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# FTC Limits Investment Rental Property Exemption

***FTC's reversal will result in more Hart-Scott-Rodino filings for companies in the pipeline, cell tower and billboard industries.***

The Federal Trade Commission's Premerger Notification Office (PNO) has significantly limited an exemption that previously removed Hart-Scott-Rodino Act (HSR) reporting obligations from many transactions involving pipelines, telecom towers and billboards.

On July 20, 2015, the PNO released a new informal interpretation regarding the Investment Rental Property Exemption, HSR Rule 802.5, reversing its position on whether certain acquisitions of pipelines, telecom towers and billboards are exempt from HSR Act reporting requirements.

## Background

Absent an exemption, the HSR Act requires a premerger notification filing for certain acquisitions of voting securities or assets valued over $76.3 million. Parties cannot consummate transactions subject to the HSR Act until they have complied with the Act's notification and waiting period requirements.

Section 802.5 of the HSR Rules exempts acquisitions of "investment rental property assets," defined as "property rented or held for rent to third parties both before and after the acquisition, and held solely for rental or investment purposes." The exemption was added to the HSR Rules in 1996 to supplement specific categories of real property that were already exempt under Section 802.2, including warehouses, rental retail space, office buildings and undeveloped land.

According to the PNO, while Section 802.5 covered a broad range of assets and did not put limits on which parties could acquire those assets, informal interpretations started to expand the exemption "well beyond" the original intent of the rule. First, in 2006, the PNO extended Section 802.5 to exempt telecommunications towers with antennae, regardless of the underlying use. Then in 2009, the PNO reaffirmed its position by exempting a transaction where the target operated and managed a system to transmit wireless signals through equipment attached to existing utility poles. The tower, antennae and all of the other equipment attached to these structures was considered exempt despite the fact that wireless companies contracted to use the wireless signal system.

In 2012, the PNO extended the 802.5 exemption yet again, in this case to pipelines. In perhaps the broadest statement from the agency on what counts as an "investment rental property asset," the PNO said that, "[u]tility lines and pipelines are generally considered real property *if they are underground or permanently attached above ground* [emphasis added]." Subsequent interpretations added gas storage facilities, oil terminals and blending stations alongside pipelines as exempt assets as well.

## Changes to HSR Act Reporting Obligations

Going forward, only real property held solely for rental or investment purposes will be exempt. According to the PNO: "To determine if the real property is held solely for rental or investment purposes, a key question is whether the buyer is behaving like a landlord (exemption applies), or is in some way participating in the business conducted on the property (exemption does not apply). To qualify for the exemption, the buyer must intend to profit from the real estate investment, not from the business conducted on the property." For example, if the seller owns a pipeline that it leases to another company to operate, and the seller only receives rental income from the property while the other company is engaged in the underlying business, then the buyer's acquisition of the pipeline will be exempt as long as it continues to lease the pipeline and does not operate other pipelines elsewhere. If the buyer plans to operate and derive revenues from the pipeline following the acquisition, the exemption is not available.

## Impact for Companies

The PNO's reversal here will result in more HSR filings for those companies in the pipeline, cell tower and billboard industries (though the billboard exemption had already been reversed prior to this announcement). Parties who continue to seek an HSR exemption under 802.5 must be careful to ensure that the buyer will not have any involvement in the use of the property beyond leasing the premises and receiving rental income. Violating the HSR rules can result in civil penalties up to $16,000 per day for each day of noncompliance. We therefore encourage companies to seek advice of counsel regarding the potential applicability of this exemption.

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