

E-ALERT | Antitrust

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FTC FINALIZES CHANGES TO HSR NOTIFICATION AND REPORT FORM

On July 7, 2011, the Federal Trade Commission and the Department of Justice (“the Agencies”) announced significant changes to the form and accompanying materials that companies must submit when reporting transactions under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”). Although the revisions will simplify the process of completing an HSR notification in many respects, they also may require filing persons to search for and produce a wider range of transaction-related documents with their filings. Acquiring persons will also now be required to report certain information regarding their “Associates,” *i.e.*, entities that they do not control but with which they may share common management, such as through an investment fund or family of funds.

The changes, along with the new HSR form, will take effect August 18, 2011. Companies that are considering transactions that may be reportable under the HSR Act should consult with antitrust counsel to ensure that they comply with these new requirements.

The revised Rules can be found [here](#). The principal changes are as follows:

- Acquiring persons must now report certain information regarding their “associates.”
 - Under the current HSR Rules, filing persons must generally provide information regarding themselves and all entities that they control, “control” being determined with reference to voting criteria for corporations (*i.e.*, 50% or more of an issuer’s outstanding voting securities) or economic ownership for unincorporated entities like LLCs (*i.e.*, the right to 50% or more of the entity’s profits or the right in the event of dissolution to 50% of the assets of the entity).
 - Acquiring persons will now also be required to report information with respect to their “associates” for Items 6 (major shareholdings of the filing person) and 7 (industry overlaps between the acquiring and acquired parties) of the HSR form. “Associates” are defined as entities that the acquiring person does not control, but with which it shares common management. For example, if an entity directly or indirectly manages, or has the right to manage, another entity’s operations or investment decisions, or if two or more entities are managed by or under common operational or investment decision management with another entity, those entities will be considered “associates” under the revised HSR Rules.
 - The new requirement regarding “associates” will require the tracking and reporting of certain minority holdings by entities not directly controlled by the acquiring person. The Agencies have noted that this revision is intended to capture information regarding entities that are commonly managed with the acquiring person through, for example, a private equity or hedge fund or a family of funds. While the intent is to uncover potential competitive overlaps that might not be apparent under the prior rules, it will significantly expand the reporting burden for certain filing parties.

- Filing persons must provide additional documents regarding the transaction.
 - Item 4(c) of the HSR form requires parties to submit documents prepared by or for officers or directors of the company 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.
 - The revised HSR form includes a new “Item 4(d),” which requires filing persons to produce (1) offering memoranda (or documents meant to serve that purpose) prepared by or for any officer or director of the filing person up to one year prior to the date of the filing; (2) certain competitive analyses prepared by investment banks and other third parties for any officer or director of the filing person up to one year prior to the date of the filing; and (3) documents prepared by or for any officer or director that evaluate or analyze the synergies or efficiencies of the transaction.
 - While the agencies view these new requirements as at least partially redundant of what many parties were already producing in response to Item 4(c), conforming to Item 4(d) may require filing persons to conduct more detailed document searches when preparing HSR filings.
- The requirements regarding the revenue information that filing persons must report have been significantly revised.
 - Filing persons will only be required to report revenue information for the most recent year prior to the filing date – *i.e.*, additional information for a second “base” year (currently 2002) will no longer be required.
 - However, companies that derive revenue from sales into the United States of products manufactured outside the U.S. will be required to provide data on those foreign manufactured goods on a more granular basis than previously required. Compiling revenue data for companies with manufacturing operations overseas will therefore demand greater attention, especially for a company’s first filing under the new rules.

For additional information about the HSR filing process or other questions, please contact:

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