

Client Alert

Antitrust & Litigation Practice Group

July 8, 2011

FTC and DOJ Announce Changes to HSR Premerger Notification Rules and Form

On July 7, 2011, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) announced revisions to the premerger notification rules under the Hart-Scott-Rodino (“HSR”) Act. The revisions to the HSR Notification and Report Form (the “HSR form”) are both substantive and ministerial, and come after a public comment period on the proposed changes. In a joint press release, the Agencies said that the changes were made to streamline the HSR form and reduce the filing burden on parties seeking antitrust clearance for proposed mergers and acquisitions. The press release regarding the changes is available [here](#). The text of the Federal Register notice outlining the changes and the new form is available [here](#).

The HSR Act requires that parties to certain mergers or acquisitions notify the Agencies before consummating the transaction. The filing requirements apply to acquisitions of voting securities, non-corporate interests (*e.g.*, LLC or partnership interests) or assets, where U.S. commerce is affected by the transaction, and where the transaction meets certain size-of-transaction and size-of-person thresholds.

According to the Agencies, the revised HSR form focuses on those categories the Agencies consider necessary for their initial premerger notification review. The form alleviates some of the burden on HSR filers by deleting several categories of “unnecessary” information. For example, HSR filers will no longer be required to provide copies of documents filed with the Securities and Exchange Commission, report economic code “base year” data, or give a detailed breakdown of all voting securities to be acquired. That said, the new HSR form includes some new requirements: Item 4(d), which requires the submission of certain documents separate from those required by Item 4(c); Item 5, which requires revenue reporting of North American Industry Classification System (“NAICS”) product code information for certain products; and Items 6(c) and 7, which require the submission of information on the holdings of “associates” that overlap with the entity or assets that are being acquired.

Under Item 4(d), HSR filers are required to submit several new categories of documents: (i) confidential offering memoranda prepared within one year prior to filing that specifically relate to the sale of the acquired entity or assets; (ii) materials developed by third-party advisors prepared within one

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year prior to filing that specifically relate to the sale of the acquired entity or assets; and (iii) all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer or director of the merging parties for the purpose of evaluating or analyzing the acquisition. These new categories will require HSR filers to search for and divulge many documents kept during the ordinary course of business, such as memoranda regarding the sale of the entity or assets, corporate subscriptions to market studies, industry references, market research, information received by financial investors, pitch books created by investment bankers or consultants, and analyses prepared in connection with the valuation of the acquisition.

Under Item 5, HSR filers are now required to (a) report revenues derived from U.S. manufacturing operations for the most recent completed fiscal year by 10-digit NAICS code, and (b) report revenues for products manufactured outside of the U.S. that are sold into the U.S. directly or through the reporting entity's U.S. operations by 10-digit NAICS code.

Finally, under Items 6(c) and 7, the HSR form adds the term "associate" to reporting requirements to refer to certain entities that are not "affiliates"—*i.e.*, entities controlled, directly or indirectly, by the filing person. An "associate" is defined broadly to include an entity that: (a) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); (b) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; (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. Items 6(c) and 7 require the acquiring entity to report certain information about its associates' earnings and holdings. According to the Agencies, the purpose of this change is to allow the Agencies to identify and evaluate any potential competitive effects of an associate's ownership of minority interests in entities that may operate in the same markets as the acquired entity or assets. The change will have the most significant effect on private equity firms, master limited partnerships, and other investors who invest through multiple investment vehicles.

Key Takeaways

- According to the Agencies, the purpose of the revisions to the HSR form is to streamline the premerger notification process and to require the submission of certain additional information to aid the initial antitrust reviews by the FTC and DOJ.
- Although some of the changes to the HSR decrease the burden of completing the HSR form, other revisions, such as the addition of Item 4(d) and changes to Item 5 significantly increase the burden on HSR filers. In addition, the inclusion of the term "associate" in Items 6(c) and 7 may place significant burden on private equity firms and hedge funds because of the need to provide information for "associate" funds.
- Given the requirements under the new Item 4(d), there is an even greater need to be vigilant about internal document creation, as well as the creation of documents by third-party advisors, consultants and investment bankers.

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