Acquisitions from Financially Distressed Entities Under the HSR Act

BY MALCOLM R. PFUNDER

IN THE CURRENT ECONOMIC RECESSION, many individuals and companies find their businesses in various forms of financial distress. Some are facing the prospect of defaulting on existing loan or credit obligations. Some are unable to raise necessary cash from conventional lending sources. Some find themselves needing to shut down, divest, or liquidate unprofitable operations.

Others find potential opportunity in times of economic recession. Assets and businesses can sometimes be acquired at bargain prices. Comparatively inexpensive investments, if carefully chosen, offer the prospect of substantial future gains if the target company recovers or expands.

Failing and "flailing" companies, and specifically bankruptcy proceedings, have long been viewed by the federal antitrust enforcement agencies as presenting opportunities for potential mischief, as acquisitions or combinations of competitors that are put together for the benefit of creditors may confer monetary benefit through a reduction in competition between the combining parties.[1] For this reason, the premerger notification and waiting period obligations imposed by the Hart-Scott-Rodino (HSR) Act[2] do not provide for an exemption for acquisitions in bankruptcy, even though all such acquisitions must be approved by a federal district court before they can be consummated. The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice often scrutinize transactions arising in a bankruptcy context, in an effort to assure that such transactions are not anticompetitive.[3]

Under the HSR Act, these agencies have the power to delay reportable transactions while they are investigated and, if necessary, to seek a court injunction preventing their consummation. There are, however, a number of provisions designed to facilitate a quicker HSR Act review for certain acquisitions of assets in bankruptcy than apply to other reportable transactions in or outside of bankruptcy. There are also limited exemptions in the HSR rules for certain kinds of acquisitions by creditors from debtors, and for certain acquisitions of voting securities by banking entities pursuant to a plan of reorganization.

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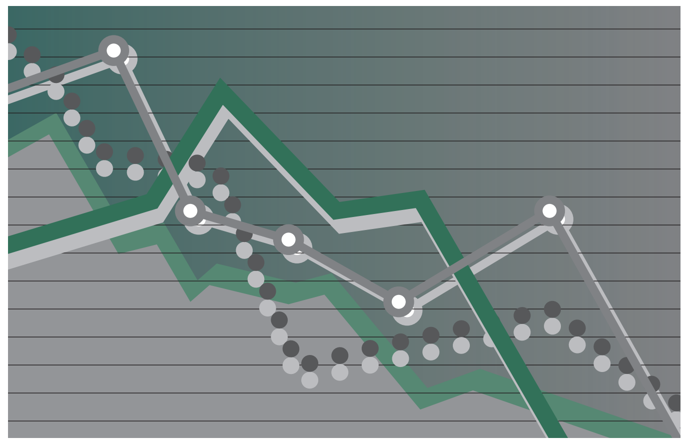

Bankruptcy issues are somewhat of an HSR backwater. Relatively little attention has been paid to the interface between bankruptcy and premerger notification issues, as well as to defining or refining the HSR provisions applicable to economically distressed and bankrupt companies. The result is a reporting regime that tends to facilitate some "routine" acquisitions by creditors from debtors, in addition to certain acquisitions from debtors in pending bankruptcy proceedings.

The purpose of this article is to identify and explain the provisions of the HSR Act and implementing rules that are specific or peculiar to bankruptcy and to non-bankruptcy circumstances involving parties facing financial distress. Some of these provisions are straightforward; others raise questions that have not yet been resolved by the FTC staff, which is responsible for informal interpretations of the HSR Act and rules.[4]

The HSR Act in Bankruptcy Proceedings

The HSR Act requires that certain acquisitions of assets or voting securities between parties satisfying certain size-of-person tests must be reported in advance to the FTC and the DOJ. The parties provide the enforcement agencies with information about themselves and about their proposed transaction by filing a Notification and Report Form with each agency. These filings trigger a waiting period, normally thirty days, within which the parties cannot consummate the proposed transaction. If during that thirty-day waiting period either of the enforcement agencies decides to investigate the transaction further, it can issue a request for additional information and documentary materials (commonly referred to as a "second request"), which lengthens the waiting period, generally until both parties have substantially complied with their respective second requests, and for thirty days thereafter.

