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Recent Revisions to the Hart-Scott-Rodino Act Reporting Requirements

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The Federal Trade Commission recently announced significant revisions to the reporting rules under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR" Act), which will take effect on August 18, 2011. **Importantly**, the revisions do not alter the rules with regard to whether a particular transaction is HSR reportable or not, but rather change what information needs to be supplied to the federal antitrust enforcement agencies for transactions that are HSR reportable. The revisions are designed to provide the antitrust authorities with more meaningful information by which to assess the competitive implications of proposed transactions, and to help streamline the reporting process. While both of these goals are reflected in the changes, on balance the changes appear to impose a greater burden on filing parties. The following is a brief explanation of the more important changes that parties should bear in mind going forward.

Helpful Streamlines

The revisions include numerous highly-technical ministerial changes that should provide some marginal easing of the HSR reporting burden. As two examples, the revised rules eliminate the need for filing parties to submit documents filed with the Securities Exchange Commission, as well as the requirement for filing parties to provide their (and all their unconsolidated subordinate entities') most recent regularly prepared balance sheets. But by far the most helpful streamlining change is the elimination of the revenue base year requirement. Under the prior rules, filing parties were required to provide their total annual US revenue data (broken out by North American Industrial Classification System ("NAICS") code) for 2002, which was used as the base year. This Item was particularly troublesome for firms that had made various acquisitions since 2002, as the rule required that 2002 revenue be supplied as if the filing party had owned all entities currently within it in 2002. Realizing this burden (and the lack of meaningful information obtained from this Item), the revised rules delete this base year requirement entirely, and now mandate that such revenue data only need be supplied for the most recent fiscal or calendar year.

The Addition of Item 4(d)

Existing Item 4(c) of the HSR rules requires that parties submit all documents written by or for an officer or director of the party, in connection with the transaction, that reference competition-related material, such as market shares, competitors, entry conditions, and the like. The revisions add a new Item, 4(d), which requires that three additional types of documents be provided, regardless of whether they may or may not also qualify under Item 4(c): (1) all Confidential Information Memoranda (or functional equivalent if none exists) written within one year prior to filing; (2) all

documents prepared by third-parties (e.g., investment bankers, consultants, etc.) in connection with an engagement, or for the purpose of seeking an engagement, that were prepared for an officer or director of the filing party and relate to the sale of the acquired entity or assets within one year prior to filing; and (3) all documents relating to synergies and/or efficiencies prepared by or for an officer or director for purposes of evaluating the transaction. In many instances, these three additional categories of documents will be similar to what is already required under Item 4(c), but certainly not all. Thus, filing parties will need to take additional care in the types and content of documents they create preceding and throughout the deal process, and will likely need to expend additional resources in searching for and assembling the relevant documents required under this new Item 4(d).

The Addition of the Term "Associate"

Another burdensome addition contained in the revised HSR reporting rules concerns the addition of a new term of art, "associate" entities. Under the previous rules, filing parties were only required to submit information concerning themselves and any subordinate entities within their control. The revised rules require that certain information be further supplied for any "associate" entities of the acquiring party. While this new requirement technically applies to all types of entity structures, the revisions are clearly directed at acquiring private equity firms, other types of investment funds, energy master limited partnerships, and other partnerships and limited liability companies managed by persons that do not control them.

An "associate" entity is defined as one that: (i) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring party (a "managing entity"); (ii) has its operations or investment decisions, directly or indirectly, managed by the acquiring party; (iii) directly or indirectly, controls, is controlled by, or is under common control with. a managing entity; or (iv) directly or indirectly, manages, is managed by, or is under common operational or investment decision management with, a managing entity. Private equity and other such firms will need to pay special attention to this definition going forward.

While the scope of these new entities now considered within an acquiring party is potentially extensive, the good (or at least less bad) news is that the additional information required concerning associate entities does not apply to all Items in the HSR form. An acquiring party need not provide documents or revenue figures for its associate entities, for example. Rather, the information on associate entities is limited to Items 6(c) and 7 of the form, which require certain information regarding minority interests in entities with NAICS code overlaps with the target, and operations' locations where there are NAICS code overlaps with the target. Usefully, regularly prepared financials less than three months old can be relied upon for at least certain aspects of this information, and the revisions allow for a "knowledge or belief" standard that can accommodate remaining information gaps despite a diligent effort on the buyer's part. To be sure, however, this revision may nonetheless l hit certain types of buyers especially hard in preparing future HSR filings.

Conclusion

The new revised HSR reporting rules are largely highly technical, but the above-mentioned changes are important to be aware of. There are some clear plusses in the elimination of outdated ministerial requirements, but the additional document search and provide requirements, along with the new "associate" entity inclusion, will likely increase the burden on HSR filing parties in the majority of transactions, especially private equity and other similarly-structured firms.

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