

Important Changes to Hart-Scott-Rodino Rules Proposed by Federal Trade Commission

The Federal Trade Commission (“FTC”) recently proposed changes to the Hart-Scott-Rodino Premerger Notification and Report Form used to notify the FTC and the Antitrust Division of the Department of Justice (“DOJ”) of pending transactions. The proposals do not change which transactions must be reported pursuant to the Hart-Scott-Rodino Act (the “HSR Act”), but if implemented, would affect the information and documents required to be included in filings.

Private equity clients in particular would be affected by changes requiring information about all companies that are “associated” entities under common management rather than just those “controlled” by the ultimate parent entity. Other changes, which would affect all filers, would somewhat expand the documents that parties must submit in response to Item 4, which currently calls for competition-related documents prepared by or for officers or directors to evaluate a transaction. A number of other changes are also proposed, many of which would be relatively ministerial or would streamline reporting. The FTC will accept comments on its proposed changes until October 18, 2010.

“Associated” Entities

Currently, the ultimate parents of the acquiring and target companies in a proposed transaction must report information in HSR filings only for the ultimate parent and the entities that they “control.” Control of an unincorporated entity is defined as the right to 50% or more of a company’s profits or 50% or more of its assets upon dissolution, while control of a corporate entity is defined as holding 50% or more of the outstanding voting securities of an issuer or having a contractual right to designate 50% or more of the directors. The FTC proposal would broaden this scope by requiring that parties report in Item 6(c) (less than majority holdings in entities deriving revenues in 6-digit NAICS Codes that overlap with the acquired person) and in Item 7 (dollar revenues) information in their HSR filings for any company that is an “Associate” of the ultimate parent through common management.¹

The effect of this change would be of particular significance for private equity firms and other investment funds. Often, a fund partner manages a family of investment funds, but does not have the right to receive more than 50% of the profits or assets upon dissolution from any of them. Under the existing rules, each investment fund is its own ultimate parent entity and its HSR filings need not identify holdings of other funds commonly managed. If adopted, the FTC proposal would therefore expand an HSR filing so that

¹ The proposed new definition would make a company an “Associate” for which reporting is required, if it:
“(A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or investments of an acquiring entity (a “managing entity”); or
(B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen 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, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.”

information would be included about each entity under common management, which could then identify additional possible horizontal overlaps between these “associated” companies.

Additional Business Documents

The new rules would add an Item 4(d) that would require companies to search for and submit three categories of documents in addition to those already called for under Item 4(c). Currently, parties must provide competition-related documents that were prepared by or for a director for the purpose of analyzing the transaction.

New Item 4(d) would require production of:

- *all offering memoranda (or documents of a similar type) and presentations that were prepared within two years of the HSR filing that **reference** the target company.* This new requirement *removes* the limitations that an offering memorandum or presentation must be produced *only* if it (i) was prepared by or for an officer or director; (ii) was prepared for the instant transaction; and (iii) discussed competition-related topics such as market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.
- *all competition-related documents prepared by investment bankers, consultants or other third-party advisors that **reference** the target company, if those documents were prepared for an officer or director within two years of the HSR filing date.* Notably, this requirement is not limited to the transaction that is the subject of the transaction at issue.
- *all studies or analyses of synergies and/or efficiencies prepared by or for an officer or director to evaluate the transaction.*

Overall, the additional documents that would have to be submitted under the new rules could increase the burden of searching for documents. For example, the document search for an HSR filing may need to go back well before the transaction at hand was even contemplated. In addition, it could require search of individuals’ files who were not involved in the instant transaction, if they may have offering memoranda or competition-related documents prepared by outside advisors that refer to the target.

Additional Revenue Reporting

Under the proposed rules, parties to transactions would be required to provide more detailed information relating to their current operations (reporting revenues for the most recent fiscal year for products and services at the 10-digit NAICS level, rather than just the currently required 7-digit level) and also to report revenues derived from foreign-manufactured goods sold in the United States. Historic revenue information, however, would no longer need to be reported.

Disclosure of Non-Corporate Holdings

Currently, parties need only disclose their holdings of corporate voting securities. The proposed change would require that they also disclose holdings of non-corporate interests, such as partnership interests.

Other Proposed Changes

The FTC proposal includes a number of other changes that are relatively minor. Some, however, merit brief mention:

- When the ultimate parent entity is a natural person, personal balance sheets would no longer be required in HSR filings;
- Any agreements not to compete that have been entered into in connection with the transaction must be included with the filing;

- Parties must identify in their HSR filings the general partners of the acquiring/acquired entities and their respective ultimate parent entities, regardless of the percentage held in these entities; and
- With regard to revenue reporting, the proposal eliminates the \$1 million minimum revenue reporting threshold.

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If you have any questions regarding this or other matters, please do not hesitate to call us.

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