The agency issuing the second request must decide during that extended waiting period whether to seek a preliminary injunction from a federal district court preventing the parties from completing the transaction, on grounds that its effect would be substantially to lessen competition in a specified market, in violation of federal antitrust law. Alternatively, the agency and the parties may negotiate a consent order, allowing the transaction to proceed subject to requirements to divest specified assets or businesses. Or, if the investigating agency ultimately decides that the transaction will not impair competition, it will allow the waiting period to expire (or terminate it) without further enforcement action.

In the absence of agency action, the parties are free to complete their transaction after the waiting period ends. The initial waiting period can be terminated early, if both agencies decide not to investigate the transaction. A number of exemptions from the notification and waiting period requirements apply to specific types of acquisitions and to acquisitions of certain kinds of assets.

Bankruptcy Code Section 363(b) Transactions. Section 363(b)(1) of the Bankruptcy Code, 11 U.S.C. § 363(b)(1), allows a trustee in bankruptcy "after notice and a hearing, [to] use, sell or lease, other than in the ordinary course of business, property of the [debtor's] estate."[5] Subsection 363(b)(2) (added to the Bankruptcy Code in 1994) modifies the HSR requirements and procedures that would otherwise apply to reportable acquisitions of property from a bankrupt debtor under Subsection 363(b)(1). Normally, HSR Act filings for a reportable transaction are made by the "ultimate parent entities" of both the acquiring and the acquired persons. However, when "property" is to be acquired from a debtor in bankruptcy under Section 363(b), the required HSR filing for the acquired person is made by the trustee (or the Debtor in Possession, or DIP), and the "acquired person" in the transaction is the debtor itself (rather than its pre-bankruptcy controlling parent, if it had one). These procedures apply only to transactions that are subject to Section 363(b).[6]

The initial waiting period for transactions reportable under Section 363(b) starts when both the acquiring person and the trustee (or DIP) have filed, but it is only fifteen days long, in contrast to the normal thirty-day period that applies outside of bankruptcy. The antitrust enforcement agencies can issue second requests to both parties, but the issuance of a second request to a debtor or trustee in bankruptcy does not affect the running of the waiting period, so the resulting suspension of the HSR Act waiting period ends ten days (rather than thirty) after substantial compliance with the second request by the acquiring person alone (rather than by both parties). There are several other HSR-related procedural differences between bankruptcy and non-bankruptcy transactions.[7]

The Section 363(b) procedures described here can be planned for in anticipation of bankruptcy, but can be invoked only by parties filing their HSR Act initial notifications after bankruptcy proceedings have been formally initiated.

Note that if the trustee (or DIP) opposes a proposed reportable acquisition of property of the Debtor and declines to file notification (because, for example, the trustee would prefer sale to an alternative buyer), it may be necessary for a prospective acquiror to seek a court order requiring the trustee to file notification, as the HSR waiting period cannot begin until both parties have filed. Failure, refusal, or delay in the trustee's response to a second request does not disrupt the running of the waiting period, however.

Most sales in the bankruptcy context are conducted via an auction-style process, sometimes with a preferred, or "stalking horse," bidder, and sometimes without one. A stalking horse bidder typically files its HSR Act notification early, and completion of that review is part of the stalking horse's advantage in the process, since other bidders generally will have to include an HSR condition and a corresponding "regulatory out" in their purchase offers. It is possible that competing bidders would each file notification (assuming that the jurisdictional tests are met by each of them), and the debtor would be required to file notifications responsive to each such potential acquiror.

Other Bankruptcy Transactions. Acquisitions of voting securities or assets of a debtor in bankruptcy, other than via Section 363(b) sales, are subject to normal HSR Act filing and waiting period requirements. For example, if in satisfaction of its claim a creditor receives title to assets or securities under a plan of reorganization under Chapter 11 of the Bankruptcy Code, or as a result of the liquidation of the debtor's assets under Chapter 7 of the Code, the creditor is required to comply with the HSR Act (as is the trustee or debtor), provided the HSR Act's jurisdictional thresholds are met and no other exemptions apply. The short waiting period and other procedural provisions in Section 363(b)(2) do not apply. Thus, the normal waiting period will be thirty days, and substantial compliance with any second request issued to the debtor or trustee is a prerequisite to expiration of the waiting period.

