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White Paper

Recent Amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the Related Impact to Private Investment Firms

The recent amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 reflect the most significant changes in decades to the disclosure obligations of parties that are required to file a Notification and Report Form with the FTC and the DOJ in connection with certain mergers and acquisitions. These changes particularly affect private equity, venture capital and similar investment firms, by requiring them to provide substantial information about their "Associates," which are—generally speaking—investment funds under the same "family umbrella." We describe these amendments and include a chart, which may be used as a quick reference tool, that highlights the principal changes to the reporting obligations of private investment firms under the HSR Act.

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General

This Memorandum describes recent amendments (the "HSR Amendments") to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), which are scheduled to become effective on August 18, 2011. We believe that a number of these amendments have been designed to, and will, impact, in particular, private equity and venture capital funds, investment funds, master limited partnerships and similar investment vehicles (hereinafter collectively referred to as "Private Investment Firms"), as described below. Also, attached as Exhibit A is a comparative chart that summarizes the HSR Amendments that are most likely to impact Private Investment Firms.

HSR Act Background

The HSR Act requires each party to an acquisition of (i) voting securities, (ii) interests in non-corporate entities (e.g., partnerships and limited liability companies) and (iii) assets meeting certain dollar thresholds (including a minimum transaction value that currently must exceed $66 million),[1] to file a Notification and Report Form (the "Report Form") with both the Federal Trade Commission (the "FTC") and the Department of Justice (the "DOJ"), and observe a waiting period—usually 30 days—before the transaction described in the Report Form may be consummated.[2]

On the purchaser's side, the filing is submitted on behalf of the "Acquiring Person," which is the "Ultimate Parent Entity" (or "UPE"[3]) of the entity acquiring the voting securities, interests in non-corporate entities or assets of the "Acquired Entity." The entity controlled[4] by the Acquiring Person that is actually purchasing the shares, other equity interests or assets is the "Acquiring Entity." Most of the information required to be reported in the Acquiring Person's Report Form relates to the *entire* Acquiring Person, and is not limited to the Acquiring Entity.

On the seller's side, the Report Form is submitted on behalf of the "Acquired Person," which is the UPE of the entity whose voting securities, other equity interests or assets are being sold. The entity whose voting securities, other equity interests or assets are being sold is the "Acquired Entity" and, in the case of the sale and purchase of assets, such assets are the "Acquired Assets." However, unlike the information required to be included in the Acquiring Person's Report Form, most of the information included in the Acquired Person's Report Form (other than consolidated financial information and Item 4(c) information[5]) relates only to the Acquired Entity or the Acquired Assets.

The HSR Amendments

The HSR Amendments represent the most significant changes to the Report Form in decades. Private Investment Firms, in particular, will have substantially greater reporting requirements relating to their equity holdings in other investment funds under the same "family umbrella," both in controlled entities (as described in footnote 4) and in entities in which they have a minority equity interest (5 percent or more but less than 50 percent) (a "Minority Interest"), and/or that they manage.

The HSR Amendments require an Acquiring Person that is part of a Private Investment Firm to provide extensive information regarding its "Associates," such as (i) the fund manager (or general partner) and (ii) the other funds for whom the same fund manager (or general partner) makes investment decisions, including information regarding each Minority Interest held by those Associates in companies that operate in the same industry as the Acquired Entity or the Acquired Assets. The HSR Amendments also identify additional documents that are required to be included as exhibits to the Report Form, *regardless of whether there is any competitive overlap*. While the HSR Amendments eliminate certain antiquated requirements, such as providing "base year" revenue information, they will increase the reporting burdens in other areas, and will likely increase the cost of compliance, under the HSR Act.

Most of the HSR Amendments are minor, and will only slightly impact the complexity and associated burdens to persons required to file a Report Form under the HSR Act. However, several changes—found in Items 4, 5, 6, and 7 of the Report Form—represent significant departures from the former obligations of reporting persons, as follows:

- Item 4 now requires certain additional documents to be submitted with the Report Form, such as confidential information memoranda and bankers' books, even if they do not meet the criteria of Item 4(c);
- Item 5 eliminates the requirement to provide 2002 revenue data, but now requires the disclosure of manufacturing revenues from the most recent fiscal year, using 10-digit manufacturing codes; and
- Items 6 and 7 now require the Acquiring Person to provide information regarding its "Associates."

Introduction of "Associates"

Perhaps the most significant change to the Report Form is the introduction of the concept of "Associates." Currently, the Report Form only requires information from the Ultimate Parent Entities of the parties to the transaction, including data on any entities they "Control," and Minority Interests in corporations held by the UPE or its controlled entities. The definition of "Control" under the HSR Act is specific (see footnote 4) and, particularly in many cases involving Private Investment Firms, an Ultimate Parent Entity does not Control portfolio companies or other entities that it manages, because it does not own a majority of the outstanding equity interests of such companies or other entities.

