FTC and DOJ Announce Changes to the HSR Form for Pre-Acquisition Notification

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On July 7, 2011, the Federal Trade Commission (FTC), with the concurrence of the Antitrust Division of the Department of Justice (DOJ), announced comprehensive changes to the form parties must file when seeking antitrust clearance of proposed mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) and the Premerger Notification Rules. This followed a period of public comment on the initial version of the proposed changes.

For some, the HSR form will be easier to complete; for others, the burden will increase, but may be minimized with advanced planning.

The most important changes are:

- Adding a requirement to file certain information regarding "associate" entities,[1] which includes portfolio companies of private equity groups that have a common general or managing partner, and entities within many groupings of LLCs and limited partnerships. This information was not reported previously because individual entities within many "families" of investments are not under common control.

- Requiring the filing of "Confidential Information Memoranda," or other documents intended to serve the same purpose. These are formal documents created in-house or by a third party that describe the details of the company whose stock or assets are for sale. While in the past such memoranda were often required to be submitted under Item 4(c), this change makes it clear that the documents are required to be produced even if they were not prepared for the purpose of evaluating or analyzing this specific transaction or did not contain competition-related content. By way of limitation, the new Item 4(d)(i) only requires documents prepared within the prior year and prepared by or for an officer or director or individual exercising similar functions. In many circumstances, production of Offering Memoranda may also be included within this requirement.

- Requiring the filing of materials prepared by investment bankers, consultants or other third party advisors that contain competition-related content pertaining to the transaction. These documents include "pitch books," or "bankers' books" that are developed by investment banking firms for the purpose of seeking an engagement or shopping a deal, as well as presentations regarding potential courses of action available to a company (e.g., whether to buy another business or sell a particular business) and that also contain analysis of the specific industry at issue.

- Requiring the submission of documents that evaluate or analyze the "synergies" or

"efficiencies" expected to result from the acquisition. Although many filing parties have submitted documents discussing synergies in response to Item 4(c), it is now explicit that these documents must be filed.

- Dropping the requirement to report economic code "base year" (2002) data, which was often difficult for filers to compile.
- Dropping the requirement to list a detailed breakdown of all the voting securities to be acquired.
- Adding a revenue-reporting obligation for foreign manufactured products by requiring filing persons to identify the 10-digit NAICS product codes and revenues for the most recent year for each product they manufacture outside the U.S. and sell in the U.S. at the wholesale or retail level, or that they sell directly to customers in the U.S. Such granular information may be time-consuming for many companies to prepare.

Companies expecting to make a filing within the next year should review the changes closely to determine what advance preparation may be necessary, especially if they file frequently or require filing within short timeframes. Companies also should be particularly mindful of the expanded document filing requirements when creating documents that analyze a potential transaction or sharing data as part of due diligence when there is no confidential offering memoranda.

The revisions will be effective some time in August, 30 days after publication in the Federal Register. Copies of the new form are available at www.ftc.gov/bc/hsr/hsrform.pdf.

Kelley Drye & Warren LLP

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[1] For purposes of Items 6(c) and 7 on the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a "managing entity"); or (B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen 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, directs or oversees, is managed by, directed or overseen by, or is under common management with a managing entity. 16 C.F.R. § 801.1(d)(2).