The HSR Act in Non-Bankruptcy Situations

The rules implementing the HSR Act contain an exemption that has particular application to transfers by or between creditors and debtors that are not in bankruptcy. HSR rule 802.63(a) provides exemption for several types of transactions viewed as ordinary course of business dealings between a creditor and a debtor outside of bankruptcy proceedings. By its terms, HSR rule 802.63(a) exempts these transactions:

- an "acquisition of collateral or receivables"
- an "acquisition in foreclosure, or upon default"
- an acquisition "in connection with the establishment of a lease financing"

- an acquisition "in connection with a bona fide debt workout."

The original Statement of Basis and Purpose accompanying promulgation of HSR rule 802.63 explained the rationale for the exemption:

> This rule exempts certain routine transactions by creditors . . . in the ordinary course of business. They are typically not undertaken with the intention of influencing the affairs of the acquired person or even necessarily with the intention of making an investment. The acquiring person may not desire to retain the acquired property, such as assets or stock acquired in default or foreclosure situations, and the acquired assets or stock may frequently be disposed of as speedily as possible. . . . In general, these acquisitions take place in circumstances and for reasons different from those underlying corporate mergers, acquisitions, tender offers, and similar transactions.
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> These transactions occur with great frequency in the insurance, banking and finance industries. To interpose the [HSR] act's notification and waiting period requirements before such acquisitions would severely impede the normal and essential procedures of these industries without achieving any significant gain in antitrust enforcement.[8]

Application of the HSR Rule 802.63(a) Exemption

What Kinds of Debtor/Creditor Relationships Are Prerequisite to HSR Rule 802.63(a) Exemption? The acquisition for which exemption is sought must be an acquisition by a "creditor" and, by implication, must involve acquisition of voting securities or assets of a person or entity that is indebted to that particular creditor and must result in the elimination or alteration of the debtor/creditor relationship. HSR rule 802.63(a) requires first that the original loan or extension of credit must have been "a bona fide credit transaction," and second, that lending or credit transaction must have been in the ordinary course of the creditor's business. Except as explained below, the FTC's Premerger Notification Office has not provided detailed guidance on either of these criteria.

ORIGIN OF THE DEBTOR/CREDITOR RELATIONSHIP. The underlying debtor/creditor relationship on which the parties now rely must originally have been created through a loan or an extension of credit by this creditor to this debtor, or by an acquisition by this creditor of a debt instrument issued by this debtor, in a subsequent transaction that was not a sham. The original Statement of Basis and Purpose that accompanied the promulgation of HSR rule 802.63 stated that "any transaction made with the primary motivation of extending credit to the debtor, as opposed to a transaction structured as a financing transaction for purpose of evading a reporting requirement, may be considered 'bona fide.'"[9] If the original transaction was not a "bona fide credit transaction," the HSR rule 802.63(a) exemption does not apply, unless the original obligation was subsequently acquired by a creditor in the ordinary course of that creditor's business.[10]

THE "ORDINARY COURSE OF BUSINESS" TEST. The language of HSR rule 802.63(a) requiring that the acquisition of assets or voting securities of the debtor is exempt "if made by a creditor in a bona fide credit transaction *entered into in the ordinary course of the creditor's business"* is applied by the FTC staff in the following manner.

- The acquiring person in the proposed transaction must currently be a creditor of the acquired person or entity whose assets or voting securities will be acquired and must have created or acquired the creditor-debtor relationship in the ordinary course of the acquiror's business.
- The acquiring person cannot be subject to the "vulture fund" exception (see below).
- The acquiring and acquired persons cannot currently be competitors of each other.

Under FTC practice, these tests are applied to the obligation on which the creditor/acquiror seeks to rely for exemption of its acquisition under HSR rule 802.63(a). If the debtor/creditor relationship on which the parties rely was created by the same parties as now propose to engage in a reportable acquisition, the analysis is straightforward.[11]

However, a creditor seeking to invoke the exemption need not have had privity with the debtor. An existing credit obligation may be transferred from one creditor to another, and the latter may be eligible to rely on the resulting creditor/debtor status under HSR rule 802.63(a) to acquire assets or voting securities of the debtor.

