

## US Federal Trade Commission Proposes Sweeping Revisions to HSR Form

On August 13, 2010, the US Federal Trade Commission announced a proposed major overhaul of the Hart-Scott-Rodino (HSR) Notification and Report Form.<sup>1</sup> According to the FTC's press release, the proposed changes are intended to streamline the form—by eliminating certain reporting requirements that, in the experience of the FTC and Department of Justice, are not useful in conducting a preliminary antitrust review—and to require the submission of additional information that the agencies believe will help in their review efforts. A number of these additional requirements are likely to result in significantly increased reporting obligations for many parties. The proposed changes have been published for notice and comment in the *Federal Register*. Public comments will be accepted until October 18, 2010.

The HSR Act requires parties to certain mergers or acquisitions to notify the FTC and Justice Department of the transaction and to observe a waiting period, usually 30 days, before closing the transaction. The parties notify the antitrust agencies by filing a Notification and Report Form. This form requires the submission of several categories of data: the identification of the parties and the parties' parents, subsidiaries and major shareholders; a description of the transaction; financial documents; documents prepared by or for officers or directors discussing the competitive implications of the transaction (so called "4(c) documents"); a list of revenues broken down according to North American Industry Classification System (NAICS) codes; and the identification of any overlaps between the parties,

as well as the geographic markets in which the parties conduct overlapping activities. The current version of the form has been in use since 2005 when it was amended to reflect changes in the HSR Act's treatment of the acquisition of unincorporated entities.

There are a number of proposed amendments to the form. Many are ministerial in nature. For example, there are several formatting changes that the FTC hopes will make the form easier to prepare and to read. But several of the proposed changes will substantially change the reporting requirements of the form—some will make reporting easier but others will require parties to search for and provide significant new categories of documents and other information. Outlined below are the more significant changes.<sup>2</sup>

**Proposed Item 4(d).** The HSR form has always required parties to submit 4(c) documents. The FTC has proposed an additional item—Item 4(d)—which would require the submission of three additional categories of documents.

- **Item 4(d)(i)** would require the submission of all offering memoranda, whether prepared for the transaction subject to the filing or not, that were prepared within two years of the date of the filing and that reference the business or assets being acquired.
- **Item 4(d)(ii)** would require the submission of all documents prepared by investment bankers, outside consultants or advisors within two years of the filing for the purpose of evaluating or analyzing markets, market shares, competition, competitors, potential for sales growth or

expansion of product or geographic markets. These documents would have to reference the business or assets being sold.

- **Item 4(d)(iii)** would require submission of all synergy or efficiency studies prepared as part of the transaction that is subject to the filing.

**Proposed Changes to Item 5.** Item 5 requires a listing of revenues broken down by the NAICS codes applicable to the filing party's business. Under the existing form, revenues must be reported for a base year, currently 2002, and the party's most recent fiscal year. Recognizing that 2002 data is of limited value to the FTC and Justice Department, and that parties often have difficulty compiling such data, the FTC has proposed eliminating the requirement that parties report 2002 revenues (Items 5(a) and 5(b)(i)), as well as information regarding product categories added or deleted between the base year and the most recent year (Item 5(b)(ii)).

**Proposed Changes to Items 6 and 7.** Perhaps the most significant proposed amendments to the form concern Item 6—which is where the parties identify their majority-owned subsidiaries (Item 6(a)), major shareholders (Item 6(b)), and minority holdings (Item 6(c))—and Item 7, wherein the parties identify any overlaps and describe the geographic markets in which they operate.

- **Item 6(a).** Currently, a party must list all entities in which it has a controlling interest, regardless of whether the entity is a corporation, partnership or LLC and regardless of whether it is located outside the United States. The FTC proposed to cut back this item by requiring parties to identify a foreign entity only if it has sales in or into the United States.
- **Items 6(b) and 6(c).** Item 6(b) requires parties to identify major (in excess of 5 percent) shareholders and Item 6(c) requires a list of minority corporate holdings of the party. Both of these items apply only to corporate holdings and not non-corporate holdings (e.g., partnerships or LLCs). Under the proposed

amendments, parties would have to report non-corporate holdings as well. The proposed Item 6(b) would not require a list of limited partners, but it would require the identification of a general partner regardless of the percentage held.

- **Items 6(c) and 7.** The FTC proposes to require parties to identify the minority holdings of “associates.” The concept of associate would be new to the HSR Act. Currently, a party reports information only for the entities that it controls (such entities would be referred to as “affiliates”). Under the proposed changes, an “associate” would be defined as a person who is not an affiliate and that: “A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a “managing entity”); or B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen 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 directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.” Item 7, which requires reporting of NAICS code overlaps between the parties, also would be expanded to include overlaps relating to associates of the acquiring person.

These proposed amendments would impact the HSR reporting requirements in several ways:

- First, the proposed Item 4(d) would add considerably to the amount of documents and searching that a party must do when preparing a filing. Notwithstanding the proposed two-year cutoff for proposed documents prepared by investment bankers and other outside consultants about the marketplace, this requirement could substantially increase the volume of documents produced with the HSR form and require the parties to submit documents that were prepared long before the subject transaction was contemplated.

- Second, if read literally, Item 4(d) could cover privileged documents, which would not be produced but would be identified on a privilege log submitted with the form.
- Third, the proposed amendments to Items 6 and 7 are targeted directly at investment funds and venture capital firms, which generally tend to structure their various funds so as to be their own ultimate parents. Under the proposed rules, when one fund makes an HSR filing, it may need to identify the holdings of multiple other funds of the same investment fund manager in its form.
- Finally, all of these changes apply even where the subject transaction raises no competitive concerns.

## Endnotes

- <sup>1</sup> The press release and Notice of Proposed Rulemaking can be found at <http://www.ftc.gov/opa/2010/08/hsrcailion.shtm>.
- <sup>2</sup> See the FTC's Notice of Proposed Rulemaking for a detailed discussion of all proposed changes.

*If you have any questions about the proposed revisions or any other matter raised in this Legal Update, please contact one of following lawyers.*

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