Specifically, the addition of the Associates concept to HSR filing requirements is intended to address the fact that in transactions involving entities such as Private Investment Firms, the current rules regarding how Control is defined for such entities (based solely on holding a 50 percent or greater financial interest) allow a general partner to gain management, investment or operational control of multiple competing operating partnerships or limited liability companies *without* having to file a Report Form under the HSR Act. Further, under the current rules, in a situation in which one of these competing partnerships is making an acquisition of another competing business and that partnership is required to make an HSR filing, the partnership has been able to do so without any disclosure in the Report Form of any competitive relationship between its general partner (or the other operating partnerships or limited liability companies that its general partner manages) and the Acquired Entity or Acquired Assets.

For example, two investment funds managed by the same organization may not be under common Control for HSR Act purposes. Accordingly, if one fund made an acquisition that is reportable under the HSR Act, its Report Form would not disclose *any* information regarding the operations of the second fund. The agencies view this scenario as a shortcoming under the HSR Act, because they may not be able to properly assess the potential competitive impact of acquisitions by entities that have or manage—or are managed by entities that have or manage—overlapping interests in the same industry as the company that is the target of the reported acquisition.

The HSR Amendments introduce the concept of "Associates" to address these concerns and gather relevant information. The definition of Associate includes entities under common management, as well as those entities Controlled or Managed by an Associate. "Managing" refers to "the right, directly or indirectly, to manage the operations or investment decisions" of an entity involved in the reported transaction (whether the Ultimate Parent Entity or the acquisition subsidiary).

An Associate of an Acquiring Person is an entity that is not an affiliate (i.e., an entity controlled, directly or indirectly, by, or under common control with, the same UPE) of an Acquiring Person but that: (i) has the right, directly or indirectly, to manage the operations or investment decisions of an Acquiring Entity (a "Managing Entity"); (ii) has its operations or investment decisions, directly or indirectly, managed by the Acquiring Person; (iii) directly or indirectly Controls, is Controlled by, or is under common Control with a Managing Entity; or (iv) directly or indirect Manages, is Managed by, or is under common operational or investment management with a Managing Entity.

This definition is exceptionally broad, but applies *only* to Acquiring Persons, *not* Acquired Persons. Under a simplified description of the definition, a person or entity that manages the operations or investment decisions of an Acquiring Entity is a "Managing Entity." The Managing Entity, anyone who controls or is controlled by the Managing Entity (essentially its parents or subsidiaries, direct or indirect), and any entity whose operations or investments are "managed" by the Managing Entity are Associates of the Acquiring Person. In addition, to the extent the Acquiring Person itself manages the operations or investment decisions of another entity, that entity is also an Associate. Accordingly, if an investment fund shares a common investment manager with other funds, the investment manager and all of the funds served by that investment manager are Associates. If an investment fund has separate investment managers for its fund, but the investment managers are commonly owned, the investment managers, and all the funds they manage, are also Associates. The same analysis applies to general partners of limited partnerships.

In effect, the concept of "Associate" will, in many if not most situations, bring all the funds in a fund family into the HSR process. As a practical matter, each fund making an acquisition will need to look at its structure and relationships with general partners and investment managers to determine who its Associates are. This will be a fact-intensive exercise for each acquiring firm that will have to be done at the beginning of the HSR preparation process, or earlier, before information for the filing is collected.

This addition will primarily affect Private Investment Firms with multiple investment entities. Under the previous Report Form, a private equity fund usually was deemed its own UPE, even if it shared a general or managing partner with another fund. Under the HSR Amendments, separate investment funds that share general or managing partners will now be considered Associates of one another; thus, if one fund is an Acquiring Person, it must submit information to the best of its knowledge regarding its Associates under

Items 6(c)(ii) and 7 of the Report Form (note that the concept of "Associate" does not affect the definition of an "Acquiring Person" for the purposes of determining whether an HSR filing is required).

With respect to Associates, the HSR Amendments require Acquiring Persons to report information regarding:

- Their Associates' Minority Interests (i.e., more than 5 percent but less than 50 percent) in entities that have revenues in North American Industry Classification System ("NAICS") codes that overlap with the Acquired Entity or Acquired Assets; and
- The names of each entity over which such Associates have Control, that the Acquiring Person *believes* derives revenues in those NAICS codes that overlap with the business of the Acquired Entity or Acquired Assets, and the geographic areas in which such Associates derive those revenues.