If the original obligation did not result from a loan or extension of credit or the acquisition of a debt instrument entered into in the ordinary course of the creditor's business, a subsequent (non-sham) acquisition of that obligation in the ordinary course of the (subsequent) acquiror's business removes any taint from the original transaction and allows the subsequent acquiror to rely on the acquired obligation for purposes of the HSR rule 802.63(a) exemption, subject to the exceptions discussed below. Conversely, if the subsequent acquisition of the debtor's obligation is not in the ordinary course of the acquiror's business, the acquiring creditor cannot later rely on HSR rule 802.63(a) for exemption.

For example, the FTC staff have recently stated that an acquisition of debt by a manufacturing company that did not have a subsidiary or division in the business of lending money or acquiring debt instruments (such as GMAC or GE Finance) did not qualify as a "bona fide credit transaction entered into in the ordinary course of the creditor's business."[12]

"VULTURE FUND" EXCEPTION. If the debtor is in bankruptcy or if anybody's (i.e., the debtor's or any of its creditors') intention to place that debtor into bankruptcy has been publicly announced, then any subsequent acquisition of any obligation of that debtor cannot later be the basis of an HSR rule 802.63(a) exemption. The staff have described acquisitions after an announcement of bankruptcy as "vulture fund" acquisitions and apparently view them as opportunistically seeking control or influence over the debtor. Thus, for example, an acquisition of debt by a vulture fund (itself an exempt transaction) would prevent the fund from subsequently converting or exchanging that debt into voting securities of the debtor without filing notification under the HSR Act, whereas a good faith acquisition of such an obligation where no earlier announcement of an intended bankruptcy filing has been made could allow subsequent conversion of that debt without HSR filings.[13] A number of years ago, the FTC staff issued informal interpretations stating that pre-bankruptcy acquisition of debt by a party that had no genuine expectation of being repaid was not a "bona fide credit transaction" within the meaning of HSR rule 802.63(a), and therefore the exemption did not apply when those acquired debt instruments were converted into voting securities in a reorganization.[14] More recent interpretations have stated that the availability of the HSR rule 802.63(a) exemption is not dependent upon the intent of the acquiror at the time that it acquired the debt obligation, but only upon whether its acquisition preceded any public announcement of an intent to initiate bankruptcy proceedings by or against the issuer of the debt.[15]

ACQUISITIONS OF OR FROM COMPETITORS. The FTC staff has taken the position that competitors that lend to one another or buy assets or voting securities from one another are, by definition, not doing so in the ordinary course of business, and therefore a competitor cannot rely on HSR rule 802.63(a) to exempt an acquisition of assets or voting securities of a debtor with which it competes.

The FTC staff has not to our knowledge articulated any other limitations based on the requirement that bona fide debt workout or other qualifying HSR rule 802.63(a) obligations be entered into in the ordinary course of the creditor's business.

What Kinds of Acquisitions May Qualify for HSR Rule 802.63(a) Exemption? HSR rule 802.63(a) provides exemption for several common types of transactions engaged in by debtors and creditors outside of bankruptcy proceedings. Such transactions may be motivated by a desire to avoid bankruptcy, or they may take place without any expectation that the debtor faces a prospect of bankruptcy.

COLLATERAL OR RECEIVABLES. Under the explicit language of the rule, a creditor can acquire assets that have been pledged as collateral for the specific obligation that creates the creditor-debtor relationship, providing the debtor is not in bankruptcy at the time of the acquisition. The creditor may, but presumably need not, formally foreclose or declare the obligation to be in default.

Although the language of the rule is not explicit, the collateral or receivables presumably must have been pledged to secure the underlying obligation at the time that obligation was created, and the collateral must secure the specific obligation that defines the creditor/debtor relationship on which the parties rely. The original Statement of Basis and Purpose characterizes this exemption as applicable to "acquisitions of receivables in connection with bona fide credit transactions. Thus an assignment of accounts receivable, with or without recourse, is exempt."[16] The FTC staff have not otherwise sought more narrowly to define or limit this exemption.

