

KIRKLAND ALERT

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FTC Issues Guidance on the Use of Escrows in Hart-Scott-Rodino Reportable Transactions

The Federal Trade Commission (“FTC”) Premerger Notification Office (“PNO”) recently issued a “Statement on Escrows.” The Statement clarifies that escrow arrangements, subject to certain limited exceptions, cannot be used to avoid the reporting and waiting period requirements of the Hart-Scott-Rodino (“HSR”) Act. This statement supersedes all prior informal interpretations and advice issued by the PNO regarding the use of escrows.

According to the Statement, an escrow arrangement used before applicable HSR waiting periods expire will be considered the transfer of beneficial ownership of the target assets or voting securities in violation of the HSR Act.¹ The PNO advises, however, that in exceptional circumstances and when consulted in advance on the specific facts of a particular transaction, they may recommend an acquisition into escrow not be challenged as an HSR violation. Structuring the escrow to prevent the acquirer from exercising beneficial ownership of the assets or voting securities prior to HSR clearance would be a necessary condition for such favorable advice, according to the PNO.

On limited occasions in the past — generally, in secondary acquisitions and foreign tender offers — the PNO has allowed voting securities to be transferred into escrow pending expiration of the HSR waiting period. In its Statement on Escrows, however, the PNO now says having primary and secondary acquisitions occur on staggered time schedules is, standing alone, generally not a sufficient reason to allow the use of an escrow before expiration of the HSR waiting period for the secondary acquisition. Moreover, with respect to foreign tender offers, the PNO now says the fact that foreign law requires the offeror take the tendered shares on a schedule that conflicts with the HSR waiting periods also generally is not a good reason, in their view, to allow the use of an escrow. The PNO further advises that the time exigencies involved in executive compensation transfers, such as a deadline in connection with the exercise of stock options prior to the expiration of the HSR waiting period, also generally will not justify the use of a pre-HSR clearance escrow.

The PNO’s Statement on Escrows underscores that transaction parties should not assume escrow arrangements will be a solution to timing problems attendant to HSR waiting periods. That said, in exceptional circumstances and with prior consultation with the PNO, the use of an escrow remains an option to be considered.

¹ Under current law, HSR Act violations are subject to civil penalties of up to \$16,000 per day.

If you have questions regarding the HSR Act or the PNO’s Statement on Escrows, please contact the following author or your regular Kirkland contact.

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