

To: Our Clients and Friends

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Antitrust Agencies Announce New HSR Form

Commonly Managed Entities and Supporting Documentary Materials Most Affected

The Federal Trade Commission and Department of Justice Antitrust Division (collectively, the “Agencies”) have announced a new Notification and Report Form (“Form”) intended to ease the filing burden on parties required to report their transactions under the Hart-Scott-Rodino Act of 1976, as amended (“HSR Act”). According to the Agencies, the changes are also intended to increase the Agencies’ efficiency in reviewing transactions. The changes eliminate some data previously required by the Form, but also specify certain additional information required from the parties. Among the newly required material is the following:

1. **Information on “Associates”** - Until now, an Acquiring Person was only required to include in its filing information related to itself and those entities it “controlled” (as expressly defined in the Premerger Notification Rules). In the new Form, the Acquiring Person must now also include some information on any “associate” that overlap with the Acquired Person in their product offerings.

An “Associate” is defined as “an entity that is not an affiliate of [an acquiring] 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.”

Associates often exist in the context of master limited partnerships or investment funds where entities are commonly managed but not technically “controlled” under the Premerger Notification Rules. Specifically, the Agencies amended the Form such that Acquiring Persons must include minority shareholding and revenue data for associates that overlap with the entity or assets being acquired.

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2. **Additional Documents** - The new Form still requires parties to submit “4(c)” documents - i.e., studies, surveys, analyses, and reports prepared by or for officers or directors that analyze the transaction based on certain identified competition-related topics. However, the Form now additionally requires parties to submit certain other specified documents, that may not clearly qualify as “4(c)” documents. Identifying documents responsive to Item 4(c) has long been a controversial aspect of the Form. The inclusion of these specific additional documents formalizes the Agencies’ view that such materials should be included with a filing. These additional required documents are as follows:

- ***Confidential Information Memoranda*** - Parties will be required to submit Confidential Information Memoranda (or, in the absence of a Confidential Information memorandum, any documents that served the same function) that specifically relate to the sale of the Acquired Entity. Only such documents produced up to one year before the date of filing will need to be submitted.
- ***Materials prepared by Investment Bankers, Consultants, or other Third Party Advisors*** - Parties will be required to submit studies, surveys, analyses, or reports prepared by investment bankers, consultants or other third party advisors, that specifically relate to the sale of the acquired entity or assets. Only such documents produced up to one year before the date of filing will need to be submitted.
- ***Materials Evaluating or Analyzing Synergies or Efficiencies*** - Parties will be required to provide studies, surveys, analyses and reports that evaluate or analyze synergies or efficiencies related to the acquisition.

Another significant change to the Form relates to the reporting of revenue data. While the old Form required that parties submit revenue data for both the most recent year and a “base year,” the new Form requires only data for the most recent year, thus, eliminating the need to provide base year data. This will reduce the information-gathering burden on parties with little or no access to historic revenue data.

Finally, the new Form requires that parties include within their revenue data sales from products manufactured outside the U.S. and sold in the U.S. at the retail or wholesale level or directly to U.S. customers. While this may increase the burden on some filing parties, the Agencies believe it will help them obtain a clearer picture of the parties’ sales in the U.S.

The new Form will be effective 30 days from publication of the final rules in the Federal Register. For more information on the recent changes to the Form, please contact:

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