FORECLOSURE OR DEFAULT. HSR rule 802.63(a) purports to exempt any acquisition "in foreclosure, or upon default." The exemption is potentially available to acquisitions of or from debtors that are not in bankruptcy at the time of the acquisition. The term foreclosure normally implies that specific property has been pledged to secure an obligation, and that property may be acquired by the creditor in the event the obligation is not paid pursuant to its terms. It is not clear whether a formal declaration or resort to formal procedures is contemplated, although the potentially more flexible "debt workout" discussed below may obviate the need for formal foreclosure procedures. In any case, an acquisition "upon default" seems to imply a looser requirement, insofar as a default may arise from a debtor's non-performance. However, there is a question whether the wording of the rule implies resort to some procedural formality. The FTC staff have left these terms undefined, and the exemption therefore potentially quite broad.

ESTABLISHMENT OF A LEASE FINANCING. The exemption for an acquisition in connection with the establishment of a lease financing is, by its terms, applicable only to acquisitions occurring upon the creation of the lease financing arrangement. This provision seems somewhat oddly included in the rule, as a lease financing does not imply non-performance by a debtor on an existing obligation. While it is possible that a lease financing might be established as a way of generating needed cash for a financially distressed lessee, the device seems more often applicable as an ordinary financing tool by parties not subject to then-current financial distress.

A lease financing typically involves transfer of an asset to a financing party who then leases the property back to the original transferor. It is that acquisition by the financing party that, but for this exemption, might otherwise be reportable. The creation of a lease financing may involve a cash payment by the financing party to the transferor, or it may involve the financing party's acquisition of the asset from a third party (e.g., the manufacturer). In either case, the financing party/lessor becomes a creditor, and the lessee under the lease financing becomes a debtor. It is the asset transfer connected with creation of the lease financing arrangement that is exempt under these circumstances. The rule does not purport to govern the termination, settlement or unwinding of a lease financing.

BONA FIDE DEBT WORKOUT. The very broad language in HSR rule 802.63(a) referring to "a bona fide debt workout" suggests that the parties to a qualifying debtor/creditor obligation are free to negotiate an acquisition of assets or voting securities that satisfies that existing obligation, in whole or in part, subject only to the requirements that the debtor not be in bankruptcy at the time of the acquisition, and that the workout not be a sham. The FTC staff does not impose any other limitations on the content or terms of the workout arrangement.

The mechanisms upon which HSR rule 802.63(a) confers exemption appear intended to apply when the debtor is not in bankruptcy. The original Statement of Basis and Purpose quotes with apparent approval this comment about debt workouts:

> For example, in a bona fide debt workout, a transaction whereby all or part of a debtor's obligations to one or more creditors are re-organized, the debtor's assets or voting securities, which may not technically be termed collateral, may be conveyed to a creditor. [One of the public comments during the rulemaking] argued that the economic and business realities of such transactions are substantially identical to the foreclosure of a pre-existing security interest and thus should be treated similarly. The final rule adopts this suggestion . . . .[17]

Indeed, the filing of a bankruptcy petition triggers an automatic stay that prevents creditors (even secured creditors) from acquiring or otherwise proceeding against assets of the debtor, other than in the context of the bankruptcy proceedings. The FTC staff thus takes the view that the HSR rule 802.63(a) exemption applies only when a bankruptcy proceeding is not already pending. Acquisitions of property (assets or voting securities) of the debtor under a plan of reorganization or a plan of liquidation cannot qualify for HSR rule 802.63 exemption and are therefore potentially reportable. Acquisitions under a plan are also not eligible for the short waiting period and related procedural provisions of Section 363(b)(2).

Note that none of the acquisitions that are exempted by HSR rule 802.63(a) extend to subsequent disposition of the assets that were acquired. A creditor who seeks to sell acquired assets or voting securities of a debtor thus must determine whether its proposed disposition would require HSR Act filings by the downstream buyer and the selling creditor. Example 2 to HSR rule 802.63 makes this explicit.

