

FTC and DOJ Announce New HSR Form and Instructions

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The Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) have changed the form and instructions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). Under the HSR Act, parties to a merger or acquisition of a certain size must each file a premerger notification form (HSR Form), and wait 30 days prior to closing the transaction so that the agencies can assess the competitive aspects of a transaction before its consummation.

These revisions are part of the ongoing effort made by the FTC and the DOJ to eliminate unnecessary rules and alleviate burdensome reporting requirements, while providing enough information to the agencies to make such a competitive assessment. The new regulations will become effective 30 days from July 7, 2011.

The revised HSR Form deletes the requirement to provide revenues by NAICs (North American Industrial Codes) by “base year,” eliminates the need to attach documents filed with the Securities and Exchange Commission or provide a detailed breakdown of voting securities to be acquired, and simplifies other sections relating to information about the party filing.

The proposed changes were published in August 2010, and received extensive comments. The responses by the agencies were thoughtful and incorporated many of the commentators’ suggestions into the new regulations.

The biggest change in the new HSR Form is the incorporation of information about “associates.” Under the new regulation, 16 CFR §801.1(d)(2), “associates” are defined as “an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ‘managing entity’); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.”

Thus an acquiring party must now look beyond the concept of “control” under the prior HSR regulations to determine whether it has entities that are under common investment or operation management with the acquiring person. This captures a series of private equity funds, or limited partnerships. Items 6 and 7 in the new HSR Form asks for information relating to these “associate” companies. For example, if a series of limited partnerships have the same general partner, they will have to provide information regarding the holdings of the other managed limited partnerships. Likewise, Item 7 of the HSR Form that requests “crossover” NAIC codes between the acquiring and

acquired persons must now include information about “associates.” Item 7 additionally contains a clarification that while Item 5 involving revenues has a de minimis exception for revenues under NAIC codes that fall under \$1 million, there is no such exception under Item 7, and all crossover revenues regardless of amount must be reported.

The agencies added a new “Item 4(d)” to the HSR Form and instructions to capture certain documents that the FTC has found helpful in analyzing the competitive impact of a transaction.

- Item 4(d)(i) formalizes a request for offering memoranda, which typically were submitted under Item 4(c).
- Item 4(d)(ii) asks for documents prepared within one year of the acquisition developed by third-party advisors during or while seeking an engagement that relate specifically to the acquired entity or the assets being sold, and those prepared by or for any officer, director, or individual exercising similar functions. This instruction is meant to capture things like “bank books” or “pitch books” typically used at the beginning of a transaction.
- Item 4(d)(iii) requests filing parties to provide all studies, surveys, analyses, and reports evaluating or analyzing synergies and efficiencies if they were prepared by or for any officer, director, or person exercising similar functions for the purpose of evaluating the transaction.

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