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DOJ & FTC Revise Premerger Filing Requirements

On July 7, 2011, the Department of Justice and the Federal Trade Commission adopted new rules for the Hart-Scott-Rodino ("HSR") premerger filing process. The new rules revise the Premerger Notification and Report Form, and are effective 30 days after publication in the Federal Register.¹ The modifications to the premerger form are intended to update and streamline the premerger process, but they will have a significant impact on certain filers.

One of the major changes in the new rules is that they require information regarding "associated" entities - those that are commonly managed by the same business as the purchaser but which have been excluded from premerger filings until now because they are not considered controlled by the ultimate parent entity.

The new "associate" requirement will have the greatest effect on private equity companies and hedge funds, which account for a large percentage of HSR filings. In the past, each fund was treated as a different entity for HSR purposes, and filers owned by a fund only had to provide competitive information about other companies held by the same fund. Under the new rules, filers will have to expand the information provided to include companies held by sister funds.

For many filers the information concerning associate entities will be difficult and time consuming to obtain. In recognition of this burden, the FTC and DOJ preface the "associate" reporting requirement with the words, "based on its [the acquiring company] knowledge or belief." Therefore, if this information is unobtainable, the acquirer may note this in the premerger form.

The revised rules also add a new category of written materials the parties must submit with the premerger form. The new rules formalize the requirement to submit materials including confidential information memoranda, materials prepared by investment bankers, consultants, or other third-party advisors, and materials evaluating synergies and/or efficiencies. While certain documents now required were provided previously by many filers, the new rules are intended to have broader application, and include documents not prepared in connection with the particular acquisition. This new category requires submission of applicable documents prepared within one year of the filing only.

The new rules also require companies to provide product codes for foreign-manufactured goods. Previously, companies were only required to provide data on revenue derived from manufactured products imported into and sold in the United States. The antitrust agencies believe that this change will help regulators identify competitive overlaps they might otherwise have missed.

Finally, the new rules eliminate some of the more burdensome information required to be submitted in the past - including filings with the U.S. Securities Exchange Commission, "base year" revenue data, and detailed listings of all voting securities acquired in a transaction.

Companies considering HSR-reportable transactions under tight time pressures, particularly those that have never completed an HSR filing before, will be challenged by the new rules. Even those companies that have made previous HSR filings will need to revamp their data-gathering system to include new "associate" information and conduct a broader search for documents received from third parties.

The implementation of the new rules within the next few weeks will have a significant impact on potential HSR filers. Venable is available to assist with all aspects of the HSR process to ensure that the filing meets all of the new requirements.

1. The full text of the Comments on the Final Rule may be found at <http://www.ftc.gov/os/fedreg/2011/07/110707hsfrm.pdf>. The new HRS Form may be accessed at <http://www.ftc.gov/bc/hsr/hsrform.pdf>.

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