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

On July 7, 2011, the Federal Trade Commission and the Department of Justice (the Agencies) announced substantial changes to the form parties must file when seeking antitrust clearance of proposed mergers and acquisitions under the Hart-Scott-Rodino (HSR) Act and the Premerger Notification Rules (the Form).[1] The changes do not affect whether a transaction is reportable in the vast majority of situations.[2] The Agencies changed the Form in order to eliminate the need to report certain information that the Agencies believe is no longer necessary to their initial review, and also added requirements—including the submission of additional documents—that the Agencies concluded would aid in their initial review of whether the proposed transaction raises competitive concerns. Although the net effect of the revisions will be a slight reduction in the effort required to complete the form for most companies, for certain filers—particularly private equity funds, master limited partnerships, or firms with US revenue from manufacturing facilities located outside the United States—the new Form may require more lead time to assemble new information not previously required. The changes will be effective in August 2011 (i.e., 30 days after publication of the Final Rule in the Federal Register). Although the changes impact nearly every item on the Form, the most significant new requirements are:

- The submission of all offering memoranda; materials prepared by investment bankers, consultants, or other third parties; and materials evaluating or analyzing synergies or efficiencies;
- The reporting of US revenue by 10-digit (manufacturing) North American Industry Classification System (NAICS) product code for each product manufactured outside the United States and sold in the United States; and

1 Federal Trade Commission, Premerger Notification; Reporting And Waiting Period Requirements (July 7, 2011), *available at* http://www.ftc.gov/os/fedreg/2011/07/110707hsrfrn.pdf [hereinafter "Final Rule"].

2 The only changes to the rules that may affect whether companies must file are: (1) an amendment to the definition of "entity" in § 801.1(a)(2) to include unincorporated entities engaged in commerce that are controlled by a government whereas the current definition only includes corporations controlled by a government; and (2) a change to the rules on determining the total aggregate amount of voting securities and assets to be acquired (§ 801.15) to eliminate the rules' current effect of aggregating an exempt acquisition of voting securities in an entity in which the acquiring person already holds 50% of voting securities with a nonexempt acquisition of voting securities of another entity in the same transaction.

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- The reporting of Associates—i.e., entities under common management with the acquiring person, but not controlled by the acquiring person, or entities that have the right to manage the operations of the acquiring person or that are managed by the acquiring person—as well as minority investments by Associates with businesses that overlap with the acquired business.

Significant New Requirements

New Documentary Information

The Agencies have long required the submission of "4(c)" documents—materials created "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets [i.e., competition-related information]."[3] The search for and review of 4(c) documents is often the most time-consuming and burdensome task associated with an HSR filing. The new Form leaves Item 4(c) unchanged, but adds three new categories of documents to produce, described below and in Table 1. While the new categories of documents seek fairly specific types of documents and, like Item 4(c), limit what must be submitted to only those documents prepared by or for officers or directors (or individuals exercising similar functions in unincorporated entities), these new requirements will likely meaningfully increase the burden of collecting and reviewing potentially relevant documents and expose filers to the risk of additional time to obtain regulatory approval if documents are not prepared with antitrust considerations in mind.

Item 4(d)(i): Confidential Information Memoranda. The new Form requires the submission of "confidential information memoranda," which the Agencies describe as "offering memoranda" or "transaction-specific marketing presentations," created up to one year prior to the filing. According to the Agencies, this new Item seeks documents that "specifically relate to the sale of the acquired entity(s) or assets" and "provide an in-depth overview or analysis of the entities or assets that are for sale, not just those materials that provide a passing reference to them."[4] Unlike the Item 4(c) requirement, Item 4(d)(i) documents need not have competition-related information in them, and need not be prepared "for the purpose of evaluating or analyzing" the transaction.[5] Accordingly, a filer must submit any offering memoranda created within one year of the filing, even if it was created before the acquiring entity begins contemplating the transaction. Offering memoranda must be submitted even if they were not provided to buyers. Where the seller did not create a Confidential Information Memorandum, Item 4(d)(i) requires the parties to submit "document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum," but does not require the submission of "ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists."[6]

Item 4(d)(ii): Materials Prepared By Third Parties. The new Form also requires the submission of documents created by third parties in connection with an engagement or for the purpose of seeking an engagement (solicited or unsolicited) with the company within one year of the filing that contain competition-related material and discuss strategic options for the business, including the proposed transaction. Examples of Item 4(d)(ii) documents include "pitch books" or "bankers' books" that were developed by investment bankers for the purpose of seeking an engagement and presentations by consultants that analyze a variety of strategic options, one of which is the transaction at issue.[7] Third-party reports on general industry conditions are not covered by this request. Prior to this addition to the form, such pitch books were typically already submitted in response to Item 4(c), unless they could be excluded because they were not prepared for the purposes of evaluating or analyzing the acquisition. Item 4(d)(ii) eliminates this exclusion by requiring the submission of such third-party documents created within one year of the

3 16 C.F.R. Part 803 - Appendix, Notification and Report Form For Certain Mergers and Acquisitions, Instruction 4(c).

