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To Our Clients:

MERGERS AND TAKEOVERS UNDER THE HART-SCOTT-  
RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

There appears to be considerable confusion and uncertainty as to the impact of the Act on mergers and takeovers. In large measure this has been caused by the poorly drafted and conceived proposed rules which are now being reconsidered and by the mistaken impression that the Act has changed the criteria for determining what mergers violate the antitrust laws. This memorandum supplements our previous descriptions of the Act (memo of 9/17/76) and the proposed rules (memo of 12/27/76) by illustrating the application to typical transactions to which the Act applies.

General Principles Applicable to All  
Types of Transactions

1. The Act did not change the basic antitrust laws. The merger criteria and guidelines continue as before. What was legal before the Act continues to be legal. However, a merger or similar transaction cannot be consummated until 30 days after notice to the FTC and the Antitrust Division, and either agency can delay consummation for an additional 20 days after receipt of requested additional information.

2. The notice requirement requires careful planning. The requirement that all documents relating to a proposed transaction be furnished to the FTC and the Antitrust Division mandates very careful planning as to what documents are created. It is essential that counsel be consulted at the very inception of the idea, before even the first memorandum or study is undertaken.

Mergers

1. Other than the notice requirement, there is no change in the timetable or procedure for a merger.

2. The notice to the FTC and the Antitrust Division cannot be given until either the formal agreement or a letter of intent is signed. If the information and

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documents for the notice are ready prior to the date when the formal agreement is ready, it will be desirable to use a letter of intent so as to enable filing the notice as early as possible.

#### Cash Tender Offers

1. The Act does not change the time periods under the Williams Act or the state takeover laws. The Act prevents the purchase of the shares by the raider until a 15-day notice requirement has been met, and purchases pursuant to the offer may be delayed an additional 10 days after receipt of requested additional information. Thus, 7 and 10 day offers can still (pending adoption of the new SEC time periods) be used where no state takeover statute is applicable. The raider must provide and disclose that although the offer period will end on the specified date, the actual purchase and payment for tendered shares will not occur until the notice requirement has been met.

2. The proposed rules would prevent giving the notice to the FTC and Antitrust Division until the tender offer is actually made or where a state statute is applicable until the state has cleared the offer. This makes no sense, and consideration is being given to permitting the notice to be given as soon as a state filing or notice takes place.

3. After the raider's notice is filed, the FTC or the Antitrust Division may, within the initial 15-day waiting period, request the raider or the target to submit additional information. If either agency makes such a request, the raider may not consummate the offer for an additional period of not more than 10 days after the receipt of the additional information by the requesting agency. Accordingly, if the raider delays in furnishing the additional information, the 60-day withdrawal period could run out and tendering security holders could exercise their withdrawal rights. Thus, it will be important for a raider to be in a position to supply additional information on short notice.

4. A target must file its notice no later than 5:00 p.m. on the tenth calendar day (or 10:00 a.m. on the next following business day if the tenth day falls on a weekend or holiday) following receipt by the FTC and the Antitrust Division of the raider's notice. However, the failure or delay of a target in filing cannot be used to extend the waiting period.

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5. White knights and black knights must comply with the Act in exactly the same manner as raiders. Therefore, the search for a white knight must be accelerated if it is necessary to have its offer conclude concurrently with, or prior to, the raider's offer. There is no impediment to announcing the white knight offer as soon as it is found; the only problem is believability if it cannot be consummated until long after the raider's offer.

#### Exchange Offers

Exchange offers are treated the same as cash tenders except the notice periods are 30 and 20 days instead of 15 and 10 days and the target must file 15 days after the raider files instead of 10 days.

#### Second Step Acquisitions After Obtaining Control

If the raider gets more than 50% of the target, a second step transaction to increase or obtain total ownership can be effected without compliance with the Act. If the raider has less than 50%, the second step must comply fully with the Act.

#### Open Market Purchases

1. There is an exemption for purchases that do not exceed 10% or \$15 million. If either 10% or \$15 million is exceeded, the Act applies.

2. The proposed rules treat open market purchases as mergers, not as tender offers, and therefore require the target to comply with the notice requirement. This makes takeovers through open market purchase impossible. This rule is being reconsidered.

#### Bear-Hug Approaches

The Act has no effect on bear-hug approaches.

#### Transition

The rules are still not effective and will not become effective until at least 30 days after they have

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been announced. The Act does not apply to transactions completed prior to the effective date. Transactions completed within 30 days of the effective date (15 days for cash tender offers) will not be subject to the waiting period if the notice is filed on or prior to the effective date. Pending transactions should be structured to take advantage of this provision. Particular attention should be given to open market purchase situations with a view to acquiring the maximum position prior to the effective date.

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