Exemption Under Section 7A(c)(11) of the HSR Act

There is one other, relatively obscure exemption in the HSR Act that may apply to a narrow set of acquisitions involving companies in economic distress. In a somewhat peculiar juxtaposition, subsection (c)(11) of the HSR Act, 15 U.S.C. § 18a(c)(11), exempts "acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business. . . ." The original Statement of Basis and Purpose says that HSR rule 802.63 "should be read in conjunction with section 7A(c)(11),[18] but it is not clear how this should be done, and the FTC staff have not provided more detailed guidance on the several issues raised by this provision.[19]

First, it appears on the face of the rule that a banking entity's or insurance company's acquisitions are limited by the "solely for the purpose of investment" definition in HSR rule 801.1(i)(1), which would preclude the acquirors from having "[any] intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[20] An acquisition of assets would normally imply that the acquiror intends no subsequent participation in the seller's business. But an acquisition of voting securities appears potentially exempt under this rule only if the acquiror intends to be a wholly passive investor, consistent with the strict interpretation that the enforcement agencies have used to evaluate acquisitions under Section 7A(c)(9) of the HSR Act and HSR rule 802.9.[21]

Second, the requirement that an asset acquisition by a banking entity or insurance company be in the "ordinary course of its business" appears to invoke Section 7A(c)(1) of the HSR Act and HSR rule 802.1. Several early FTC staff interpretations indicated that banking entity and insurance company acquisitions of all or substantially all the assets of an entity were, by definition, outside of the ordinary course of the buyer's business. These interpretations are believed to have been abandoned by the FTC staff and should not be relied upon. But it is unclear whether the "ordinary course" language imposes any present limitation on asset acquisitions by banking entities or insurance companies seeking to employ this exemption.

Acquisitions of property (assets or voting securities) of the debtor under a plan of reorganization or a plan of liquidation cannot qualify for HSR rule 802.63 exemption and are therefore potentially reportable.

Finally, the fact that acquisitions of voting securities by banking entities and insurance companies are exempt under Section 7A(c)(11) only if made pursuant to a plan of reorganization or dissolution (meaning, presumably, a plan approved by a bankruptcy court) supports the proposition that at least acquisitions of voting securities that are either (a) made by other types of purchasers or (b) not made solely for investment or (c) not made pursuant to a plan of reorganization or dissolution were intended to be subject to normal HSR Act filing and waiting period requirements.

While it is of course difficult to establish whether a particular exemption in the HSR Act or rules is seldom or frequently utilized (because application of the exemption means that HSR filings are never made), the peculiar combination of preconditions suggests that the exemption in subsection 7A(c)(11) is in fact not frequently relied upon.

Conclusion: How to Minimize the HSR Act Burden

In light of the above discussion, the following suggestions may reduce the burden of complying with the HSR Act for acquisitions of assets or voting securities of a financially distressed entity or a debtor, including a debtor in bankruptcy.

- Extending new loans, including secured loans, is not reportable.
- Acquiring non-voting convertible debt or convertible stock is not reportable until conversion occurs. Unless an exemption is available, conversions will generally be reportable if the resulting holding of voting securities exceeds the statutory size-of-person test.
- Acquisitions of stock or assets resulting in holdings valued below the HSR minimum filing threshold (currently $65.2 million) are not reportable.
- Acquisitions by buyers whose ultimate parents do not satisfy the HSR minimum size-of-person tests (i.e., having neither annual net sales nor total assets of $13 million or more) or are otherwise exempt under the HSR rules avoids the necessity of filing.
- Acquisitions in which neither the buyer's nor the target's ultimate parent (or the debtor in a bankruptcy proceeding) has either annual net sales or total assets of at least $130.3 million are not reportable.
- Creditors can take advantage of the HSR rule 802.63(a) exemption for acquisitions of collateral or receivables, acquisitions in foreclosure or upon default, and bona fide debt workouts before any bankruptcy proceedings are pending.
- Notwithstanding the apparently restrictive criteria of subsection 7A(c)(11) of the HSR Act, banking entities and insurance companies making acquisitions solely for investment should examine and consider this possible exemption.
- If bankruptcy proceedings are initiated or pending, negotiate with the bankruptcy trustee early in the process and, if possible, complete the HSR filing procedures and obtain approval from the bankruptcy court for any proposed transactions that would be reportable. This may reduce the incidence of competing filings by alternative acquirors and may help to assure that sufficient time is available to complete the HSR filing and review process without disrupting other aspects of the bankruptcy proceedings. It may also give the early filer an advantage over other competing bidders would also be required to file. Conversely, it might offset a benefit otherwise available to a competing bidder that is not required to file.
- Particularly for acquisitions from a debtor in bankruptcy, both the buyer and the trustee (or DIP) need to consider whether HSR Act filing and waiting period requirements must be observed. Asset acquisitions require particular attention to procedural detail, as the HSR rules require any buyer of assets always to make a good faith determination of the fair market value of the assets being acquired, even if the parties have agreed on the acquisition price for those assets.
- If HSR filings are required, avoid acquisitions that raise substantive antitrust concerns and therefore invite scrutiny by the enforcement agencies, with the resulting delays. ■

