

July 13, 2011

Hart-Scott-Rodino Reporting Requirements Amended

On July 7, 2011, The Federal Trade Commission, with the concurrence of the Assistant Attorney General, Antitrust Division, Department of Justice (together, the “Agencies”), issued final rules amending the Hart-Scott-Rodino Premerger Notification Rules (the “Rules”), the Premerger Notification and Report Form (the “HSR Form”) and associated instructions. The new HSR Form and Rules will take effect in mid-August, 30 days after their publication in the Federal Register.

While eliminating the least helpful items of the HSR Form, the changes significantly increase the amount of information to be provided by: (1) requiring certain HSR filers, including private equity and investment funds, to provide information about “associate” entities under common management; (2) requiring HSR filers to submit additional types of documents, in addition to those already required under Item 4(c); and (3) expanding the revenue information required in Item 5 for foreign manufacturing operations. The changes also implement certain ministerial updates. Below is an overview of the key amendments.

1. Information with Respect to “Associate” Entities

An acquiring person is required to provide information in its HSR Form with respect to all entities included within it at the time of filing. Under the existing Rules, investment funds, typically organized as limited partnerships, are required to provide information about the entities they control and entities in which they own interests of 5% or more. However, they are not currently required to provide information about other funds under common management or other funds that have the same general partner.

In order to capture information that may be relevant to the Agencies’ analysis of a transaction, they have added the term “associate” to the Rules to reach entities that are under common management with the acquiring person but are not under common “control” pursuant to the Rules.¹

An “associate” is:

“an entity that is not an affiliate 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,

¹ Control of a non-corporate entity is defined in the Rules as having the right to 50% or more of its profits or to 50% or more of its assets in the event of dissolution. Control of a corporation is defined as holding 50% or more of its voting securities or having the contractual power to designate 50% or more of its directors.

or is under common operational or investment management with a managing entity.”

The Rules give as non-exhaustive examples of such associates: 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 managers of a fund.

The inclusion of “associate” affects the disclosures required in Items 6(c) and 7 of the HSR Form:

- Item 6(c) is amended to require an acquiring person to report, based on its knowledge and belief, all associates’ holdings of voting securities and non-corporate interests of 5% or more but less than 50% in entities having a 6-digit North American Industry Classification System (“NAICS”) industry code that overlaps with the target, or, if NAICS codes are unavailable, holdings in entities that have operations in the same industry.
- Item 7 is amended to require disclosure not only of NAICS industry code overlaps between the acquiring person and the target but also of any NAICS industry code overlaps between associates of the acquiring person and the target. For an acquirer filing, geographic information will also need to be provided for associates in new Item 7(d).

2. Additional Types of Documentary Attachments

Item 4(c) remains unchanged. New Item 4(d) requires HSR filers to provide the following additional types of documents:

- Confidential information memoranda (or, if no confidential information memorandum exists, documents that served that function) prepared by or for any officer(s) or director(s) within one year prior to filing that specifically relate to the sale of the acquired entity(s) or assets.
- All studies, surveys, analyses and reports prepared within one year prior to filing by investment bankers, consultants or other third party advisors if they were prepared for any officer(s) or director(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and that specifically relate to the sale of the acquired entity(s) or assets. Only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement are required.
- Studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

3. Changes to Reporting of Revenue Data for Foreign Manufactured Products

- Item 5 will no longer require HSR filers to submit base year (currently 2002) revenue data. The new rules require disclosure of revenues for the most recent fiscal year only, by 10-digit NAICS codes for manufactured product revenues and by 6-digit NAICS codes for non-manufacturing revenues. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.
- Revenues attributable to products manufactured by the reporting person outside the US but sold in the US by an affiliated US establishment were previously attributed to a wholesale/retail NAICS code. Such revenues will now be attributable to a 10-digit manufacturing NAICS code.
- Revenues attributable to products manufactured by the reporting person outside the US but sold directly into the US (which previously did not have to be reported at all) will now be attributable to a 10-digit manufacturing NAICS code.
- Products merely sold but not manufactured by the reporting person will continue to be reported under NAICS 6-digit wholesaling or retailing codes.

4. Ministerial Changes to the HSR Form and Rules

In addition to those described above, the Agencies have also made a number of ministerial changes to the HSR Form and Rules, including:

- Item 3(b) – explicitly requires that all agreements not to compete (whether executed or in draft form) be submitted with the executed transaction agreement.
- Item 4(a) – provides that all SEC filing entities will simply need to be identified with their CIK numbers. The requirement to include copies of (or links to) relevant SEC filings is eliminated.
- Item 4(b) – requires submission of annual reports/audits for the ultimate parent entity and any unconsolidated entities (no longer limited to corporations). Provision of recent balance sheets is no longer required. Also, natural persons need only provide annual reports or audits for the highest level entity(s) they control.
- Item 6(a) – now limits the subsidiary disclosure to US entities and foreign entities that have sales into the US (although it is permissible to respond with a complete list of subsidiaries). Filers will no longer need to provide street addresses, only city/state and country.
- Item 6(b) – extends disclosure of minority holders (of 5% or more but less than 50%) of Item 6(a) entities to holders of non-corporate interests. Before the amendments, only minority holders of corporations identified in Item 6(a) needed to be disclosed. Holders of 5% or more of the *acquired entity(s)* and the *acquiring entity(s)* and its *ultimate parent entity* must be identified (only by

percentage, not number of shares/interests). Responses are not needed for the other 6(a) subsidiary entities. For limited partnerships, only the general partner(s) must be disclosed regardless of percentage ownership. *Limited partners need not be disclosed.*

- New Item 6(c)(i) – extends disclosure of minority holdings to holdings of non-corporate entities. Before the amendments, only minority holdings of corporate voting shares needed to be disclosed. For the acquiring side filing, disclosure will be limited (based on knowledge and belief) to minority holdings (5% or more but less than 50%) of any entities which derived revenues in the same 6-digit NAICS codes as the target. For the target-side filing, the disclosure is limited to minority holdings of any entities that derive revenues in the same 6-digit NAICS code as the acquiror. If NAICS codes cannot be identified (as is often the case with minority holdings) the parties may identify holdings of entities that have operations in the same industry.
- Item 7, which required disclosure of NAICS overlaps between the acquiring person and the target, will now require identification of the actual entity(s) within the reporting person to which the overlap applies.
- Item 8, which required the acquiring person to identify certain prior acquisitions of assets and voting securities during the last five years, is amended to require disclosure of acquisitions of non-corporate interests as well.
- Finally, the Agencies have made minor changes to the Rules, primarily to eliminate certain inconsistencies in the treatment of corporations and non-corporate entities.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning these changes or the premerger notification requirements of the HSR Act should be addressed to any of the following:

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