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FTC Narrows Scope of HSR Reporting Exemption for Certain Acquisitions

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On July 20, 2015, the Federal Trade Commission (FTC) released ***revisions*** to its interpretation of the rule, 16 C.F.R. §802.5, that exempts certain acquisitions of "investment rental property assets" from reportability under the Hart-Scott-Rodino (HSR) Act. The HSR Act requires that mergers and acquisitions exceeding certain dollar thresholds be notified to the FTC and the Department of Justice Antitrust Division. The FTC's revised guidance has significant ramifications for HSR reportability of transactions in numerous industries, including in the oil and gas midstream sector.

Section 802.5 of the HSR rules exempts from the HSR reporting requirements "acquisitions of investment rental property assets," which includes real property that is rented or held for rent to third parties and is held solely for rental or investment purposes. Through its informal interpretation process (whereby transaction parties contact the FTC for an opinion as to whether a particular transaction qualifies for an exemption from HSR reporting), the FTC had previously interpreted this rule to exempt the acquisition of real property used to provide services to unaffiliated third parties. Per the FTC's prior guidance, where a portion of the real property was used by the seller or was intended to be used by the buyer for its own proprietary use, that portion would not be exempt from the HSR reporting requirements, and a filing under the HSR Act was required only if the fair market value of the nonexempt portion of the real property exceeded the HSR reporting threshold. Under this interpretation of § 802.5, many mergers and acquisitions in the oil and gas midstream industry, including some involving gathering systems, pipelines, gas storage facilities, and oil terminals, were exempt from the HSR reporting requirements even if the transaction size exceeded the HSR threshold. While this broad interpretation of § 802.5 was favorable to transaction parties in that it exempted numerous acquisitions from HSR filing obligations, it did not sit well with the original intent behind the rule or the extensive history of antitrust agency enforcement actions against such transactions.

The FTC has now revised its position on § 802.5. Going forward, the FTC has advised that to qualify for the investment rental property exemption, the buyer must intend to *profit from the investment in the real estate* (*i.e.*, buyer acting solely as a landlord), not from the business to be conducted on the property. Where a buyer participates in the business conducted on the property and derives revenue from the business service, however small, the exemption will no longer be available. The FTC explains, "[p]roviding a business service would include leasing the property's capacity (for example, providing storage or being a conduit for materials passing

through the property), rather than leasing the premises and receiving rental income without regard to the specific use of the property." The FTC goes on to provide several examples, including one involving an acquisition of assets relating to a gas gathering and compression system which will be used by the buyer to provide midstream transportation services. Such an acquisition, which previously would have been exempt if the system were used to gather and transport only unaffiliated third party gas, is now no longer exempt unless the buyer and seller are only landlords to the tenant providing such services, and do not profit from providing the gas gathering services themselves. The revised FTC guidance also indicates that even where a buyer intends to act as a landlord with respect to the specific real property it intends to acquire, the exemption will not be available if the buyer otherwise operates in the line of business that takes place on the acquired property.

These changes take effect immediately and may impact transactions currently in progress. Despite this narrowing of the § 802.5 exemption, certain acquisitions of midstream oil and gas assets (for example, those involving storage facilities) may still be exempt under other HSR rules. The consequences of failing to file a reportable transaction include civil penalties of up to $16,000 per day for each day a party is in violation of the HSR Act. Transaction parties should consult HSR counsel early in the deal making process to ensure their transaction complies with HSR reporting obligations.