Because Associates are not Controlled by the Acquiring Person, the FTC has acknowledged that Acquiring Person may not have perfect visibility into the operations of their Associates. Accordingly, Acquiring Persons are only required to supply information about their Associates based on their *knowledge and belief*.

As explained in the examples listed in the *Federal Register*,[6] the new Associate reporting requirement can present several issues for Private Investment Firms, including the following:

- If a Private Investment Firm's operations are organized into several investment partnerships (funds) and the general partner of the Private Investment Firm (directly or indirectly) has the authority to make investment decisions for those partnerships, then if one of these investment partnerships is making a reportable acquisition under the HSR Act, the general partner of the Private Investment Firm, the Private Investment Firm itself (if managed by that general partner), and each of the other investment partnerships managed by the general partner of the Private Investment Firm is an Associate of the partnership making the acquisition.
- Even if an Acquiring Entity is its own UPE (in which case it is also the Acquiring Person), when it outsources the right to manage its investments to a Private Investment Firm or any other entity or person, the Private Investment Firm (or such entity or person) and any entity over which it has investment management authority is an Associate of the Acquiring Person.
- When a Private Investment Firm manages the investment decisions of an Acquiring Person, and contracts with an outside investment manager for that purpose, the investment manager and any entity over which it has investment management authority are considered Associates of the Acquiring Person.

The examples contained in the *Federal Register* also prescribe some important limitations on the scope of the term "Associate," as noted below:

- A Private Investment Firm that provides non-binding investment advice to an Acquiring Entity is not considered the entity's Associate.

- A principal in a Private Investment Firm that manages an investment partnership is not considered an Associate of that partnership when the partnership is an Acquiring Person; *provided* that the principal does not have a controlling ownership interest in the entity that makes investment decisions for that firm and does not have a contractual right to manage that Private Investment Firm.
- A corporation or other entity that provides back-office functions, such as accounting, maintenance, IT, or human resources, for a Private Investment Firm is not considered to be an Associate of that Private Investment Firm.

The FTC acknowledges that reporting information related to Associates will increase the burden that filing parties face, but reasons that this information "provides the Agencies (the FTC and DOJ) with a much clearer picture of the competitive impact in transactions involving families of private equity funds or master limited partnerships." Unfortunately, this change will require many types of companies, including Private Investment Firms, to provide information regarding Associates about which they may know very little and, in certain cases, have no right to obtain.

New Requirements Regarding Subsidiaries and Minority Shareholders and Shareholdings

ITEMS 6 AND 7

Item 6(a). Under the current rules, in Item 6(a), the Acquiring Person (being the Acquiring Entity's UPE) is required to list the name and address of each entity in which it has a Controlling Interest. In contrast, the Acquired Person is required only to list entities Controlled by the Acquired Entity. Both the Acquiring Person and the Acquired Person may omit disclosure of entities having less than $10 million in total assets. Many commentators have objected to this provision, because it can require an Acquiring Person, in particular, to disclose information about subsidiaries that do no business whatsoever in the United States and, therefore, do not compete with the Acquired Entity or Acquired Assets in the United States.

The HSR Amendments limit this reporting requirement for both the Acquiring Person and the Acquired Person (and, in the case of an Acquired Person, only the entities that are Controlled by the Acquired Entity are required to be included in the Report Form) to US subsidiaries and non-US subsidiaries *that make sales in the United States*, which should greatly reduce the HSR Act reporting burden on companies with large numbers of non-US subsidiaries.

Item 6(b). Item 6(b) currently requires an Acquiring Person to report information regarding each other person or entity (i.e., a person or entity that the Acquiring Person does not Control and that is not Controlled by it) that owns a 5 percent or greater interest in the Acquiring Person's UPE, if the UPE is a corporation, and information regarding each other person or entity that owns a 5 percent or greater interest in any of the UPE's corporate subsidiaries that is not wholly owned (subject to being able to exclude subsidiaries with less than $10 million in total assets). Holders need not be listed for entities with total assets of less than $10 million. A similar requirement applies to the Acquired Entity and each of the Acquired Entity's corporate subsidiaries that is not wholly-owned. The HSR Amendments limit this requirement (i) for the Acquiring Person to its UPE and the Acquiring Entity (rather than all of the UPE's

subsidiaries), and (ii) for the Acquired Person, to the Acquired Entity, but expands the information required to be filed to include investments of 5 percent or more in non-corporate entities (e.g., a 10 percent holding in a UPE that is a limited liability company (a "UPE LLC"), and a 50 percent holding by the other partner in a joint venture partnership in which UPE LLC has a 50 percent interest). For limited partnerships, only the general partner must be identified, regardless of its percentage held.

