

News from our Antitrust & Trade Regulation Group

Major Revisions to Hart-Scott-Rodino Form Set to Go Effective in Early August

Major revisions to the Hart-Scott-Rodino Notification and Report Form were announced today by the Federal Trade Commission and the Department of Justice and will go into effect in early August, 30 days after their upcoming publication in the Federal Register.

These revisions, which follow proposed revisions issued nearly a year ago, streamline certain aspects of the Form—including reducing the burden of submitting SEC filed documents and other financials (particularly for individuals), and eliminating the need to report revenues by NAICS code in a base year.

However, several proposed changes to the HSR Form that were the most controversial and which add significant additional burdens on filing parties have survived, although with modifications to lessen the impact of these new burdens on filers from what was originally proposed.

Most significantly, the new “4(d)” item has survived with a narrower scope (both the types of documents captured and to whom they are directed) and in terms of duration (cutting back the initial proposed two year span before filing to a one year period).

Another significant and controversial aspect of the proposed changes, particularly for private equity and venture funds, was the expansion of reporting requirements

regarding “associates” of the acquiring party submitting a filing. Those changes have also survived, although with some narrowing of the definition so that the additional reporting burdens are directed only to entities that are under common investment or operational management with the acquiring party who is filing, rather than reaching a potentially far broader group of entities that the proposed changes might have drawn in based on terms initially in the proposed language (including “direct” and “oversee”).

Once the new HSR Form goes effective, 30 days after its publication in the Federal Register (which should be in the next few days), it and the revisions underlying the revised Form will need to be used by all filing parties.

Anyone contemplating a potentially reportable transaction in the near term should consult with antitrust counsel to ensure that the information and documents necessary to file under HSR are collected or that submission of any required HSR filing takes place prior to the effective date of the new Form. ■

A copy of the final revisions to the HSR Form, as issued by the Federal Trade Commission, is available at www.ftc.gov/os/fedreg/2011/07/110707hsrfrm.pdf.

Significant Revisions

Item 4(d)

Item 4(d)(i): Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose

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of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that

specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii): Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

Definition of Associate

Associate. For purposes of Items 6 and 7 of the Form, an associate of an acquiring person shall be 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 management with a managing entity.