

Changes to US Premerger Notification Requirements to Become Effective in Mid-August

Premerger notification requirements in the US have been significantly revised, affecting the information that must be supplied on the Premerger and Notification Report Form (Form) used to notify the US Federal Trade Commission (FTC) and US Department of Justice (DOJ) of a proposed transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). The revisions eliminate certain categories of information that had previously been required, but add new categories that will increase the burden for some filers. Changes were initially proposed by the agencies in August 2010, and public comments were invited. The earlier proposal has now been adopted with some modifications based on the public comments. The new information requirements will apply to filings made after a not-yet-specified date in mid-August.

The HSR Act requires that parties wishing to consummate a merger or acquisition above a certain size provide notification to FTC and DOJ and wait a prescribed period of time before closing the transaction. The changes to the Form are designed to give the reviewing agencies a more complete picture of the competitive impact of the proposed transaction during their initial review and to eliminate parts of the Form that had not proved useful. The FTC has also made changes to the HSR Rules, largely to reconcile the treatment of corporate and non-corporate entities.

While some of the changes to the Form streamline the process and reduce the burden of information-gathering, other changes require significantly more information to be provided, particularly by private equity funds, investment funds, master limited partnerships, and similar entities.

The principal changes fall into three categories.

1. Additional reporting requirements for entities "associated" with the filing entity

The most significant change to the Form is a requirement to report certain data for entities that are "associated" with the "ultimate parent entity" (a defined term under the HSR Rules, referred to here as "Parent") and its controlled entities when completing the Form. The "associated" concept captures corporate and non-corporate entities that manage or are under common management with the acquiring party. Previously, information was reported only for entities "controlled" by the Parent of the acquiring entity, under a strict definition of control (generally, 50% interest). Under the structure typically used by private equity funds, the portfolio companies belonging to related

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funds often were not considered under common "control" by the Parent, and detailed information about those other portfolio companies was not required.

Examples of entities captured by the term "associated" include general partners of a limited partnership, other partnerships with the same general partner, other investment funds whose investments are managed by a common entity or under a common investment management agreement, and investment advisers of a fund.

The revised Form requires information about these associated entities where their lines of business overlap with the company or assets to be acquired. Overlap is measured by revenues as broken down into North American Industry Classification System (NAICS) codes, the standard codes used by Federal agencies for the purpose of collecting, analyzing, and publishing statistical data related to the US business economy. If precise NAICS codes are not known, filers are required to list holdings in entities that have operations in the same industry, based on the knowledge or belief of the Parent. Information also must be provided regarding the associated entities' minority shareholdings in companies engaged in the same line of business as the company or assets to be acquired, as measured by NAICS codes.

The increase in information requirements is somewhat counterbalanced by a separate decrease in required information addressing the Parent's other holdings. It is no longer necessary to provide a comprehensive list of every entity "controlled" by the Parent to the transaction. Only entities located inside the US, or having sales in or into the US, are reported. The requirement to provide information on all minority outside shareholders of the Parent and each of its controlled entities is also no longer required. This information must only be provided only for the Parent and the entity that is a direct party to the transaction. However, this category of information is expanded to cover not just companies with voting securities, as was formerly the case, but also non-corporate entities. Any general partner(s) of a limited partnership must be reported as an interest-holder on the Form, regardless of the size of interest held. Finally, minority shareholdings in outside companies must only be listed if those companies derive revenues in the same NAICS codes as the target company or assets.

2. Expansion of documents required to be submitted with the Form

The scope of the documents that must be submitted with the HSR filing has also increased. Previously, the only documents submitted with the filing include a copy of the agreement between the parties; certain securities filings and accounting materials; and all "studies, surveys, analyses and reports" that were prepared by or for officers or directors for the purpose of evaluating or analyzing the acquisition with respect to certain specified competition-related factors. The revisions eliminate the need to submit copies of public securities filings, but expand the document submission requirement to include the following:

- (a) offering memoranda, or documents serving that function, prepared by or for any officer or director of the Parent or the acquiring or acquired entity that reference the entity or assets to be acquired, even if not prepared specially for the transaction, created within the last year;
- (b) studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors for any officer or director of the Parent or the acquiring or acquired entity that reference the entity or assets to be acquired in terms of certain competition-related factors, even if not prepared specially for the transaction, created within the last year; and
- (c) documents prepared by or for any officer or director analyzing potential synergies or efficiencies of the transaction.

Agreements not to compete must also be submitted along with the principal agreement between the parties.

3. Changes to revenue reporting

A third category of changes to the Form relates to revenue reporting. Filing parties are no longer required to provide information about US revenues derived in the so-called "base year," which is currently 2002. This should significantly reduce the burden on filing parties that face difficulty locating the proper figures from so long ago.

However, parties are now required to report on manufacturing revenues not only for those products made in the US, but also for those products manufactured outside the US and sold within the US. In addition, filing parties need to provide information with regard to most recent fiscal year manufacturing revenues by 10-digit NAICS code, rather than the previously required 7-digit codes.

The FTC's press release, along with the full text of the Federal Register Notice announcing the proposed changes, may be found at <http://www.ftc.gov/opa/2011/07/hsrform.shtm>.

This client memorandum does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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