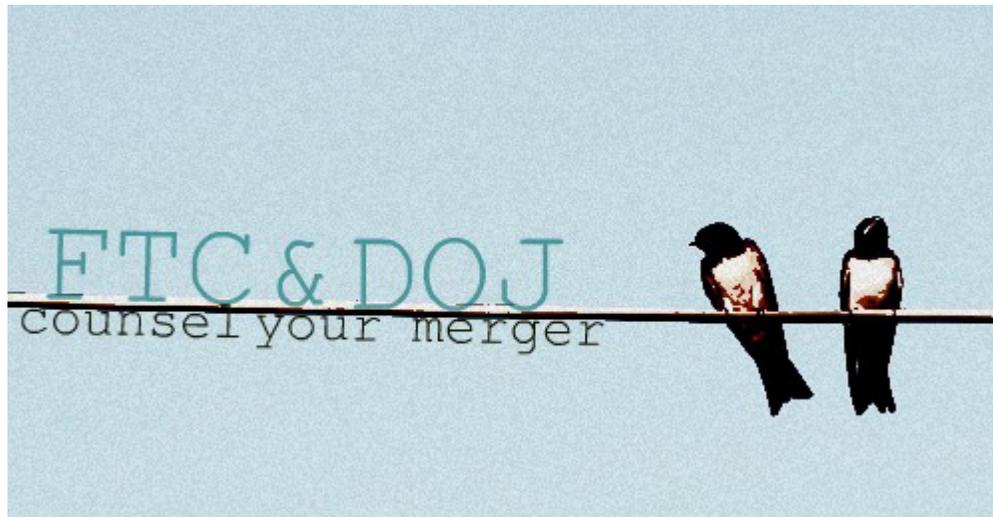




## FTC and DOJ, Your Least Favorite Marriage Counselors

July 13, 2011



You and another company fall in love and now you want to make it official by merging. It's like a big corporate romantic comedy starring Jennifer Aniston and...well...you. But before the big climactic kiss, the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) jump in and say "Whoaaaaaaa! Not-so-fast!" They can't just let the kiss happen. You need to fill out some forms and get their approval first. And now, among other things, the forms have changed.

The FTC and DOJ have modified the form and instructions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). Under the HSR Act, companies of a certain size involved in a merger or acquisition must each file a "premerger notification form" (HSR Form), and wait 30 days prior to closing the transaction. That way the DOJ and FTC have time to assess the competitive aspects of a transaction before its consummation.

### What's Your Roll In The New HSR Rules?

If you've ever seen an HSR Form, you'll see some changes, particularly when it comes to referring to the parties involved, aka "associates." Under the new regulation, 16 CFR §801.1(d)(2), "associates" are defined as an entity that is not an affiliate of such person but:

- Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a 'managing entity'); or



# Startup Law Blog

Insights for founders of and investors in emerging and startup companies

- Has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or
- Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or
- Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

Wow, this is beginning to sound less and less romantic and more like a serious business relationship, which it is. You will find that the new regulation is more philosophical. Who knew that the people down at the FTC and DOJ were so deep? According to the regulations the acquiring party must now look beyond the concept of “control.”

As specified in a DWT release, the previous regulations “determined whether it has entities that are under common investment or operation management with the acquiring person. This captures a series of private equity funds, or limited partnerships. Items 6 and 7 in the new HSR Form asks for information relating to these “associate” companies.”

For example, if a series of limited partnerships have the same general partner, they will have to provide information regarding the holdings of the other managed limited partnerships. Likewise, Item 7 of the HSR Form that requests “crossover” NAIC codes between the acquiring and acquired persons must now include information about “associates.” Item 7 additionally contains a clarification that while Item 5 involving revenues has a de minimis exception for revenues under NAIC codes that fall under \$1 million, there is no such exception under Item 7, and all crossover revenues regardless of amount must be reported.

## Other Things You Should Know About The HSR Rule Changes

It all seems a little nit-picky doesn't it? Well, that's because it is and needs to be. Life is full of opening and closing loopholes depending on needs and agendas. One of the tricks to being a lawyer is paying attention, recognizing them, and learning how they affect you. As the cliché goes, “the devil is in the details.” Here are some details added a new “Item 4(d)” on the HSR Form. We'll look for the horns later.

- **HSR Form Item 4(d)(i)** – formalizes a request for offering memoranda, which typically were submitted under Item 4(c).
- **HSR Form Item 4(d)(ii)** – asks for documents prepared within one year of the acquisition developed by third-party advisors during or while seeking an engagement that relate specifically to the acquired entity or the assets being sold, and those



# Startup Law Blog

Insights for founders of and investors in emerging and startup companies

prepared by or for any officer, director, or individual exercising similar functions. This instruction is meant to capture things like “bank books” or “pitch books” typically used at the beginning of a transaction.

- **HSR Form Item 4(d)(iii)** – requests filing parties to provide all studies, surveys, analyses, and reports evaluating or analyzing synergies and efficiencies if they were prepared by or for any officer, director, or person exercising similar functions for the purpose of evaluating the transaction.