4 Final Rule at 9.

5 *Id.* at 11.

6 *Id.* at 15 (setting forth the new instructions to Item 4(d)(i)).

7 *Id.* at 12.

HSR filing, regardless of whether they were created before or after the filer began seriously contemplating the transaction.

Such third-party documents sometimes present challenges to obtaining termination of the initial waiting period because some consultants and investment bankers create them without regard to antitrust considerations. Often, the use of ambiguous wording unnecessarily raises concerns that the parties must address. Accordingly, it is advisable to include antitrust counsel early when engaging with consultants.

Item 4(d)(iii): Materials Evaluating or Analyzing Synergies and Efficiencies. New Item 4(d)(iii) requires the submission of documents evaluating or analyzing synergies and efficiencies prepared by or for an officer or director for the purpose of evaluating or analyzing the acquisition. Pro-forma synergy or efficiencies projections, without competition-related information in the document, typically were not submitted in response to Item 4(c). Now that all synergies and efficiencies documents (prepared by or for an officer or director) must be submitted, care should be taken to ensure antitrust analysis is considered in their creation as synergies and efficiencies resulting from a transaction often become the centerpiece of an argument to the Agencies that a transaction is procompetitive. Indeed, the Agencies stated that "[f]iling parties can assert synergies arguments at any time, but there is a possibility that documents submitted with an HSR filing in response to Item 4(d)(iii) may carry greater weight with the Agencies than materials claiming synergies

Table 1

Item 4(c) (no change)	All studies, surveys, analyses, and reports: (i) Prepared by or for any officers or directors. (ii) For the purposes of evaluating or analyzing the acquisition. (iii) With respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.
Item 4(d)(i)	All Confidential Information Memoranda (i.e., formal documents created in-house or by a third party that lay out the details of a company that is for sale): (i) Prepared by or for an officer or director of the Ultimate Parent Entity of the Acquiring or Acquired Entity up to one year before the date of filing. (ii) That specifically relate to the sale of the acquired entities or assets. Where no Confidential Information Memorandum is created, documents that "serve the purpose of Confidential Information Memoranda" must be submitted if provided to officers or directors of the buyer.
Item 4(d)(ii)	All studies, surveys, analyses, and reports: (i) Prepared by investment bankers, consultants, or other third-party advisors up to one year before the date of the filing. (ii) During an engagement with the third party or for the purpose of seeking an engagement with the third party. (iii) For any officers or directors of the Ultimate Parent Entity of the Acquiring or Acquired Entity. (iv) For the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. (v) That specifically relate to the sale of the acquired entities or assets.
Item 4(d)(iii)	All studies, surveys, analyses, and reports: (i) Evaluating or analyzing synergies and efficiencies (but not financial models without stated assumptions). (ii) Prepared by or for an officer or director. (iii) For the purpose of evaluating or analyzing the acquisition.
	These descriptions are meant to be a guide and are not verbatim reproductions of the Form's instructions. Filers should refer the Form's instructions when preparing a filing.

created and submitted at a later time during the investigation."[8] Thus, early documents that do not account for all synergies and efficiencies that will result from the deal could create a challenge for antitrust clearance. Synergies and efficiencies analyses that are limited in their assumptions and scope should make the limitations of the analysis explicit in the document.

Disclosure of US Revenue From Products Manufactured Outside the United States

The old Item 5 in the Form required filers to submit information regarding dollar revenues and lines of commerce with respect to operations conducted within the United States for the company's most recently completed year and a "base year," which was 2002. The new Form eliminates the need to provide base year information, which for some filers was a significant burden.

The removal of the base-year requirement is a welcome change and the requirement of reporting recent revenue by 10-digit manufacturing code likely does not add a meaningful burden to completing the form over the long term. However, the Agencies made the Form somewhat more difficult to complete for companies with foreign manufacturing operations that sell products into the United States. The old Form only required the reporting of revenue "with respect to operations conducted within the United States." Revenue from such sales often was reported in less-specific wholesale or retail NAICS codes, but would not be reported if sales were made directly to customers from foreign manufacturing sites. The new Form now requires the reporting of all US revenue for products manufactured outside the United States. Moreover, wholesale or retail revenue from foreign-manufactured products must be backed out to avoid double counting. Because the NAICS system is a creation of the US Census Bureau, many companies may not keep revenue information for sales originating from foreign manufacturing faculties by NAICS code in the normal course of business. Accordingly, filers with foreign manufacturing facilities that serve the United States should plan for additional time to complete this section of the form.

