

## Federal Trade Commission Announces Major Changes to Disclosure Requirements Under Hart-Scott-Rodino Antitrust Improvements Act

On July 7, the Federal Trade Commission (“FTC”) announced major changes to disclosure requirements under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”). Although intended to reduce the burden on the filing parties by eliminating certain disclosure requirements, the updated rules are likely to increase drastically the expense of HSR filings for most companies. The changes should take effect in mid-August, 30 days after they are published in the *Federal Register*.

The most significant changes include:

- Introduction of the concept of “associates,” which will now require companies to make disclosures for all “managed” entities;
- Additional requirements for offering memoranda and related materials; and
- Changes to required revenue data, specifically revenues derived from products manufactured outside the United States and sold into the country.

**Associates:** Perhaps most significantly, the changes to the rules introduce the new concept of “associates,” which the FTC defines to include entities under common management of the acquiring party, as well as all entities controlled or managed by these entities. Under the revised rules, acquiring parties must report information about associates’ significant minority holdings (defined as more than 5 percent, but less than 50 percent) in entities with revenues in North American Industry Classification System (NAICS) codes that overlap with the acquired business.

This change will affect hedge funds and private equity firms, which were not previously required to disclose information about holdings of affiliated companies with no direct involvement in the acquisition. For example, under the old rules two investment funds managed by a single organization would have been treated as separate entities, requiring that competitive information be provided only for companies held by a single fund.

Under the new rules, the acquiring fund would be required to make disclosures for all qualifying companies held by the second fund as well. Although this broader disclosure requirement may aid the FTC in assessing competitive interaction between companies held by commonly managed funds, the burden on the organization to prepare disclosures for each of its individual funds will likely result in significantly increased costs.

**Increased Offering Document Requirements:** The current rules require submission of documents prepared by or for an officer or director “for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” The new Item 4(d) formalizes the FTC’s practice of requiring parties to submit offering memoranda and other materials prepared by investment bankers up to one year before the date of filing. Required submissions include: all Confidential Information Memoranda prepared by or for any officer or director, and all surveys, studies, analyses, and reports prepared for any officer or director (whether for analyzing or evaluating synergies and/or efficiencies, or for analyzing or evaluating market shares, competition, competitors, markets, potential for sales growth, etc.). Item 4(d) will not only increase the cost of preparing HSR filings, but will also require companies to ensure that appropriate

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preservation policies are in place at the outset of any acquisition activity.

**Revenue Data:** Under current rules, both base-year (currently 2002) and current year revenue derived from domestic operations must be provided by means of a seven-digit NAICS code; revenue derived from foreign operations need not be reported. The revised rules eliminate the base-year reporting requirements, potentially reducing the disclosure burden for some parties. The revised rules also add a reporting requirement for revenue from products manufactured outside of the United States and sold into the country. This new requirement is likely to create a substantial amount of work for companies with extensive overseas manufacturing operations. In addition, companies must now make revenue disclosures using a more detailed 10-digit NAICS code. Although this latter change may eventually bring more consistency to HSR filings, it will likely create significant short-term burdens as companies are forced to re-categorize revenue.

If you have any questions concerning the issues raised in this alert, please contact the authors of this alert [David Hamilton](#), [Brent Powell](#), [Jacob Hansen](#)\*, or any of our other experienced [Antitrust attorneys](#).

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