Items 6(c), 7(b) and 7(d) Generally. The HSR Amendments significantly expand the requirements under the Report Form in the existing Items 6(c) and 7(b), and add a new Item 7(d), which likely will burden many Private Investment Firms and other Acquiring Persons within umbrella organizations that are comprised of non-corporate affiliated entities under common management. The most significant addition to these items is the requirement that an Acquiring Person report certain information about its Associates, and each such Associate's Minority Interests in the voting securities of corporations as well as the equity interests in non-corporate entities.

Item 6(c)(i). In addition to the Acquiring Person's obligation under Item 6(a) to include information in the Report Form about entities in which they have a Controlling Interest, current Item 6(c) requires the Acquiring Person and the Acquired Entity to identify Minority Interests that they hold in corporate issuers that have $10 million or more in total assets (holdings in non-corporate entities are not covered). Under the new Report Form, the existing Item 6(c) has been divided into two new subsections: 6(c)(i) and 6(c)(ii).

Item 6(c)(i) requires the Acquiring Person to list all Minority Interests, including Minority Interests in non-corporate entities, that it holds in entities that derive revenues in the same 6-digit NAICS codes as the Acquired Entity or the Acquired Assets. If available, the Acquiring Person should use 6-digit NAICS industry codes to report this information; however, if 6-digit NAICS code information is unavailable, the Acquiring Entity may list its Minority Interests by industry (e.g., pharmaceuticals, health care or mining). Similarly, the Acquired Entity is required to report its Minority Interests in entities that derive revenues in the same 6-digit NAICS code or industry as the Acquiring Person. As an alternative, the Acquiring Person or Acquired Entity can list its Minority Interests in any entity with $10 million or more in total assets without limiting the list to such investments that constitute a NAICS code or industry overlap with the other side, but this alternative may not be preferable to Acquiring Persons or Acquired Entities with large numbers of Minority Interests in both corporate and non-corporate entities.

Item 6(c)(ii). In addition, Item 6(c)(ii) requires the Acquiring Person only to list, for each Associate, "minority holdings ... that overlap with the Acquired Entity(s) [or Acquired] Assets, even if only by industry." The instructions accompanying Item 6(c)(ii) require the Acquiring Person to identify each of its Associates that holds a Minority Interest in an entity, including a Minority Interest in a non-corporate entity, that "derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the Acquired Entity(s) [or Acquired Assets] also derived dollar revenues in the most recent year." Associate Minority Interests in the Acquired Entity that exist prior to the transaction being reported also must be identified. Further, for each such holding by an Associate, the Acquiring Person must identify the Associate holding the interest, the entity in which Associate holds the interest, and the percentage held in such entity by the Associate.

If an Acquiring Person cannot provide information on Minority Interests through NAICS industry codes, it may provide the information by describing the industry for each Minority Interest. Also, as an alternative

to complying with these requirements, the Acquiring Person can list all entities in which its Associates hold Minority Interests, without limiting the response to such investments that constitute a NAICS code or industry overlap with the acquired entity or assets. However, the FTC cautions that responding in this manner may result in delays in review of the filing if the FTC or the DOJ requests additional information regarding such overlaps.

Items 7(b)(ii) and 7(d). In the existing Report Form, under Item 7, companies are required to supply a 6-digit NAICS code and geographic information for industries where there is a NAICS code overlap between the Acquiring Person and the Acquired Entity or Acquired Assets. Under the new Report Form, Acquiring Persons will also be required under Item 7(b)(ii) to list each Associate of the Acquiring Person that, in the prior year, derived revenue in the same industry as the Acquired Entity or Acquired Assets derived revenues and, if different, the entities in which the Associate had Minority Interests that actually generated these revenues. In addition, for each such Associate and entity identified in Item 7(b)(ii), Item 7(d) requires the Acquiring Person to provide geographic information regarding the state or locations at which the Associate or entity derives revenues in the overlapping NAICS code(s).

Impact on Private Investment Firms

Overall, the changes to Items 6 and 7 will place a significant burden on Private Investment Firms by requiring companies to collect and report information regarding their Associates and their Associates' investments. For Private Investment Firms with a large number of investment funds for which their investment decisions are made centrally or by an entity that makes investment decisions for other entities or funds within the overall structure of the private equity firm, a significant amount of information may need to be collected regarding those funds' Minority Interests. In addition, in some instances, the acquiring investment fund or partnership may have difficulty obtaining information regarding its Managing Entity's other managed funds and their Minority Interests.

