PNO Statement on Escrows

In order to provide greater clarity about the use of escrows in connection with transactions subject to HSR, the Premerger Notification Office ("PNO") issues this statement on escrows. All prior informal interpretations and PNO advice with regard to the use of escrows are superceded.

In promulgating the HSR Rules, the Commission and the Antitrust Division ("the Agencies") explicitly state in the Statement of Basis and Purpose for the HSR Rules (SBP) that an escrow agent does not become the beneficial owner of assets or voting securities held in escrow. 43 Fed. Reg. 33450, 33460 (July 31, 1978). The SBP further states that an acquisition in escrow must be reported if beneficial ownership changes hands as a result of the acquisition.

In the PNO's view, acquisitions using an escrow arrangement before the end of the applicable HSR waiting period are likely to transfer beneficial ownership of the assets or voting securities at issue to the acquiring party in violation of the HSR Act, leading the Agencies to consider actions seeking civil penalties under 15 U.S.C. 18a(g)(1).[1] If, however, despite this general admonition, a party believes that it is facing exceptional circumstances that warrant that no HSR enforcement action be taken if an escrow is used, the PNO should be consulted in advance. When consulted in advance on the specific facts of the transaction at hand, the PNO may in very limited instances advise that it would recommend that the Agencies not challenge as an HSR violation an acquisition into escrow in the specific situation posed. [2]

Note that the presence of different time periods for primary and secondary acquisitions is generally not sufficient reason to allow the use of an escrow before the expiration of the HSR waiting period for the secondary acquisition. Similarly, in the context of a foreign tender offer, the fact that the law of another country requires the offeror to take up the tendered shares in a time frame that conflicts with the HSR waiting period is generally not sufficient reason to allow the use of an escrow. An acquiring person could, by bringing the acquisition to the attention of the Agencies before making its HSR filing and cooperating with the Agencies, avoid a conflict between the foreign tender deadline and the HSR waiting period. Further, time exigencies in executive compensation acquisitions, e.g., where stock options may need to be exercised, if at all,

---

[1] One example is the *Malone* case, where the Complaint alleged that using an escrow arrangement did not prevent beneficial ownership from passing to an acquirer. *See* Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting and Waiting Requirement of Hart-Scott-Rodino Act ¶¶ 1, 34-41 at 1-2, 10-11, United States v. Malone, No. 1:09-CV-01147-HHK (D.D.C. filed June 23, 2009); United States v. Malone, No. 1:09-CV-01147-HHK (D.D.C. June 25, 2009) (Final Judgment), available at http://www.ftc.gov/os/caselist/0810219/index.shtm.

[2] Further, structuring the escrow so as to prevent the acquirer, to the extent possible, from exercising beneficial ownership of the assets or voting securities would be a necessary, but not sufficient, condition for such favorable advice.

before expiration of an HSR waiting period, would not be sufficient reason to allow closing in escrow.

In sum, the PNO's view is that escrows generally do not shield an acquirer from obtaining beneficial ownership of the escrowed assets or voting securities. When presented by parties in advance with a specific factual situation, the PNO may in exceptional circumstances advise that it would not recommend an HSR enforcement action if an escrow was used.