

Client Alert.

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FTC and DOJ Implement Substantive Changes to the HSR Act Reporting Requirements

By Jeff Jaeckel and Panagiotis C. Bayz

On Thursday, July 7, 2011, the U.S. Federal Trade Commission (“FTC”) issued its final rule implementing a number of significant revisions to the Hart-Scott-Rodino (“HSR”) Act Premerger Notification Form (“HSR Form”) that companies must submit to the FTC and U.S. Department of Justice Antitrust Division (“DOJ”) for proposed transactions that satisfy the HSR Act notification thresholds (“Final Rule”). The Final Rule follows the FTC’s issuance of a notice of proposed rulemaking in August 2010 (“Proposed Rule”) but incorporates a number of meaningful changes to the Proposed Rule in response to comments by interested parties.

The Final Rule makes two types of changes to the HSR Form. First, it imposes significant new reporting requirements on parties submitting an HSR Form with respect to information about “associates” of the acquiring person and also requires HSR filers to provide additional categories of documents with the HSR filing above and beyond the scope of the current “Item 4(c)” obligation. Second, it streamlines parts of the HSR Form by deleting from the informational requirements several categories of technical information that over time have proven relatively burdensome to filers but unnecessary in a preliminary merger review.

The Final Rule will be effective 30 days after publication in the Federal Register, which is likely to occur within the next few days.¹ The principal substantive changes to the HSR Act reporting requirements are discussed below.

1. Expanded Reporting Requirements With Respect to “Associate” Entities Under Common Management

Historically, the HSR Form has required acquiring parties to identify all other entities that are under common corporate control (e.g., subsidiaries and sister companies that are majority owned by the same ultimate parent). The Proposed Rule expanded that obligation to include a new category of holdings called “associates” — companies that are not majority-owned by the same parent but are nonetheless subject to common operational control or influence. The Final Rule retains the concept of “associate” entities introduced in the Proposed Rule, with only a minor modification in the definition of the term “associate.” The term covers entities that are under common management with the controlling entity of the acquiring party. The full definition is as follows:

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.

¹ The FTC Press Release and the text of the Federal Register notice are available at <http://www.ftc.gov/opa/2011/07/hsrform.shtm>

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The HSR Form will now require the acquiring party to report in Item 6(c)(ii) all of its associates' holdings of 5 percent or more but less than 50 percent in the acquired entity(ies) of the transaction, and in entities with revenues (based on North American Industrial Classification System ("NAICS") Codes) that overlap with the revenues attributable to the acquired entity(s) or assets. The reporting requirements under Item 7 of the HSR Form, involving revenue overlaps between the acquiring and acquired parties to the transaction, have been expanded to include NAICS Code revenues attributable to associates.

The FTC acknowledges that these additional reporting requirements may result in an increased reporting burden and provides mechanisms that may limit the potential burden in some cases. For example, if an acquiring person cannot provide information on the minority holdings of its associates in response to Item 6(c)(ii) at the NAICS Code level, it could opt to respond on the basis of industry (e.g., pharmaceuticals, mining, healthcare, etc.).

These additional reporting requirements will likely have a significant impact on private equity firms, investment funds, energy firms organized as master limited partnerships and other entities with holdings structured as limited partnerships or other investment vehicles that are under common management (often through a common general partner or managing member) but that are not under common "control," as defined by the HSR Act and implementing rules.

2. Additional Documentary Production Requirements

Under the current reporting requirements, Item 4(c) of the HSR Form requires parties to a transaction to produce documents prepared by or for an officer or director of the party for the purpose of analyzing or evaluating the transaction and that discuss certain competition related factors. The Final Rule retains the Item 4(c) obligation and creates a new Item 4(d) that imposes an obligation to provide copies of additional categories business documents as part of the HSR Form. Fortunately, the provisions of the Final Rule address certain concerns noted in comments submitted in response to the Proposed Rule that the scope of the Item 4(d) request was overly broad.

The new Item 4(d) requires filing parties to provide copies of the following categories of documents:

Item 4(d)(i): All confidential information memoranda (or the functional equivalent) prepared by or for any officer or director that specifically relate to the sale of the acquired entity or assets. 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 of a confidential information memorandum when no such confidential information memorandum exists, and are limited to those produced up to one year before the date of filing.

Item 4(d)(ii): All studies, surveys, analyses and reports prepared by investment bankers, consultants or other third-party advisors ("third-party advisors") for any officer or director 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 and are limited to those produced up to one year before the date of filing.

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

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While certain documents to be provided under Item 4(d) may arguably be covered by the scope of the Item 4(c) production requirements, the commentary to the Final Rule notes that the scope of Item 4(d) is intended to be broader than Item 4(c) which is limited to documents prepared in connection with the acquisition. However, to the extent a document is included in Item 4(d), it is not necessary also to include that document in response to Item 4(c).

3. Adjustments to Reporting of Revenues

The current HSR Form imposes detailed reporting requirements for revenue derived from sales of items manufactured in the United States by the reporting party or an entity or entities under common control. The Final Rule expands that obligation by requiring the same detailed reporting of revenues (by 10-digit NAICS Code) from products manufactured outside the United States that are sold in or into the United States. However, the Final Rule removed the requirement (stated in the Proposed Rule) for a party to report its subsequent sales of such manufactured products as non-manufactured product revenues under a wholesale or retail NAICS Code.

In addition, the Final Rule eliminates the onerous and often extremely burdensome requirement that a filing party provide its revenues by NAICS Code for a historical “base year” (currently 2002) in addition to the most recent year. Rather, under the Final Rule, NAICS Code revenues need only be reported for the current fiscal year. If such data have not been compiled for the most recent year, estimates of dollar revenues by applicable NAICS Codes may be provided if a statement describing the method of estimation is furnished.

4. Ministerial and Administrative Changes

Finally, the Final Rule contains numerous additional, mostly ministerial, changes to the reporting requirements, and introduces the revised the HSR Form.

Contact:

Jeff Jaeckel

(202) 778-1440

jjaeckel@mofo.com

Panagiotis C. Bayz

(202) 887-8796

akibayz@mofo.com

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