

WSGR ALERT

JULY 2011

FTC AND DOJ ANNOUNCE CHANGES TO HSR PREMERGER NOTIFICATION FORM

On July 7, 2011, the Federal Trade Commission (FTC) and the United States Department of Justice, Antitrust Division (DOJ) announced changes to the Hart-Scott-Rodino (HSR) Premerger Notification Rules and the Premerger Notification and Report Form, following a public comment period that ended on October 18, 2010. Prior to the most recent revisions, the FTC and DOJ last made modifications to the HSR form in 2005; however, unlike the relatively minor 2005 changes, the 2011 changes are extensive and may significantly affect the burden placed on filing parties. The new rules and HSR form will go into effect 30 days after the publication of the changes in the Federal Register.

Most of the changes are minor and will only slightly impact the complexity and associated burdens of the HSR form. However, filing parties should be aware that several changes—found in Items 4, 5, 6, and 7 of the HSR form—represent significant departures from the previous HSR form:

- Item 4 now requires certain additional documents to be submitted with the HSR form, such as Confidential Information Memoranda and bankers' books, even if they do not meet the criteria of Item 4(c)
- Item 5 now eliminates the requirement to provide 2002 revenue data, but it requires manufacturing revenues from the most recent fiscal year to be reported using 10-digit manufacturing codes

- Items 6 and 7 now require acquiring persons to provide information regarding "associates," which are entities under common operational or investment management (such as separate private equity funds that share a general partner)

Revisions to Item 4

The revisions add a new category of documents that must be submitted with the HSR form. Most parties are familiar with the HSR form's requirement to produce 4(c) documents ("Studies, Surveys, Analyses, and Reports"), which are documents prepared for or by officers or directors, used to evaluate or analyze the transaction, and contain competition-related content. Now, Item 4(d) also will require "Additional Documents" that the FTC and DOJ have deemed to be helpful in their reviews of transactions.

Item 4(d)(i) requires filing parties to produce any Confidential Information Memorandum (CIM) related to the acquired entities or assets that were prepared for officers or directors (or for unincorporated entities, those serving similar functions) within one year prior to the time of filing, whether the CIM was shared with the buyer or not. If no CIM that relates to the relevant entities or assets to be acquired was prepared, then documents serving the purpose of a CIM (such as a presentation containing a company or industry overview), even if drafted in the ordinary course, need to be submitted if they were given to the buyer specifically to serve the purpose of a CIM. The new Item 4(d)(i) is more expansive than Item 4(c) in that it

requires the submission of a CIM that is not specifically tied to the proposed transaction, and in the absence of a CIM it requires the submission of ordinary course documents that are not required under Item 4(c).

Item 4(d)(ii) requires filing parties to produce documents developed by third-party advisors during an engagement, or for the purpose of seeking an engagement, that relate to the acquired entities or assets if those documents were prepared within one year prior to the time of filing. The documents are required if they meet the other criteria of Item 4(c) even if they were not used specifically to evaluate or analyze the proposed transaction. Thus, third-party documents (such as bankers' books) that were prepared for directors or officers (or for unincorporated entities, those serving similar functions) and that contain competition-related material now need to be submitted if they relate to the acquired entities or assets, even if they were not specifically tied to the proposed transaction.

Item 4(d)(iii) essentially expands the content-related criterion of Item 4(c), requiring the submission of materials that evaluate or analyze synergies or efficiencies related to the proposed transaction and were prepared by or for directors or officers (or for unincorporated entities, those serving similar functions), even if they do not contain other competition-related content.

Revisions to Item 5

Among other things, Item 5 on the former HSR form required that filing parties submit revenue information from a base year, which

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is currently 2002. This requirement now has been eliminated, along with the requirement that parties identify the years in which manufactured products have been added or deleted since the base year.

However, revenues from manufactured products for the most recent fiscal year must now be reported by 10-digit North American Industry Classification System (NAICS) codes; under the previous form, manufacturing revenues could be aggregated under 7-digit NAICS codes. In addition, products manufactured overseas by the filing party but sold in the United States, whether directly to a customer or by a U.S. entity within the filing person, will also require reporting by 10-digit NAICS codes.

Revisions to Items 6 and 7

Item 6(c) requires information regarding the minority holdings of the filing person, and Item 7 requires information regarding NAICS code overlaps among the filing parties. Under the revisions, the requirements for both have been expanded for acquiring persons through the addition of the term “associate” under the rules. An “associate” of an acquiring person is defined as:

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.

This addition mostly will affect private equity companies with multiple investment entities.

Under the previous HSR form, a private equity fund usually was deemed its own ultimate parent entity, even if it shared a general or managing partner with another fund. Under the revisions, separate investment funds that share general or managing partners will now be considered associates of one another; thus, if one fund is an acquiring person, it must submit information to the best of its knowledge regarding its associates under Items 6(c)(ii) and 7 of the HSR form (note that the concept of “associate” does not affect the definition of an “acquiring person” for the purposes of determining whether an HSR filing is required).

Item 6(c)(i) requires information regarding the minority holdings of the acquiring person and the acquired person, for entities that derived revenues in the most recent fiscal year from operations in industries within any 6-digit NAICS code that overlaps with the other party. For acquiring persons, Item 6(c)(ii) requires additional information regarding the minority holdings of the acquiring person’s associates for entities that derived revenues in the most recent fiscal year from operations in industries within any 6-digit NAICS code that overlaps with the other party. To the extent that such information regarding associates’ minority holdings is not available by NAICS code, the acquiring person could rely upon regularly prepared financial statements that list the investments of its associates (as long as the financial statements are no more than three months old), or elect to list the entities that are within the same general industry as the acquired person, such as pharmaceuticals, mining, and healthcare.

Under the old HSR form, Item 7 required the parties to list overlapping NAICS codes. Now, Item 7(b)(i) also will require the name of the entity, if different than the person, that derived revenues from operations in industries within any 6-digit NAICS code that overlaps with the other party. Acquired persons also are required in item 7(b)(ii) to list the entities of their associates that derived

revenues from operations in industries within any 6-digit NAICS code that overlaps with the acquired person. In Item 7(d), they are required to list the geographic markets in which the entities of their associates listed in Item 7(b)(ii) conducted operations or derived revenues.

Conclusion

The FTC and DOJ claim that these revisions generally will decrease the burdens associated with the HSR form while at the same time providing relevant and helpful information to assist in their review of transactions. However, for certain transactions the burden has increased, and filing parties will now need to account for the changes.

- The Item 4 revisions now will require filing parties to expand their search of documents that must be submitted with the HSR form. This revision is particularly important since the collection of Item 4(c) documents often requires a substantial amount of time and resources, and it was often a gating item for the submission of the HSR form; the addition of Item 4(d) will only increase the necessary collection scope and time.
- The Item 5 revisions now will require all manufacturing revenues to be categorized by 10-digit NAICS codes.
- The addition of the “associate” concept presents a potentially significant burden for private equity companies in particular, which must now provide additional financial information under Items 6 and 7 of the HSR form.

If you have any questions about the revisions to the HSR form or regarding HSR in general, please feel free to contact [Charles Biggio](#) (212-497-7780), [Scott Sher](#) (202-973-8822), or another member of Wilson Sonsini Goodrich & Rosati’s antitrust practice.

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