

# Client Alert

Latham & Watkins  
Antitrust and Competition Practice Group

## Amendments to the Hart-Scott-Rodino Notification Requirements

Today, July 7, 2011, the Federal Trade Commission (FTC) announced important amendments to the Premerger Notification Rules (the Rules), which implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). The HSR Act is the federal premerger notification program that allows the FTC and Department of Justice Antitrust Division (DOJ) time to consider the competitive effects of proposed mergers and acquisitions and, if appropriate, to challenge and enjoin transactions under the antitrust laws before they are completed.

The amendments affect the information and documents that parties are required to provide to the agencies as part of their HSR notification forms. Most significant are the amendments requiring new information be submitted:

- A broader set of documents analyzing or evaluating the acquisition target than those already required by Item 4(c) of the form
- Information regarding holdings of "associates" of the filing parties
- Revenues derived in the US from foreign manufacturing operations
- Information regarding investors in and holdings of non-corporate entities

Although the amendments reduce information requirements in some respects, these new obligations have the potential to impose significant additional burdens on notifying parties. For these reasons, earlier versions of the amendments that were circulated within the HSR community and later published for public comment drew intense and broad-based criticism. Although somewhat modified from earlier versions, the net effect of the final amendments is to increase notification burdens. The amendments will become effective 30 days after publication in the Federal Register. The amended Rules do not change the substantive standard of review for proposed transactions.

### Documents Prepared for the Purpose of Evaluating or Analyzing the Acquisition Target or the Transaction

New Item 4(d) expands upon the familiar Item 4(c) in several significant ways. While Item 4(c) of the HSR form currently requires documents (i) prepared by or for an officer or director (ii) for the purpose of evaluating or analyzing the acquisition (iii) with respect to "market shares, competition, competitors, markets, potential

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for sales growth or expansion into product or geographic markets,” Item 4(d) requires more, particularly in calling for information related to prior contemplated deals or other analyses of the affected assets:

- Item 4(d)(i) requires production of all Confidential Information Memoranda (or, if there are none, documents serving such function) prepared within one year prior to submission of the HSR notification by or for an officer or director of the acquiring person, target and ultimate parent entities, that specifically relate to the sale of the acquired entity or assets. Ordinary course documents and financial data are not responsive unless such documents served the purpose of a Confidential Information Memorandum in the absence of such a document.
- Item 4(d)(ii) requires production of all documents prepared within one year prior to submission of the HSR notification for an officer or director of the acquiring person, target and ultimate parent entities, by investment bankers, consultants or other third party advisors during the course of an engagement or for the purpose of seeking an engagement, provided such documents contain “4(c) content” and specifically relate to the sale of the acquired entity or assets.
- Item 4(d)(iii) requires production of all documents evaluating synergies or efficiencies prepared by or for any officer or director for the purpose of evaluating or analyzing the acquisition.

## Associates

Under the current rules, the information required from the acquiring person in its notification is limited to the ultimate parent entity of the acquiring entity (the control person as defined in the rules)

and entities that the ultimate parent controls. “Control” for HSR purposes is defined as: (i) for a corporation, holding 50 percent or more of the outstanding voting securities, or, having the contractual power presently to designate 50 percent or more of the directors; or (ii) for an unincorporated entity, having the right to 50 percent or more of the profits, or the right to 50 percent or more of the assets upon dissolution. For HSR purposes, a general partner is typically deemed to not control a limited partnership. For this reason, investment funds and Master Limited Partnerships have not typically had to report information regarding related funds and partnerships.

The new rules require the acquiring person also to provide certain limited information regarding “associates.” Associates include any entity that (i) has the right to manage the operations or investments of the acquiring person, (ii) has its operations or investments managed by the acquiring person or (iii) has its operations or investments under common management with the acquiring person. Examples include 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 agreement, and investment advisors of a fund. Under the new rules, acquiring persons will need to provide the following information regarding associates and their investments:

- *Minority Holdings of Associates:* If an associate has a minority investment (5 percent to less than 50 percent) in a company that derives revenues from a NAICS code that to the person filing’s knowledge or belief overlaps with the target’s codes the filing must include the name of the “top level” associate and the investee entity and percentage interest held.

- *Subsidiaries of Associates:* To the extent a subsidiary of an associate derives revenues from a NAICS code that to the person filing's knowledge or belief overlaps with the target's codes the filing must include the name of the associate and its subsidiary and a list of states in which the subsidiary derives revenues from the overlapping code.

## **Revenue Reporting and Foreign Manufactured Products**

Item 5 currently requires filing parties to provide dollar revenues by 6-digit NAICS industry code with respect to operations conducted in the United States during the most recent year as well as the base year, currently 2002. To the extent dollar revenues are derived from US manufacturing operations, revenues must be reported by 7-digit NAICS product class for the most recent year and by 10-digit product code for the base year. Amended Item 5 eliminates entirely the base year reporting requirements. To the extent dollar revenues are derived from US manufacturing operations, amended Item 5 requires most recent year revenues by more precise 10-digit NAICS product code, in place of 7-digit NAICS product class. Amended Item 5 also requires filing parties to report most recent year revenues for each product manufactured outside of the US and sold into the US.

## **Non-Corporate Entities**

The amended rules further expand upon the 2005 amendments with respect to aligning the treatment of unincorporated entities with the

treatment of corporations. Under the current rules filing parties are required to identify each holder of 5 percent or greater minority interests in corporate entities controlled by the person filing notification. The new rules require filing parties to also identify each holder of 5 percent or greater minority interests in unincorporated entities controlled by the person filing notification. For limited partnerships, only the general partner should be listed, but all general partners must be listed, regardless of their percentage interest in the partnership. The new rules also eliminate the \$10 million asset threshold which currently permits omission of holders of entities having less than \$10 million in assets.

In addition, the current rules require filing parties to report their holdings of 5 percent or greater, but less than 50 percent, of the voting securities of corporate issuers. The new rules require filing parties also to report 5 percent or greater minority interests in noncorporate entities. The acquiring person's response is limited to entities that derive revenues in the same 6-digit NAICS industry code as the target. The acquired entity's response is limited to entities that derive revenues in the same 6-digit NAICS industry code as the acquiring person.

There are many other technical changes, including ministerial revisions to implement the amended Rules and minor changes to the notification form. The full text of the amendments is available on the FTC website at [www.ftc.gov](http://www.ftc.gov).

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