

KIRKLAND ALERT

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FTC Premerger Notification Office Narrows Application of HSR Rule 802.5: The Investment Rental Property Exemption

The Federal Trade Commission (“FTC”) Premerger Notification Office (“PNO”) recently issued updated guidance regarding how the PNO will interpret and apply going forward the exemption for investment rental property set forth in 16 C.F.R. § 802.5 of the regulations promulgated under the Hart-Scott-Rodino Antitrust Improvements (“HSR”) Act. This guidance supersedes all prior informal interpretations and advice issued by the PNO regarding Rule 802.5.

The PNO’s new position significantly narrows the situations in which the Rule 802.5 exemption will apply. In particular, under the PNO’s new approach, certain acquisitions of pipelines, billboards, and communications towers (and entities that hold such assets) that were exempt under the 802.5 investment rental property exemption pursuant to prior PNO informal interpretations no longer will be exempt going forward.

HSR Rule 802.5 exempts acquisitions of real property assets that are held by the seller and will be held by the buyer solely for rental or investment purposes and that will be rented only to entities not included within the buyer (except for the sole purpose of maintaining, managing, or supervising the operation of the investment rental property assets). Previously, the PNO had applied this exemption broadly to acquisitions of pipelines, billboards, and communications towers as long as the services related to these assets were provided to third parties.

Under the PNO’s new position, the Rule 802.5 investment rental property exemption only will apply in situations where the seller is behaving, and the buyer intends to behave, like a landlord — in other words, where the seller and buyer are leasing or intend to lease the premises and are receiving or intend to receive rental income without regard to the specific use of the property. If the buyer in some way will participate in the business being conducted on the property — for example, by providing storage or being a conduit for materials passing through the property — then the 802.5 exemption is not available.

For example, if the buyer proposes to acquire natural gas pipelines that it will use to provide midstream transportation services to third parties, the transaction is not exempt under Rule 802.5. On the other hand, if the buyer intends to lease the pipelines to a midstream transportation provider who will contract with third parties to transport their product through the pipelines, the transaction will be exempt under Rule 802.5 provided that the seller also rents or holds out for rent the pipeline assets to a third party midstream transportation provider. Similarly, the ac-

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quisition of billboard assets is not exempt under Rule 802.5 if the buyer will use or the seller is using the assets to generate revenues from advertisers as part of their respective advertising businesses, as opposed to simply holding the real property and receiving rental income. Likewise, the acquisition of telecommunications towers is not exempt under Rule 802.5 if the buyer intends to use the assets to provide telecommunications services to wireless providers.

In its notice, the PNO maintains that the prior informal interpretations applying the Rule 802.5 investment rental property exemption expanded the rule's application "well beyond" its original intent and that the PNO's current approach merely restores the original scope of the exemption. The PNO's new position on this topic underscores the importance of keeping up to date on current PNO guidance regarding the application of the HSR rules and exemptions. It also demonstrates that the PNO regularly evaluates its informal guidance and will not hesitate to revise prior positions should it identify compelling reasons to do so.

The announcement of the PNO's revised position on Rule 802.5 can be found at: <https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/hsr-rule-8025-investment-rental-property-exemption>.

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