In sum, these requirements will impose additional costs and potential delays relating to filings by private equity and venture capital funds, investment funds and master limited partnerships. Further, failure to provide the required information pursuant to at least one of the options permitted by the FTC (e.g., list industries instead of NAICS codes, or list all Minority Interests held by Associates) may result in the Report Form being rejected, and the beginning of the HSR waiting period being delayed, unless the Filing Person can show that the required information was not available through any reasonable means.

REVENUE RELIEF

Item 5

Item 5(a) Deletions. In an effort to make it easier for companies to obtain and provide more useful revenue information to the agencies, the FTC has eliminated the existing 2002 base-year requirement in Items 5(a) and 5(b)(i). As a result, companies no longer will be required to collect and aggregate historical data from nearly a decade ago by the 6-digit NAICS industry code or 10-digit NAICS manufacturing codes. These changes also eliminate existing Item 5(b)(ii), which requires companies to identify all products that have been added or deleted subsequent to 2002 by 10-digit NAICS code. Instead, under new Item 5(a), companies will only be required to provide aggregated 6-digit NAICS code data for non-manufacturing

revenues and 10-digit NAICS code information for manufacturing revenues for the most recent year. In addition, companies that manufacture products and sell them through their US wholesale or retail operations will need to report revenues only under the 10-digit manufacturing codes, which eliminates the double-counting of these revenues under the present rules as both manufacturing and non-manufacturing revenues.

Item 5(a) Additions. Item 5(a) has been expanded in one respect that may place an additional burden on companies with foreign manufacturing operations. Under the existing Report Form, companies are not required to report revenue for "products manufactured outside the United States but sold in or into the United States" unless the product was sold through a US entity. However, under the new Report Form, revenue from sales made by a foreign manufacturing facility directly to a US customer must be reported under the relevant 10-digit NAICS code. The FTC believes that receiving such revenue information will give the agencies a more accurate understanding of the potential competitive impact of a reportable transaction, especially if there is a NAICS code overlap.

Impact on Private Investment Firms

Overall, the new Item 5 requirements will be a welcome change, as the FTC has eliminated a number of time-sensitive exercises, in particular the 2002 base-year requirement. However, foreign revenues will now need to be monitored to the extent that they result from the sale by a foreign manufacturing facility directly to a US customer.

EXPANDED DOCUMENTARY REQUIREMENTS

Item 3

Item 3(b). Item 3(d) of the Report Form currently requires companies to "furnish copies of final or most recent versions of all documents which constitute the agreement" providing for the reported transaction. Now, as part of new Item 3(b), the FTC has added to this requirement by codifying an existing FTC Premerger Notification Office ("PNO") position that also requires submission of any separate non-competition agreements, including unexecuted form agreements, that exist at the time the filing is submitted.

Item 4

Item 4(d) Generally. Item 4(d) is a new Report Form section that codifies several existing positions taken by the PNO related to Item 4(c) material, and also expands on the type of competition- and transaction-related information that companies must provide. It should be noted with respect to the submission of these documents that, like the entire HSR filing, they are required by statute to be treated as confidential and exempt from the production requirements of the Freedom of Information Act. Given these protections, the FTC and the DOJ will not permit such documents to be withheld from submission with an HSR filing on the grounds that they contain confidential business information.

Item 4(d)(i). The FTC believes that Confidential Information Memoranda ("CIMs") aid the agencies in their substantive understanding of a transaction, in large part because such documents tend to be formal, prepared by a third party, and lay out the details of a company or part of a company that is being acquired.

While the language of the existing Item 4(c), which calls for documents "evaluating or analyzing the acquisition," does not, by its terms, cover most CIMs, which relate only to the target business, the PNO has long taken the position that such documents *should* be submitted pursuant to Item 4(c). New Item 4(d)(i) not only codifies this requirement, but also requires that, when no CIM exists, any document provided to any officer or director of the Acquiring Person meant to serve the function of a CIM should be submitted. While the exact meaning of this requirement is somewhat unclear, such documents could include strategic plans, other documents prepared by the seller in the ordinary course of business, and certain due diligence materials.

Item 4(d)(ii). Although the language of the current Item 4(c) does not expressly cover documents prepared by investment bankers, consultants or other third-party advisers that otherwise meet Item 4(c) criteria, the PNO also has required such documents to be submitted. The new Item 4(d)(ii) makes this requirement explicit, and requires production of such documents that have been prepared both by third-party advisers that have been retained, as well as "pitch" or "banker" books provided by advisers who seek to be retained, even if they are not ultimately hired. The FTC believes that such materials often touch upon competitive issues that will aid the agencies in their analysis, including by giving the agencies a useful overview of the competitive landscape in a particular industry.

