# FTC/DOJ Announce Changes to HSR Merger Notification Requirements

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The Federal Trade Commission and the U.S. Department of Justice Antitrust Division have announced significant changes to the Hart-Scott-Rodino (HSR) mandatory reporting requirements for merger and acquisition transactions exceeding certain size thresholds. The new HSR rules, which will take effect 30 days after publication in the Federal Register, have real, practical implications for businesses contemplating transactions that are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The antitrust agencies first issued proposed amendments in August 2010 and received comments from multiple parties.

Parties to HSR-reportable transactions have a legal obligation to submit Notification and Report Forms (HSR Forms) to both the FTC and the DOJ, thereby triggering a waiting period during which the antitrust agencies review the transaction for potential competitive issues and determine whether to seek an injunction. For this reason, HSR-reportable transactions may not be consummated until the expiration or termination of the waiting period. The agencies' stated purpose for the recent changes is to streamline the HSR Form and capture new information that will help the agencies conduct their initial review of a proposed transaction's competitive impact.

The HSR Form requires the submission of information and data regarding the transaction and the parties, together with various documents. Some of the new amendments will indeed simplify the HSR Form and are welcome (and long overdue). Others, however, will require new, additional information and documents to be submitted with HSR filings, thereby increasing the burden and cost for many, if not most, filing parties. The most significant of these changes are discussed below. The changes do not alter the substantive standard of antitrust review for proposed transactions.

**Additional Documents to be Submitted with HSR Filings**

To date, the most critical part of the HSR Form has been Item 4(c). It requires filing parties to submit certain documents prepared in connection with the reportable transaction for the purpose of evaluating or analyzing that transaction with respect to one or more enumerated topics relating to competition. Significantly, Item 4(c) does not require (with very limited exceptions) the submittal of pre-existing, ordinary course business documents.

The revised HSR Form now contains a new Item 4(d) calling for three additional categories of documents that would not necessarily be captured by Item 4(c). In summary, those categories are: (i) confidential information memoranda (or, if there are none, documents serving such function) created up to one year before the date of the HSR filing that specifically relate to the sale of the acquired entity or assets (but not necessarily the specific transaction at issue), irrespective of whether they contain competition-related content; (ii) materials prepared up to one year before the HSR filing by investment bankers, consultants, or other third party advisors, during an engagement or for the purpose of seeking an engagement, that contain competition-related content specifically relating to the sale of the acquired entity or assets (but not necessarily the specific transaction at issue); and (iii) documents evaluating or analyzing synergies and/or efficiencies prepared for the purpose of evaluating or analyzing the transaction in question. In determining what materials are responsive, each of these three categories has certain exceptions.

The new Item 4(d) will require a broader document search, collection and review exercise prior to filing HSR, hence the average time needed for document gathering and review likely will increase. Moreover, with regard to documents describing synergies, the agencies have indicated that such documents submitted with an HSR filing may carry greater weight than materials claiming synergies created and submitted at a later time during an investigation. This may increase pressure on merging parties to expend resources on performing detailed synergies analyses earlier in the course of certain transactions.

**Associates**

The new HSR rules require the acquiring person to provide more details regarding its corporate structure, including various information about "associates" -- entities that are commonly managed with the acquiring person. Examples of associated entities include general partners of a limited partner, other partnerships with the same general partner, other investment funds whose investments are managed by a common entity or under a common investment agreement, and investment managers of funds.

This change stems from the fact that, until now, an acquiring person only had to provide information with respect to all entities falling within a technical definition of "control." As a result, the antitrust agencies felt they were not receiving all the information they needed to form a complete picture of the potential antitrust ramifications of a transaction. This has frequently been an agency concern in transactions involving families of private equity funds and in the energy industry with master limited partnerships (MLPs). Historically, competitive overlaps amongst limited partnerships with a shared general partner typically have not been required to be disclosed on the HSR Form and therefore may have gone undetected.

The new concept of "associate" and its application to the HSR Form is particularly significant for businesses with complex partnership structures, such as many private equity firms, hedge funds and MLPs. It will involve assembling and reporting more information on general partners, sister funds and their portfolio companies.

**Other Changes of Note**

Under the current rules, filing parties only need to identify minority interests in corporate entities, i.e., those that issue voting securities. The HSR amendments now also call for information regarding minority interests in unincorporated entities, such as partnerships and LLCs.

The agencies have also made changes to Item 5 of the HSR Form dealing with revenue reporting. On the one hand, they have removed completely the requirement to report revenues for a "base year." The amended Item 5 now requires only revenue information for the most recent fiscal year, which will eliminate the need for companies to dig into old financial records. On the other hand, Item 5's scope has been expanded to require more detailed revenue information regarding products manufactured outside the U.S. and sold into the U.S.

**Implications of the Changes**

The additional information and documents mandated by the HSR changes likely will, at least in some transactions, assist the antitrust agencies in their analysis of deals and perhaps even expedite the review process in certain cases. However, this will come at the expense of increased burden and cost for companies. Some of the extra information called for will have a particularly significant impact on first-time filers, a point the agencies acknowledge. Parties to HSR-reportable transactions will need to incorporate into their overall deal timelines and budgets the likelihood that, at least in some instances, HSR filing preparation will become longer and more expensive.