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SPECIAL FUND ALERT

Proposed HSR Rule Amendment: Foreign Today but Not Tomorrow?

November 21, 2019

What happened?

On November 8, 2019, the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") proposed changes to the premerger notification rules ("Rules") relating to how U.S. and foreign entities are defined for purposes of determining reportability under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act").[1] As a result of the proposed amendments to the Rules, certain acquisitions of foreign voting securities and assets currently exempt from the HSR Act's filing requirements would be reportable. In particular, if the proposed changes are finalized, acquisitions by offshore funds of minority interests in a foreign issuer *may no longer be exempt* even though those transactions likely would not raise any competition concerns.

Currently, an offshore investment fund is deemed "foreign" for purposes of the HSR Act and Rules, even if its investment manager or general partner is located in the U.S., so long as the fund is incorporated, organized and has its headquarters outside the U.S. Accordingly, such an offshore fund may acquire minority stakes in foreign issuers without needing to file HSR.[2] The proposed changes to the Rules would result in the offshore fund being deemed a U.S. entity if either the fund's investment manager or general partner is organized or incorporated under U.S. law (or, if an individual, is a resident or citizen of the U.S.).[3] The amended Rules may substantially increase the

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1 The HSR Act requires that parties to certain transactions that exceed the reportability thresholds (currently $90 million) must submit a premerger notification with the FTC and DOJ and observe a waiting period (generally 30 days) before closing the transaction unless an exemption applies.

2 *See* 16 C.F.R. §802.51(b)(1).

3 An entity cannot be "foreign" for purposes of the HSR Act and Rules if the entity's "principal offices" are located within the U.S. The Rules currently do not define "principal offices," but HSR practitioners have long relied upon the Statement of Basis and Purpose issued with the original Rules in 1978 to define "principal office" as "that single location which the person regards as the headquarters office of the ultimate parent entity. This location may or may not coincide with the location of its principal operations." Pivoting from this position, the proposed amendment does not reference "headquarters" and instead deems an entity's "principal offices" to be located in the U.S. if: (1) 50% or more of the entity's officers reside in the U.S.; (2) 50% or more of the entity's directors reside in the U.S.; *or* (3) 50% or more of the entity's assets (including assets of all entities it controls) are located in the U.S., based on a fair market valuation. For entities that do not have officers or directors, the analysis is based on individuals exercising similar functions.

number of HSR filings for hedge fund managers of offshore funds that take noncontrolling interests in foreign issuers.[4]

What happens next?

The FTC has invited interested parties to comment on the proposed amendments to the Rules. Comments must be received by December 30, 2019. The FTC will review the public comments and may make revisions prior to publishing the final changes. The amended Rules will become effective 30 days after publication in the Federal Register.

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, DC, Charlotte) and Europe (London, Brussels), is composed of specialists that offer 'end-to-end' advice on compliance, investigations and related litigation. Our practitioners are experienced in counseling on HSR issues and are available to assist clients or trade associations to which they belong with preparing comments and participating in this rulemaking process.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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[4] Even if the offshore fund is deemed a "foreign person" under the proposed amendments, the changes would require the fund to look to the location of the target issuer's officers and directors and to the location and fair market value of the target's assets in order to determine of the target qualifies as a "foreign issuer." Such detailed information, particularly for complex globalized businesses, may not be readily available from public sources.