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August 16, 2010

FTC Proposes Substantive Changes to the HSR Act Reporting Requirements

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On Friday, August 13, 2010, the U.S. Federal Trade Commission (“FTC”) issued a Notice of Proposed Rulemaking (“Proposed Rule”)¹ proposing a number of significant revisions to the Hart-Scott-Rodino (“HSR”) Act Premerger Notification Form (“HSR Form”) that companies must submit to the FTC and U.S. Department of Justice Antitrust Division for proposed transactions that satisfy the HSR Act notification thresholds.

The Proposed Rule would simplify some of the highly technical reporting requirements of the HSR Form, but would also create three new or expanded obligations to submit information with the HSR Form. In particular, the Proposed Rule would: (1) expand dramatically the information and documents that certain HSR filers, such as investment funds, must provide regarding affiliated entities under common management; (2) require all HSR filers to provide copies of certain categories of business documents that previously were not part of the HSR filing; and (3) expand and modify the revenue reporting requirements. Comments on the Proposed Rule are due by October 18, 2010.

The principal substantive changes to the HSR Act reporting requirements are:

1. Expanded Reporting Requirements With Respect to “Associate” Entities Under Common Management

The Proposed Rule introduces the concept of “associate” entities, defined as entities that are under common management with the controlling entity of the acquiring party, and imposes substantial new information reporting requirements with respect to associate entities. These additional reporting requirements would likely have a significant impact on private equity firms, investment funds, energy firms organized as master limited partnerships and other entities with holdings structured as limited partnerships or other investment vehicles that are under common management (often through a common general partner) but that are not under common “control,” as defined by the HSR Act and implementing rules. The existing HSR Act regulations define control based on a 50% threshold. However, many entities, such as partnerships and limited liability companies, are managed by entities with ownerships interests below 50%.

The existing HSR Form requires filers to provide information only with respect to itself and other entities that are under common control. The Proposed Rule would expand the information reporting requirements to all “associates” of the acquiring party. Thus, the proposed HSR Form would require the acquiring party to list, in addition to the existing reporting requirements:

- holdings of 5% or more but less than 50% of its associates in entities that derived revenues under a 6-digit North American Industrial Classification System (“NAICS”) Code in which the acquired entity or assets derived revenues (HSR Form Item 6(c)); and

¹ The FTC Press Release and Notice of Proposed Rulemaking are available at <http://www.ftc.gov/opa/2010/08/hsrcaillion.shtm>.

Client Alert.

- revenues by 6-digit NAICS Code of associates that derived revenues under the same NAICS Codes as the acquired entity or assets, and the names of such associates (HSR Form Item 7).

2. Additional Documentary Production Requirements

Under the current reporting requirements, Item 4(c) of the HSR Form requires parties to a transaction to produce documents prepared by or for an officer or director of the party for the purpose of analyzing or evaluating the transaction and that discuss certain competition related factors. The Proposed Rule would retain the Item 4(c) obligation and create a new Item 4(d) that would significantly expand filing parties' obligations to provide copies of business documents as part of their HSR Forms.

In particular, the proposed Item 4(d) would require filing parties to provide copies of the following categories of documents:

- offering memoranda (or their equivalent) that reference the assets or entities to be acquired, if prepared during the preceding two years, even if such documents were prepared for a different potential buyer or in the context of a different potential transaction, and even if not prepared by or for an officer or director;
- documents and other materials prepared for an officer or director in the preceding two years by investment bankers, consultants, or other third party advisors that contain a reference to the acquired entity or assets and that discuss issues relating to competition, even if those documents were not prepared in connection with the proposed transaction and do not specifically discuss the proposed transaction; and
- documents discussing synergies and/or efficiencies likely to result from the transaction.

Some of the documents targeted by the proposed Item 4(d) would be captured by the existing scope of the Item 4(c) reporting requirements. However, the Proposed Rule would require production of these additional categories of documents whether or not they would have been within the scope of Item 4(c).

3. Adjustments to Reporting of Revenues

The current HSR Form imposes more detailed reporting requirements for revenue derived from sales of items manufactured in the United States by the reporting party or an entity or entities common control. The Proposed Rule would expand that obligation by requiring the same detailed reporting of revenues (by 10-digit NAICS Code) from products manufactured outside the United States that are sold in or into the United States. For example, if an entity controlled by the reporting party sells products manufactured outside the United States at wholesale into the United States, then the revenue would be reported under both a manufacturing NAICS Code with respect to the intra-company transfer (at the transfer price for such transaction) as well as under the applicable NAICS Code for wholesale or retail sales (at the sale price).

In addition, in a long overdue victory for sanity, the Proposed Rule would eliminate the onerous and much hated requirement that filing parties must provide their revenues by NAICS Code for a historical "base year" (currently 2002) in addition to the most recent year.

4. Ministerial and Administrative Changes

Finally, the Proposed Rule contains numerous additional, mostly ministerial, changes to the reporting requirements, and introduces revisions to the HSR Form.

Client Alert.

The concept of an “unincorporated entity,” such as a partnership or limited liability company, was introduced in the 2005 amendments to the HSR Act. However, many of the reporting requirements under the current rules do not extend to unincorporated entity information. The Proposed Rule would largely harmonize the reporting requirements for unincorporated entities with the reporting requirements applicable to incorporated entities.

Many of the other proposed revisions appear to streamline incrementally the reporting burden. For example, the current HSR Form requires parties to provide a complete listing of the names and addresses of all entities under common control. The Proposed Rules would (a) eliminate the need to include non-U.S. controlled entities that do not have sales in or into the United States and (b) permit a party to provide only the city and state or foreign country designation for such controlled entities.

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Please contact a member of the Morrison & Foerster Antitrust and Competition Law Practice if you have questions regarding the potential impact of these revisions, or if you would like assistance preparing comments. All comments are due by October 18, 2010.

We anticipate the Proposed Rule will receive significant comment, in particular with respect to the items highlighted in sections 1-3 above, and may be refined prior to implementation. It is unlikely that the Proposed Rule, either in the proposed form or with revisions based on public comments, will go into effect before the end of this year.

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