ftc.gov/os/2004/03/premergerfrn.pdf, is to reconcile treatment under the HSR Act of transactions involving noncorporate entities such as partnerships and limited liability companies with transactions involving corporations.

The proposed amendments are likely to materially impact the HSR implications of (i) acquisitions of interests in preexisting partnerships or limited liability companies; (ii) formations of partnerships or limited liability companies; and (iii) intraperson transfers of assets from partnerships or limited liability companies. The Proposed Rulemaking also notably proposes an expansion of the HSR rule that exempts acquisitions of interests in entities that hold assets, the direct acquisition of which would be exempt. This memorandum addresses these principal amendments under the Proposed Rulemaking. We invite you to provide to us any comments you may have on the Proposed Rulemaking. In the event you have comments, we would be pleased to relay them to the FTC. Please note that the FTC must receive all comments by June 4. The comment procedure is addressed in the Notice of Proposed Rulemaking.

The Proposed Rulemaking May Cause Acquisitions of Interests in Partnerships or Limited Liability Companies to Be Reportable Under the HSR Act Where an Acquisition Would Confer Control of the Relevant Noncorporate Entity

Under the current HSR rules, an acquisition of an interest in an existing partnership or limited liability company only triggers potential notification obligations under the HSR Act where an Acquiring Person would hold 100% of the interests of the partnership or LLC as a result of the proposed acquisition. This has had the anomalous effect of not requiring notification where a potentially competitively sensitive event occurs -- i.e., where control of a partnership or LLC is transferred from one person to another. At the same time, the current policy mandates notification in many circumstances that can have no conceivable competitive impact (i.e., where a holder of 99% of the interests in a noncorporate entity -- including the general partner or managing member interest -- intends to obtain the remaining 1% interest).

The Proposed Rulemaking would trigger a potential filing event when an Acquiring Person would hold 50% or more of the interests of a partnership or LLC as a result of a proposed acquisition, justifying this change by stating that "[c]onsistent with the treatment of corporate

entities, meaningful antitrust review should occur at the time that control of an unincorporated entity changes and not after control is already acquired."

Proposed Rule 801.10(d) would specify the method of valuing a transaction in which noncorporate interests are acquired (as the acquiring person would need to hold interests in the target valued in excess of $50 million to implicate the HSR Act). The value of the noncorporate interests being acquired would be the acquisition price, if determined, or the fair market value if the acquisition price is not determined. That amount would be aggregated with the fair market value of the interests held prior to the subject acquisition to determine the total value of the acquisition.

Formations of Noncorporate Entities May Trigger Notification Requirements

Currently, the formation of a partnership is outside the coverage of the HSR Act, and the formation of an LLC is potentially reportable only under very limited circumstances.[1] Under Rule 801.50 of the Proposed Rulemaking, a formation of a noncorporate entity such as a partnership or LLC may trigger notification obligations where one of the venturers would control the entity upon formation. Of course, the size-of-person test (requiring a controlling venturer to have sales or assets in excess of $10 million and the entity to have assets in excess of $100 million or the controlling venturer to have sales or assets in excess of $100 million and the entity to have assets in excess of $10 million) and the size-of-transaction test (requiring the controlling venturer to hold in excess of $50 million worth of the interests in the newly formed entity) would need to be satisfied to trigger filing obligations.

The Exemption for Intraperson Transfers Would Be Enlarged

Under the current HSR rules, a transfer of assets from a corporation to a controlling shareholder, or from one controlled corporate subsidiary to another controlled corporate subsidiary is exempt under Rule 802.30, which exempts acquisitions where "by reason of holdings of voting securities, the acquiring and acquired persons are . . . the same person." Because of the use of the phrase "by reason of holdings of voting securities," similar transfers involving noncorporate entities are not currently exempt under this rule. Thus, for instance, a transfer of assets from a partnership to a controlling individual partner is currently potentially reportable, even though the acquiring partner already indirectly controls the assets being transferred.

The Proposed Rulemaking would enlarge Rule 802.30 to exempt transactions where the acquiring and acquired persons are the same by means other than through the holding of voting securities (i.e., by holding 50% or more of the interests of a partnership or LLC).

[1] Under current Formal Interpretation No. 15 (which would be repealed under the Proposed Rulemaking), the FTC treats the formation of an LLC as reportable only if (1) two or more preexisting, separately controlled businesses are being contributed to the LLC and (2) at least one member would control the LLC.

The Exemption for Acquisition of Interests in Entities That Hold Primarily Exempt Assets Would Be Expanded

Currently, Rule 802.4 exempts acquisitions of voting securities of entities that hold certain assets, the direct acquisition of which would be exempt. This exemption has principally been limited to acquisitions of voting securities of corporate entities that hold real estate. The Proposed Rulemaking would expand this exemption in two significant ways. First, the exemption would apply to acquisitions of interests in noncorporate entities (as is appropriate in light of the other changes in the Proposed Rulemaking that would otherwise trigger filing obligations where one is acquiring control of a noncorporate entity). Second, it would be enlarged to exempt acquisitions of interests in entities that hold assets whose direct acquisition would be exempt under any section of Part 802 of the HSR rules or Section 7A(c) of the HSR Act. In addition, it would exempt acquisitions of entities that would hold only cash or cash equivalents. This is intended to exempt the formation of joint venture acquisition vehicles, whether structured as a corporation or as a noncorporate entity.[2]

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If you have any questions about the Proposed Rulemaking, have comments that you would like us to address to the FTC, or otherwise require assistance with any matter related to the HSR Act, please contact our HSR specialist, Jonathan J. Konoff (212-728-8627, jkonoff@willkie.com) or Steven J. Gartner (212-728-8222, sgartner@willkie.com).

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[2] Under current rules, the formation of a corporate joint venture special purpose acquisition vehicle may trigger HSR filing obligations in certain circumstances.