Federal Trade Commission Enacts Changes to the Hart-Scott-Rodino Premerger Notification and Report Form and Rules

On July 7, 2011, the Federal Trade Commission ("FTC") adopted 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 changes to the Form and its related Rules affect the information and documents required to be included in all filings made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

Of particular note for private equity and other investment fund clients are the changes that require an ultimate parent entity to submit information for all entities that are "associated" with it – *i.e.*, under common management – rather than just for those companies that are under its "control," as the regulations currently require. In a second significant change, the FTC has broadened the criteria for the documents parties must submit in response to Item 4 of the rules. New Item 4(d) requires parties to submit certain documents, such as Confidential Memoranda and documents of investment bankers or other third party advisors, if they merely refer to the target company. Current rules only required these documents if they were prepared for analyzing the instant transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. In addition, under new Item 4(d), parties will be required to submit any studies or analyses of synergies prepared by or for officers or directors for use in evaluating the transaction.

These changes will become effective 30 days after publication in the Federal Register – most likely in mid-August, 2011.

"Associate" 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's recent enactments broaden the scope of required disclosure by requiring that acquiring parties report holdings in "Associate"[1] entities that derive revenues in six-digit NAICS Codes

[1] New Rule 801.1(d)(2) defines an "Associate" as follows:

> For purposes of Items 6 and 7 of the Premerger Notification and Report Form, an associate of an acquiring person shall be entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investments 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 decision management with a managing entity.

that overlap with the acquired person in response to new Item 6(c)(ii), as well as in response to new Items 7(b)(ii) and (d).

The effect of this change is of particular significance for private equity firms and other investment funds. Often, a fund sponsor 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. The FTC's new rule broadens the HSR filing requirements to include information with respect to six-digit NAICS industry code overlaps between the acquired entity or assets and each entity under common management with the acquiring person.

Additional Business Documents

The rules add new Item 4(d), which requires that companies search for and submit three additional categories of documents in addition to those already called for under Item 4(c). Currently, pursuant to Item 4(c), 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) requires in addition that companies produce:

- *All Confidential Offering Memoranda (or documents of a similar type) that were prepared within one year of the HSR filing and* ***reference*** *the target company.* This new requirement *removes* the limitations that an offering memorandum 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.
- *Documents prepared by investment bankers, consultants or other third-party advisors, if those documents were prepared for an officer or director for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets, reference the target company, and were produced up to one year before the date of filing.* The documents required to be filed pursuant to this item include "pitch books" and similar materials prepared by investment bankers, consultants and other third-party advisors when seeking to be retained, if they include the specified information. Notably, this requirement is not limited to the transaction that is the subject of the filing 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 must be submitted under the new rules increase the burden of searching for documents. For example, the document search for an HSR filing may need to go back before the transaction at hand was even contemplated. In addition, companies will need to search files of individuals who were not involved in the instant transaction, if they may have offering memoranda or competition-related documents that refer to the target and were prepared by outside advisors within the past year.

Additional Revenue Reporting

Under the newly enacted rules, parties to transactions are 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 ten-digit NAICS level, rather than just the currently required seven-digit level) and also to report revenues derived from foreign-manufactured goods sold in the United States. Historic revenue information, however, will no longer need to be reported.

Disclosure of Non-Corporate Holdings

Currently, parties need only disclose their holdings of corporate voting securities. These new rules require that filing parties also disclose holdings of non-corporate interests, such as partnership interests.

Other Changes

The newly enacted rules include 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 will 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 allows a $1 million threshold for non-manufacturing revenue for Item 5 of the Premerger Notification and Report Form.

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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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