

ALERTS AND UPDATES

Revised HSR Premerger Notification Form Goes into Effect

August 17, 2011

All filings under the Hart-Scott-Rodino Antitrust Improvements Act made on or after August 18, 2011, must be submitted on a [revised form](#). Following publication and comments last year, the U.S. Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") released "changes to streamline the Premerger Notification Form." The changes also impose new responsibilities on filers, including requiring production of additional documents relating to the transaction; disclosures relating to "associates" of the acquiring person under common management; and more-detailed breakdown and reporting of foreign manufacturers' revenues in the United States. With the new form, filers are no longer required to submit SEC filings, detailed information on classes of securities and old 2002 base-year revenue data, which had been increasingly challenging for first-time filers to find or estimate.

Additional Documents: The form adds three categories of documents that must be produced. First, it requires production of all confidential information memoranda prepared by or for officers or directors of the acquiring or acquired person that specifically relate to the sale of the acquired entity or assets. If there is no formal confidential information memorandum, documents given to officers or directors of the buyer meant to serve the same function must be filed.

Second, the form requires production of all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third-party advisors ("third party advisors") for officers or directors of the acquiring or acquired person for the purpose of evaluating or analyzing market shares, competition, competitors, markets, or potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity or assets. Many of these documents would fall within the scope of documents subject to production under the old form, but the revised form now requires production of materials from third-party advisors not only during an engagement, but also for the purpose of seeking an engagement. Thus, unsolicited materials prepared within a year before the HSR filing are now subject to production. Apart from the additional burdens of locating and producing such documents, they are more likely to contain inaccurate or carelessly worded information than materials prepared by third-party advisors working with the company.

Third, the form requires production of all studies, surveys, analyses and reports evaluating or analyzing synergies or efficiencies prepared by or for any officers or directors (internally or by third-party advisors) for the purpose of evaluating or analyzing the acquisition. Those drafting and circulating such documents should consider how they could be perceived by the FTC and the DOJ.

Information on "Associates" of the Acquiring Person: Prior to the revisions, filers had to provide information relating only to entities under the common control of a single ultimate parent entity. The revisions target (without limitation) master limited partnerships and commonly managed private-investment funds, and now require disclosure of certain information on "associates" of the acquiring person—thereby expanding disclosure to entities under common management.

An associate of the acquiring person is an entity that is not controlled by the ultimate parent entity of the acquiring person, but:

(A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "Managing Entity");

(B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person;

(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.

New Item 6(c)(ii) requires the acquiring person to identify minority holdings of associates with revenues in categories overlapping the revenues of the acquired entity or assets, and revised Item 7 requires revenue overlap information for associates. These new requirements may be particularly challenging for private investment funds with numerous and changing associates and minority shareholders of associates.

More-detailed, 10-digit Product Codes for Revenue from Manufactured Products: The revised form eliminates the requirement to report 2002 base-year revenue, as well as the addition or deletion of new products in intervening years. However, now filers have to submit information for manufactured products for the most recent year, not in broad seven-digit product classes as before, but instead using the more-detailed 10-digit product codes for manufactured products. In addition, revenue in the United States from products manufactured abroad will now have to be reported at the more detailed 10-digit product-code level. These requirements are likely to present challenges in determining which six- or 10-digit codes may apply to revenues of the filer, breaking down revenue into those components and determining how to calculate revenue. The FTC has issued [guidance](#) suggesting that the sale of foreign manufactured products to a controlled U.S. entity should be reported at the transfer price, and the sale of foreign manufactured products to a non-controlled U.S. entity or U.S. direct purchaser at the wholesale/retail price.

For Further Information

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