Item 4(d)(iii). Item 4(d)(iii) significantly expands on the existing requirements governing the submission of Item 4(c) material. In particular, Item 4(d)(iii) requires "all 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 the acquisition." The practical effect of this new requirement is far-reaching, as the filing parties now are required to submit any document that discusses synergies or efficiencies, even if the discussion of these issues does not reference competitive issues. As such, documents discussing synergies related to issues such as R&D or even payroll will be subject to disclosure, including in transactions in which there is no competitive overlap.

Impact on Private Investment Firms

While many of the changes to Item 4 merely codify existing PNO positions, the requirement for documents analyzing synergies and efficiencies in particular will place a potentially significant burden on private equity and venture capital groups and other filing parties to identify and submit additional documents.

Conclusion

Overall, while the new HSR Amendments eliminate time-sensitive exercises related to the collection of revenue data and provide for some narrowing of the requirements to provide certain information regarding subsidiaries and shareholders, they also increase the burden that Private Investment Firms will face when reporting on minority shareholdings, particularly with respect to the new requirements to report on Associate relationships and when collecting Item 4(d) documents. Private equity and venture capital groups planning to engage in acquisitions likely to be reportable under the HSR Act should consider the following steps, which may help minimize the additional burdens and avoid potential delays resulting from these new requirements:

- Create a database of all identified Associates, their minority holdings, and the NAICS codes applicable to the entities in which those minority interests are held, and update that database on a regular basis;
- For each acquisition, request that a specific document be prepared that constitutes a Confidential Information Memorandum so there is no ambiguity about what documents need to be produced under Item 4(d)(i); and
- Limit the creation of Item 4(d) documents (as well as traditional Item 4(c) documents), by working with third-party advisers to ensure that such documents are created only on an as-needed basis.
- While these suggestions may serve as a starting point for limiting the impact of the HSR Amendments, other specific actions may be appropriate for individual Private Investment Firms.

Endnotes

1 The current filing thresholds (which became effective on February 24, 2011) have not changed as a result of the revisions to the requirements under the Report Form described in this Memorandum. These filing thresholds are as follows:

SIZE OF TRANSACTION TEST	Notification is required if the Acquiring Person will acquire and hold certain assets, voting securities, and/or interests in non-corporate entities valued at **more than $66.0 million**.
SIZE OF PERSON TEST (Transactions valued at **more than $263.8 million** are not subject to the Size of Person Test and are therefore reportable)	Generally one "person" to the transaction must have at least **$131.9 million** in total assets or annual net sales, and the other must have at least **$13.2 million** in total assets or annual net sales.

2 This waiting period can be terminated early or extended under certain circumstances.

3 "UPE" means the entity or individual that "Control*s*" (defined below) a party to the transaction and is not itself Controlled by anyone else. The UPE may be separate from the entity that is a party to the transaction by many layers of controlled subsidiaries, or the UPE may actually be entering into the transaction in its own name.

4 "Control" or "Controlling Interest" means, in the case of a corporation, the ownership of 50 percent or more of the voting securities of such corporation or the right to appoint 50 percent or more of the members of the board of directors of such corporation; in the case of a non-corporate entity, the right to receive 50 percent or more of the profits or assets upon dissolution of such entity.

5 Generally speaking, this consists of documents "evaluating or analyzing the acquisition," *but see* the description of the changes to Item 4 detailed in this White Paper.

6 *See* http://www.ftc.gov/opa/2011/07/hsrform.shtm, Text of Federal Register Notice, pp. 22-26.

Exhibit A

Comparative Chart

REVISIONS TO HART-SCOTT-RODINO ACT PREMERGER NOTIFICATION AND REPORT FORM

DEFINITIONS

Acquiring Person: ultimate parent entity (UPE) on the buyer's side and all entities controlled, directly or indirectly, by that UPE.

Controlling Interest: for a corporation, this means holding 50 percent or more of the voting securities or having the right to appoint 50 percent or more of the board of directors; for a non-corporate entity, this means having the right to 50 percent or more of the profits or assets upon dissolution.

UPE: entity that is not controlled by any other entity. Also can be a natural person.

Acquiring Entity: entity controlled by the Acquiring Person that actually is acquiring the voting securities, interests in non-corporate entities and/or assets being acquired.

Acquired Person: UPE on the seller's side and all entities controlled, directly or indirectly, by that UPE.

Acquired Entity: entity controlled by the Acquired Person whose voting securities, non-corporate interests or assets are being acquired.

Acquired Assets: assets being acquired.

Filing Person or Person Filing Notification: applies to each of the Acquiring Person and the Acquired Person. Note that for Items 5-7 of the HSR Form, the Acquired Person responds only with respect to the Acquired Entity and the Acquired Assets.

