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# The Pre-Merger Notification Office of the FTC Re-Defines the Limits of the HSR Filing Exemption for Investment Rental Property

The Pre-Merger Notification Office ("PNO") of the Federal Trade Commission ("FTC"), which administers the pre-merger notification program under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR filing"), has re-examined the scope of the exemption that permits parties acquiring investment rental property to forego making an otherwise necessary HSR filing. Under the new, more restrictive interpretation, transactions will only qualify for the exemption if the acquiring entity intends to benefit solely from investment in the property as a landlord and not from conduct occurring on the property itself. This change in scope of the exemption takes particular aim at acquisitions of pipeline transfer stations, telecommunications towers, and billboards, many of which will no longer be excused from HSR filings under the investment rental property exemption. This change is effective immediately.

16 C.F.R. § 802.5 provides that acquisitions of "investment rental property," which is defined as any real property held solely for investment or rental purposes that will not be rented to entities included within the acquiring person (except to maintain or manage the property), are exempt from an HSR filing. The exemption does not place limits on the type of acquiring entity that may qualify for the exemption. Moreover, it does not restrict the type of real-property that qualifies. As outlined in the Statement of Basis and Purposes ("SBP") of § 802.5, a key consideration for the exemption is the intent of the acquiring party at the time of the acquisition, which must be to use the property solely as a stream of income from renting or leasing the property to third parties. The SBP specifically points to investments by real estate investment trusts ("REITs"), industrial parks, and sports complexes as examples of acquisitions that often qualify.

Guided largely by informal PNO interpretations of § 802.5, a myriad of transactions involving other types of investors or property have benefited from this exemption. Depending on the specific facts of the transaction in question, it has, for example, been possible for the acquisition of telecommunications towers, space on which was leased to the likes of Verizon or AT&T, to have been exempt from HSR filing obligations. The same could potentially have been the case for the acquisition of advertising billboards.

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Following the PNO's announcement on July 22, 2015, such acquisitions may now require HSR filings.

Explaining its re-examination of § 802.5, the PNO noted that the exemption had been stretched too far such that entities participating in the business conducted on acquired property, such as cell phone tower companies and advertisers, were failing to make HSR filings, albeit lawfully. The PNO emphasized that the goal is to revert back to the rule's original intent and purpose. According to the PNO, this intent was to exempt transactions in which the acquiring entity plans on acting simply as a landlord, rather than participating in the business that is conducted on the property itself. As such, previous informal interpretations and other guidance on § 802.5 have now been superseded by this new re-examination.

The PNO's announcement provides three specific examples of acquisitions that will no longer qualify for the § 802.5 exemption. The examples relate to certain acquisitions of pipelines, billboards, and telecommunication towers. As to the latter, the announcement provides that the exemption will not apply when a party acquires cell phone towers and then uses such towers to provide telecommunication and collocation services to wireless providers. Similarly, the PNO's examples state that transactions in which billboards are acquired for inclusion within the acquirer's advertising business are not exempt from HSR filing obligations under § 802.5. This is because the acquirer will generate revenue from the billboards as part of its advertising business – which constitutes advertising revenue rather than rental income. According to the PNO's re-interpretation of the § 802.5 exemption, this scenario is different from owning the property on which a billboard or telecommunication tower sits and obtaining rental income from a third party operating a tower or billboard.

It does not appear that the PNO's new position will have any effect on typical acquisitions by REITs, so long as the REITs act solely as landlords of the acquired property.

Until the PNO provides further clarification and this new guidance is tested, entities considering acquisitions of investment property would be wise to be more cautious when analyzing whether or not an HSR filing is necessary. If there are doubts as to whether the § 802.5 exemption applies parties may, as always, seek an opinion from the PNO on an anonymous basis.



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