[1] The original Statement of Basis and Purpose issued upon promulgation of the rules implementing the HSR Act acknowledged a number of public comments that had called for outright exemption of acquisitions approved by a bankruptcy court: "These recommendations were rejected. Purchases at bankruptcy sales may pose antitrust concerns, as may subsequent dispositions of property acquired pursuant to a credit relationship. A bankruptcy court has no responsibility to consider antitrust issues relating to dispositions of the debtor's property." 43 Fed. Reg. 33,450, 33,502 (1978).

[2] The HSR Act is Section 7A of the Clayton Act, 15 U.S.C. § 18a.

[3] *Compare* HSR rule 802.70, which exempts transactions pursuant to a court order or a proposed consent order in an antitrust proceeding brought by the FTC or DOJ.

[4] The rules implementing the HSR Act are codified at Title 16 of the Code of Federal Regulations. Thus, for example, a provision referred to here as "HSR rule 802.63(a)" is found at 16 C.F.R. § 802.63(a).

[5] A trustee's use, sale, or lease of debtor property in the ordinary course of business does not require approval of the bankruptcy court and presumably is exempt from HSR Act filing requirements under subsection (c)(1) of the HSR Act, 15 U.S.C. §18a(c)(1), and HSR rule 802.1, as transfers in the ordinary course of business.

[6] The agencies rely on (and generally do not question) the parties' sworn certification in their HSR filings that Section 363(b) applies. An item on the HSR Act Notification and Report Form requires the submitting party to indicate specifically whether the transaction is subject to Section 363(b). An "officer or director" of a person filing an HSR Form must certify that the responses on the Form were prepared according to instructions issued by the FTC and are, to the best of his or her knowledge, "true, correct and complete in accordance with the statute and rules." The filing party thus certifies, under oath, whether Section 363(b) applies to the transaction that is the subject of the HSR filing.

7 For example, in lieu of a signed agreement or letter of intent, which under HSR rule 803.5(b) is normally a prerequisite to the parties' ability to make their initial HSR filings, a court order setting the procedures for a Section 363(b) sale may be supplied.

[8] 43 Fed. Reg. 33,450, 33,501 (1978).

[9] *Id.*

[10] Examples of debtor/creditor relationships that the staff of the FTC's Premerger Notification Office does *not* recognize as satisfying this criterion or qualifying for HSR rule 802.63(a) treatment include (1) obligations owed to preferred shareholders for guaranteed dividends that are currently in arrears, (2) indemnification owed to a property owner for environmental damage by a former owner, and (3) contingent additional "earnout" consideration owed to the seller of a business by reason of post-acquisition performance targets met by the buyer.

[11] The FTC staff does not view the "ordinary course of business" provisions and lore under HSR rule 802.1 as applicable to HSR rule 802.63.

[12] FTC Informal Interpretation No. 0812006 (Dec. 16, 2008).

[13] *See* ABA Section of Antitrust Law, Premerger Notification Practice Manual 289 (2007).

[14] FTC Informal Interpretations No. 0202007 (Feb. 21, 2002), and No. 0204006 (Apr. 22, 2002).

[15] FTC Informal Interpretation No. 0805004 (May 7, 2008), and No. 0812006 (Dec. 16, 2008).

[16] 43 Fed. Reg. 33,450, 33,502 (1978).

[17] *Id.*

[18] *Id.* at 33,501.

[19] Note that there is no HSR rule specifically implementing or explaining subsection 7A(c)(11).

[20] 16 C.F.R. § 801.1(i)(1).

[21] *See also* 43 Fed. Reg. 33,450, 33,465 (1978).