

FTC AND DOJ ISSUE NEW HSR RULES AND FORM

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On July 7, 2011, the Federal Trade Commission (FTC) and U.S. Department of Justice issued revised Hart-Scott-Rodino (HSR) premerger notification rules and changed the form companies must file when seeking antitrust clearance of proposed mergers and acquisitions. Although the agencies streamlined the HSR form by eliminating requests for outdated information, several key changes will undoubtedly result in increased burdens for most filers. As described below, the new HSR rules require further document production, expand the concept of U.S. operations to include direct shipments by foreign manufacturers, and require acquirers to disclose the holdings of “associated” entities.

The new HSR rules will become effective 30 days after publication in the Federal Register, so parties submitting HSR filings beginning in mid-August will be required to use the new form.

Increased Document Search and Production

Currently, the obligation to submit market or competition analyses with an HSR filing is contained only in Item 4(c), which requires the production of documents prepared by or for any officer or director for the purpose of analyzing the transaction with respect to market share or competition. The new HSR form introduces Item 4 (d), which significantly broadens the scope of the document search.

Parties to a proposed transaction must now submit Confidential Information Memoranda (CIM), which were prepared within one year of filing. CIM are described as “formal documents created in-house or by a third party that lay out the details of a company, or a part of a company, that is for sale.” In addition, Item 4(d) requires parties to submit third-party analyses from investment bankers or consultants (e.g., pitch books and banker’s books) that reference the acquired entity or assets and were prepared within one year of filing.

Notably, the new rules require disclosure of both CIM and third-party analyses regardless of whether such documents relate to the acquisition for which HSR is filed. This will potentially capture documents prepared even before the transaction at hand was contemplated. Besides considerably adding to the burden of document production, the expanded search requirements increase the risk of disclosure to

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people not "in the know" well before the transaction has been finalized.

Reporting of Revenue From Foreign-Manufactured Products

Under the current HSR form, Item 5 requires filers to submit information regarding revenues with respect to operations conducted within the United States. Accordingly, direct shipments from foreign manufacturing operations of the filing party to U.S. customers have fallen outside Item 5 reporting because there were no "U.S. operations." Thus, revenue data for foreign-manufactured products sold into the United States has only been reported up to now if the goods passed through related U.S. operations of the filing person, such as warehouses. Even then, the revenue was only reported under a wholesale or retail six-digit NAICS industry code.

The new HSR rule requires parties to report revenue data for each product manufactured outside of the United States and sold into the United States at the wholesale or retail level or directly to U.S. customers. Additionally, parties will now need to supply the more burdensome 10-digit NAICS code for each foreign-manufactured product and allocate revenue among those codes.

Disclosure of "Associated" Entities

The current HSR form limits the reporting obligations to information about each party's ultimate parent entity (UPE) and the entities that each UPE controls. The FTC has historically criticized these disclosure requirements for failing to elicit sufficient information about ties between acquiring investment funds and other associated entities that may derive revenues in the same industry as the acquired company. In an effort to target acquisitions involving private equity firms, hedge funds, and other non-corporate entities, the new HSR form requires acquiring parties to disclose investments of "associated" entities to the extent that they overlap with a target company's activities.

The new rules define an associate as an entity that is under common management with, but not necessarily controlled by, the acquiring person. Of particular concern is how the acquiring person will go about obtaining the required information from an entity that it manages but does not control. The fact that an authorized officer must certify that the information submitted is "true, correct, and complete in accordance with the statute and rules" also adds to the burden of complying with the new disclosure rule.

We anticipate that the new HSR rules and form will increase the burden for many parties, especially those whose foreign manufacturing operations have sales into the United States. And, for most companies, it may take additional time to complete the HSR filing.

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