Minority Interest: holding an interest in a corporation or non-corporate entity of 5 percent or more but less than 50 percent.

Associate: an entity that is not an affiliate (e.g., parent or subsidiary) of an Acquiring Person but that: (i) has the right, directly or indirectly, to manage the operations or investment decisions of an Acquiring Entity (a "Managing Entity"); (ii) has its operations or investment decisions, directly or indirectly, managed by the Acquiring Person; (iii) directly or indirectly controls, is controlled by, or is under common control with a Managing Entity; or (iv) directly or indirect manages, is managed by, or is under common operational or investment management with a Managing Entity.

PRIOR VERSION	NEW VERSION	IMPACT ON PRIVATE INVESTMENT FIRMS
Item 6(a) required a Filing Person to list the name and address of all companies with $10 million or more in total assets in which it holds a Controlling Interest. This included subsidiaries that had no contact with the United States and, therefore, did not compete with the other Filing Person for US customers.	New Item 6(a) limits a Filing Person's reporting requirement to "US entities and any foreign entities that have sales into the United States." The $10 million minimum asset threshold has been retained.	All Filing Persons with extensive international operations will benefit from the reduced reporting requirement in the new Item 6(a).
Item 6(b) required an Acquiring Person to provide information (shareholder name, number and class of shares held, percentage of class held) on shareholdings by other persons with a 5-percent or more voting securities interest in the Acquiring Person's UPE or any corporate entity the UPE controlled; the Acquired Person only had to provide such information for the Acquired Entity, if a corporation, and that entity's 50 percent or more-owned corporate subsidiaries. Holdings in corporate issuers with less than $10 million in total assets and holdings in non-corporate entities were not required to be reported.	New Item 6(b) limits this requirement to the Acquiring Person's UPE, the Acquiring Entity, and the Acquired Entity, but extends this requirement to require reporting on each "person that holds ... five percent or more of the outstanding voting securities **or non-corporate interests** of the [Acquiring Person, Acquiring Entity or Acquired Entity.]" (Emphasis added). The $10 million minimum asset threshold has been retained.	Acquiring Persons will benefit from the elimination of the requirement to provide information for entities they control that are not involved in the transaction, but both Acquiring Persons and Acquired Entities now will need to provide information regarding Minority Interests held by other persons in non-corporate Acquiring Person UPEs, Acquiring Entities and Acquired Entities.
Item 6(c) required an Acquiring Person and Acquired Entity to provide information (issuer name, and class, number of shares, and percentage of total voting securities held) on the "holdings of [the] person filing [the] notification" in entities controlled by other persons. This included Minority Interests in the voting securities of corporate issuers, but did not include Minority Interests held in issuers with less than $10 million in total assets or Minority Interests held in non-corporate entities.	New Item 6(c) is split into two parts. New Item 6(c)(i) requests information (the entity in which the interest is held and percentage held) on Minority Interests held by the Acquiring Person or Acquired Entity in both corporate and non-corporate entities controlled by other persons, but limits the information required to be disclosed to Minority Interests in entities that derive revenues in the same 6-digit NAICS codes as the other Filing Person. If NAICS code data is not available the Filing Person can describe the overlap by industry (e.g., health care, pharmaceuticals, mining).	Item 6(c)(i) will place an additional burden on Filing Persons to obtain NAICS code or industry overlap information regarding their Minority Interests, or to provide a complete list of their Minority Interests, including non-corporate entities.

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	Alternatively, the Filing Person can provide a list of all entities in which it holds a Minority Interest not limited by NAICS code or industry overlap. The $10 million minimum asset threshold has been retained.	
See description of current Item 6(c) above.	The new Form also contains Item 6(c)(ii), which requires the Acquiring Person to provide information regarding "holdings of Associates." "Associate" is defined as an entity—other than a parent or subsidiary of the Acquiring Person, that has direct or indirect management or operational control over the Acquiring Person (the "Managing Entity"), or is a parent, subsidiary, or is under common management with the Managing Entity (e.g., for an operating partnership that is an Acquiring Person, "Associates" would include the partnership's general partner, the general partner's parents and subsidiaries, and any other entity that manages or is managed by the general partner). The Acquiring Person is required to identify each Associate that holds a Minority Interest in any Acquired Entity or in any other entity that derives revenues in the same 6-digit NAICS code as the Acquired Entity or Acquired Assets. Further, for each such Minority Interest, the Acquiring Person is required to identify the entity in which the interest is held and the percentage held. If NAICS code data is not available, the Acquiring Person can describe the overlap by industry (e.g., health care, pharmaceuticals, mining). Alternatively, the Acquiring Person can list all of its Associates, and all	Acquiring Persons that are part of a private equity or venture capital firm, investment fund, master limited partnership and the like (hereinafter collectively referred to as "Funds"), may be required to provide information on substantial numbers of Associates and Minority Interests of those Associates. Compilation of this information may be time-consuming and result in delays in completing the filing and closing the transaction unless information is collected ahead of time.