Disclosure of "Associates" and Minority Holdings of "Associates"

Finally, the Agencies announced a change to the Form and Rules that may significantly increase the burden for certain filers, particularly private equity funds and master limited partnerships. Previously, Item 6(c) required filers to report investments greater than five percent but less than 50 percent. New Item 6(c) goes a step further. Aimed at obtaining more information from private equity funds and master limited partnerships, the new Form requires that the acquiring firm list "Associates," which is defined as:

"[A]n entity that is not an affiliate [i.e., less than 50 percent interest or no control] of such person but: (A) has the right, directly or indirectly, to manage the operations or investment 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."[9] Associates include natural persons with such rights, such as third parties hired to be investment managers, but as Example 7 to the definition of "Associate" makes clear, officers and directors of a firm are not considered Associates, even though they manage the operations and investments of the acquiring person.

Moreover, Item 6(c)(ii) requires an acquiring person to report, based on its knowledge or belief, all of the entities in which its Associates hold *minority interests* of five percent or more

8 *Id.* at 14-15.

9 Final Rule at 22, to be codified at 16 C.F.R. § 801.1(d)(2).

that derive revenues in NAICS codes that overlap with the acquired person's codes. The Agencies acknowledged that filers may not keep this information in the normal course and it may be difficult to obtain because it is held by companies over which the filer, by definition, has no control. Nevertheless, the Agencies determined that the benefit to their analysis outweighs the burden associated with reporting the information.[10] A company whose transactions routinely meet the requirements for reporting under the HSR Act should determine whether it has any Associates, as the term is defined by the new rule, and attempt to identify the lines of business in which its Associates and its Associates' minority interests operate in order to avoid a delay for its next filing.

Other Changes

The new Form includes many other changes, some ministerial. Other notable changes include the following:

- The Agencies' attempt to more closely align the treatment of unincorporated entities with the treatment of corporations. Accordingly, certain items on the Form now require information on noncorporate interests whereas only information on voting securities was previously required.[11]
- The new Form eliminates the need to provide the name of a person who performed a fair market valuation for purposes of determining the total value of the transaction (previous Item 2(e)).
- The new Form eliminates the need to describe assets previously acquired from the acquired person and currently held by the acquiring person, and description of assets held by any unincorporated entities that are being acquired (previous Item 3(b)). A description of the voting securities or assets being acquired is required by revisions to Item 3(a).
- The new Form eliminates the need to provide the detailed information regarding voting securities required in Item 3(c) of the old Form.
- The new Form eliminates the need to provide links to Securities and Exchange Commission (SEC) filings pursuant to Item 4(a). Rather, if the filer wishes to direct the Agencies to SEC filings available on EDGAR, the form must include the Central Key Index number for the ultimate parent entity filing the form and for each entity within the ultimate parent.
- The new Form eliminates the need to provide balance sheets in response to Item 4(b).
- Item 5 on the old Form required filers to submit certain data at the six-digit NAICS industry code level. To the extent that the dollar revenues were derived from manufacturing operations, data were also provided at the seven-digit product code level for the most recent year and at the 10-digit product code level for the base year. As discussed above, the new Form eliminates the need to provide base-year information. The new Form, however, requires reporting of manufacturing revenue for the most recent year by the more precise 10-digit NAICS industry code.
- Filers no longer need to provide names of entities within the party filing that do not have sales in the United States in response to Item 6(a). Moreover, street addresses are no longer necessary to respond to Item 6(a) of the HSR form.
- The response to Item 6(b), which previously required the identity of shareholders of greater than 5 percent of *any* entity included within the filing person with assets valued greater than US$10 million, now needs to include only the shareholders of the acquired entities, the acquiring entity, and the acquiring entity's ultimate parent entity.
- Item 7 requires the parties to list overlapping NAICS codes. The new Form adds the requirement that the parties also provide the names of the entity or Associate that derived those revenues for each NAICS code.
- The Agencies added new lines of businesses—nonmetallic mineral mining and quarrying (2123), concrete (32732), concrete products (32733), and

10 Final Rule at 7.

11 *See, e.g.*, Items 2(d), 6(b), and 6(c).

industrial gases (33512)—to Item 7(c)(iv), which requires the street address of each establishment that derives revenues in certain NAICS industry codes.

In summary, companies should prepare for some additional time to complete and file the HSR Form, at least the first time it files after these new changes take effect. Additionally, filers should strongly consider involving antitrust counsel early in the process given the new requirement that filers submit additional deal-related documents.

We hope that you have found this Advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or either of the following attorneys:

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