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## FTC and DOJ's Antitrust Division Change Initial Reporting Requirements for M&A Transactions under the Hart-Scott-Rodino Act

### Executive Summary

Effective August 18, 2011, parties to certain mergers and acquisitions will have to file a newly revised notification and report form under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). The new form requires more documentary evidence for almost all filers, and, for entities that manage but do not control other firms ("associates"), like private equity funds, more information about the operations of those associates.

Specifically, parties will now have to submit (1) synergy or efficiency studies analyzing the transaction; (2) non-competition agreements between the parties; (3) confidential offering memoranda (or documents that served that function); and (4) competition analyses performed by third parties. Parties will have to be much more thorough and comprehensive in their initial searches for documents, perhaps implementing methodologies at the start of the deal for tracking these documents. And parties will have to exercise much more control over the process by which their outside consultants (and internal staff) generate documents and other information about the transaction. With more documents comes a greater chance that someone working for the parties will inaccurately describe the nature of competition in a particular market. Early-phase synergy documents, created without the benefit of diligence, may in fact not accurately describe the full extent of savings in which a particular deal will ultimately result. As a consequence, the new rules increase the chance that the deal can become derailed by an injudiciously created document.

With regard to associates, acquiring companies will now have to identify overlaps between the target and acquiring person's associates. As a consequence, parties will need to develop a clear understanding of who their "associates" are and the extent to which they can track the revenues of those entities. Parties filing for the first time under the new regime should be prepared for a more lengthy process as they, and the FTC, get a handle on the scope of the new rules.

### Introduction

On July 7, 2011, the United States Federal Trade Commission announced changes to the form that parties that are subject to the HSR Act must initially file with the United States antitrust agencies. The HSR Act prohibits parties to certain mergers and acquisitions from consummating their anticipated transactions until they give notice to the FTC and the United States Department of Justice's Antitrust Division and observe applicable waiting periods. The HSR Act functions as the principal means by which the antitrust authorities evaluate the competitiveness of transactions prior to consummation.

The HSR reporting amendments, which were published in the Federal Register, on July 19, 2011, will become effective on **August 18, 2011**. Parties reporting transactions after the **August 18, 2011**, effective date must therefore comply with the new rules.

These are the first revisions to the HSR reporting rules since 2005 and the most comprehensive revisions in many years. While they relieve parties from the duty of providing some information that was never used in practice, and so represent some lessening of burden, they also require a good deal of additional information that had not been required previously, including new categories of financial information and new classes of documents.

### **New Categories of Documents to be Turned Over**

The revisions expand the number of substantive analytical documents parties must initially submit significantly. In the past, parties had to submit only so-called "4(c) documents" — documents prepared by or for an officer or director that discuss, with respect to the transaction, market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. The new rules add to this list documents discussing **synergies** and **efficiencies** that the transaction might present. The new rules also require parties to submit "confidential information memoranda" and other documents analyzing the target entities or acquired assets so long as they were prepared by or for an officer or director of the ultimate parent of the parties or any entity within the parties.

Some of the categories of documents called for under these new requirements are:

- All studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition (but not financial models without stated assumptions).
- All non-competition agreements entered into as part of the transaction, whether executed with the agreement or in draft.
- Any "confidential offering memoranda" produced up to one year before the date of filing that relate to the sale of the target or assets, or, if no such memoranda exist, any document given to an officer or director of the buyer that serves the function of a confidential offering memoranda.
- All studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors up to one year before the date of filing for the purposes 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 target or the acquired assets. (This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement.)

### **Reporting with Regard to Non-Corporate Entities**

Prior to these revisions, parties were required to treat corporations and non-corporate interests differently under certain items. Under the revisions, parties will be required to report holdings of non-corporate interests to the same extent that they report holdings of voting securities of corporate entities. Parties will also have to list all general partners of limited partnerships regardless of percentage of interest held. Individual limited partners do not have to be identified.

## Reporting of "Associate" Entities

HSR filers must now provide information about "associate" entities that operate in the same industries as the entity being acquired. Prior to the revisions, the filing person only had to report with regard to those entities that it controlled. This change is designed to give the agencies information regarding potential overlaps between the acquired person and competitively significant holdings of which the acquiring person has common investment or operational management, but does not control.

Under the definition provided in the new rules, an "associate":

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

16 C.F.R. § 801.1(d)(2). For example, in a common private equity structure, the managing partner of Fund I LP, Fund II LP and Fund III LP is Fund Management LP. If Fund II LP acquires NewCo., then Fund Management LP, Fund I LP, and Fund III LP, as well as any entity over which any of them have investment authority, and all entities within them, would be deemed "associates" of Fund II LP.

Acquiring persons must provide the following information about their "associates":

- For all entities the associate controls that derives revenues from any NAICS codes from which the target also derives revenues, the acquiring person must list the associate, subsidiary and geographic revenue information for the overlapping code.
- If an associate holds between a 5% and 50% interest in the target, or in another entity that derives revenues from any NAICS codes from which the target also derives revenues, the acquiring person must list the associate, the entities that also derived revenues, the percentage interest held, and geographic revenue information for the overlapping code.

## Elimination of Certain Revenue Reporting Requirements

The revisions eliminate the requirement from the old rules of providing revenues for the base year. Before, parties had to supply revenues for 2002, the base year, and the most recently completed fiscal year. In addition, United States revenues derived from manufacturing, even if abroad, must now be reported under the 10-digit code and not under wholesale codes. Prior to the revisions, manufacturing revenues were reported under a 7-digit code, and goods manufactured abroad and imported into the States for sale were reported under wholesale codes.

## Impact

The changes regarding the new document requirements and the information required of associates have the potential to be significant. With regard to the new documents, parties should include the additional requests in the memoranda they circulate internally to gather the documents that need to be submitted with the HSR filing. Parties may also wish to identify the in-house contact person at the earliest stages of a transaction and ask that person to track document generation as the transaction progresses: keep a list of third party advisors and individuals; and identify synergy and efficiency studies, non-competition agreements, confidential offering memoranda, and third party analyses, as they become

available. As these documents will now become part of the initial filing, one should be as careful in their preparation as one would be with a 4(c) document. Indeed, it may be quite important to admonish third party advisors to be careful with their documents as well. The extent of the burdensomeness of this request will play out largely as the FTC interprets the new rules. It is conceivable that some particularly thorough parties will not see much change in volume or process. For others, the change could be significant.

With regard to the information required regarding associates, this requirement will not be particularly difficult for corporate entities. It may be quite difficult for certain funds that share common management. Through the definition of "control," the present rules view individually organized but commonly managed funds as unique entities. The changes will require parties to examine and report on those commonly managed entities. The potential for burdensomeness will depend on how the FTC interprets "associates." It is entirely possible that a particularly expansive view of what an associate is could result in filers having to seek information from entities over which they in fact have little practical control at all. The FTC anticipates this situation and calls for filers to provide broader information or a statement for non-compliance. It remains to be seen whether this solution is in fact workable.

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