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	Minority Interests held by its Associates, not limited by NAICS Code or industry overlap. The $10 million minimum asset threshold has been retained.	
Item 7 required a Filing Person to supply 6-digit NAICS code and geographic information for industries where there is a NAICS code overlap between the Acquiring Person and the Acquired Entity or Acquired Assets.	New Item 7(b)(ii) requires an Acquiring Person to "list the name of each Associate" of the Acquiring Person who in the prior year derived revenue in the same 6-digit NAICS code industry as the Acquired Entity or Acquired Assets and, if different, those entities in which the Associate holds a Minority Interest that actually derived such revenues. In addition, new Item 7(d) requires the Acquiring Person to provide information relating to such Associates and entities with respect to the states or locations in which they derived such revenues in the most recent year.	The extension of Item 7 reporting requirements to Associates of the Acquiring Person will increase the reporting burden of Acquiring Persons who are part of Funds.
Items 5(a) and 5(b)(i) required a Filing Person to list revenues it derived from industries by 6-digit NAICS codes and 10-digit NAICS manufacturing codes for a base year, which most recently was 2002. Revenues from sales of products manufactured by the Filing Person and then sold through the Filing Person's wholesaling subsidiary had to be reported under both a 10-digit manufacturing code and 6-digit wholesaling code. A Filing Person that manufactured products outside the United States and sold the products directly to a US customer without the products passing through a US entity did not have to report revenues from those sales.	New Item 5(a) eliminates the requirement that revenue be reported for a base year, and requires that revenue from the sale of manufactured products be reported only under 10-digit NAICS codes. New Item 5(a) also requires a Filing Person to report revenue from the sale of foreign-manufactured products that are sold directly to US customers under a 10-digit NAICS manufacturing code.	On balance, these changes will reduce the burden of reporting revenues on the HSR Form, particularly through elimination of the base-year requirement. However, a private equity or venture capital group with significant foreign manufacturing operations will have additional reporting requirements for any direct sales to US customers.

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Item 3(d) required a Filing Person to "furnish copies of final or most recent versions of all documents which constitute the agreement" relating to the reported transaction.	Item 3(b) of the new Form codifies an existing position of the FTC Premerger Notification Office that a Filing Person furnish agreements not to compete that exist at the time of filing, including unexecuted form agreements.	No change in the Filing Persons' reporting burden.
Item 4(c) required the production of "all studies, surveys and reports which were prepared by or for any officer(s) or director(s)" of the Filing Person 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."	While Item 4(c) remains, new Item 4(d) largely codifies, but also expands, positions taken by the FTC Premerger Notification Office regarding what is required to be produced under Item 4(c). New Item 4(d)(i) requires a Filing Person to furnish any Confidential Information Memoranda ("CIM") created with respect to sale of the Acquired Entity or Acquired Assets. When no CIM exists, any document provided to any officer or director of the Acquiring Person *meant to serve the function of a CIM* must be produced. New Item 4(d)(ii) requires a Filing Person to "[p]rovide all studies, surveys, analyses, and reports prepared by investment bankers, consultants or other third party advisors ... 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 that specifically relate to the sale of the [Acquired Entity(s) or Acquired Assets]." This includes analyses, such as pitch books, prepared by third-party advisers seeking to be engaged. New Item 4(d)(iii) requires a Filing Person to '[p]rovide all studies, surveys, analyses, and reports evaluating or analyzing synergies and/or efficiencies prepared for any officer(s) or director(s)[.]"	Items 4(d)(i) and 4(d)(ii) largely codify existing FTC Premerger Notification Office positions, but the requirement for documents that "serve the function of a CIM" is ambiguous and may require the production of a number of types of documents. The Acquiring Person may be able to avoid this problem by requesting that a CIM be prepared. Also, the Acquiring and Acquired Persons should establish a policy that pitch books be provided only upon request. Item 4(c) did not require submission of documents analyzing potential synergies or efficiencies that did not discuss competitive issues. However, this new requirement may pose a significant burden to firms that are part of a private equity or venture capital group when a substantial analysis of potential efficiencies has been conducted. As a general matter, a Filing Person should attempt to limit the creation of such documents (as well as 4(c) and other 4(d) documents) to those truly necessary to analyze and evaluate the transaction.

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