

## FTC and DOJ Announce New HSR Rules and Form

The Federal Trade Commission and Department of Justice have announced the much-anticipated final Hart-Scott-Rodino ("HSR") premerger notification rules and published a new HSR form, completing a rule-making process started in August 2010. The final rules – while narrowed significantly in scope from the proposed rules – will nevertheless create some increased burdens for filers who must produce additional documents and respond to questions about the holdings of entities under common management and foreign-manufactured products. The rules will, however, reduce the filing burden in other areas, eliminating the need for statistical base year revenue data and certain other items that filers have found difficult to obtain and that typically provide little value to the agencies. The rules will take effect 30 days after publication in the Federal Register, which is expected within the week; thus, parties making HSR filings starting about mid-August will be governed by the new rules and will need to use the new form.

### The New Disclosure Requirements

- New Document Disclosure. The rules create a new class of documents to be included in each HSR filing. Broadly referred to as “Item 4(d) documents,” they will provide the agencies with additional information about the acquisition target, the industry, and possible transaction-specific synergies and efficiencies. Item 4(d) generally builds on the concepts of Item 4(c), which requires the provision of transaction-specific competition-related documents and remains unaltered in this rule-making. Item 4(d) documents consist of:
  - *Confidential Information Memoranda (“CIM”)*. Parties must now file CIM, described as “formal documents created in-house or by a third party that lay out the details of a company, or a part of a company, that is for sale,” provided the documents were created within one year before the HSR filing date, were prepared by or for directors or officers of the Ultimate Parent Entity of the Acquiring/Acquired Person or Acquiring/Acquired Entity and specifically relate to the sale of the acquired entity or assets. Note, however, that there is no express requirement that such materials relate to the acquisition for which HSR is filed. This suggests that the following types of documents may need to be produced: multiple versions of a CIM produced by a seller (perhaps tailored to different potential buyers); buyer-created CIM for purposes of equity syndication; and CIM received by persons that acquired assets and then propose selling all or a portion of them. Information memoranda from earlier proposed transactions must also be produced if they were given to a director or officer of the buyer as an introduction to the investment target or otherwise.
  - *Materials Prepared by Investment Bankers, Consultants or Other Third Party Advisors*. Parties must file materials prepared by third parties, including investment bankers and consultants, that contain competition-related content and were prepared by or for directors or officers of the Ultimate Parent Entity of the Acquiring/Acquired Person or Acquiring/Acquired Entity up

to one year before the HSR filing. As with CIM, there is no express requirement that these materials relate to the acquisition for which HSR is filed. Third-party materials will include pitch books and banker's books prepared for purposes of seeking an engagement as well as materials prepared by advisors who have been retained to explore strategic alternatives for a company. However, the rules clarify that such materials will not include unsolicited banker materials except to the extent that such materials are found in the files of a director or officer, relate to the sale of the acquired entity or assets and contain the necessary competition-related content. A number of other types of ordinary course materials are also specifically excluded, including industry reference materials, databases and routine market research materials.

- *Synergy or Efficiency Documents.* Parties must provide materials prepared by or for directors or officers for the purpose of evaluating or analyzing the synergies or efficiencies of the acquisition. There is no time period on this category of documents, though such documents must specifically relate to the particular acquisition for which HSR is filed. Financial models without stated assumptions are not captured.
- Creation of Associates Definition and Disclosure of the Holdings of Such Entities. Acquiring persons will now have to report the minority and controlled investments of “associates” – entities under common management with, but not controlled by, the acquiring person – to the extent that they derive revenues in the same industry as the target. This disclosure aims to provide the agencies with information about competitive overlaps (for example, between funds sharing the same general partner and the target) which they would otherwise not receive due to the unique control rules embodied in HSR. This new disclosure requirement particularly impacts master limited partnerships and private equity funds.
- Disclosure of Foreign-Manufactured Products. In a departure from the Census reporting concepts currently embodied in the HSR form, parties will now need to supply 10-digit NAICS product codes and revenues for each product manufactured outside of the U.S. which is sold into the U.S. at the wholesale or retail level or which is sold directly to customers in the U.S. Currently, direct sales of foreign-manufactured products are not reported; sales of foreign-manufactured products through a controlled U.S. establishment of the filer are reported only at the wholesale or retail level.