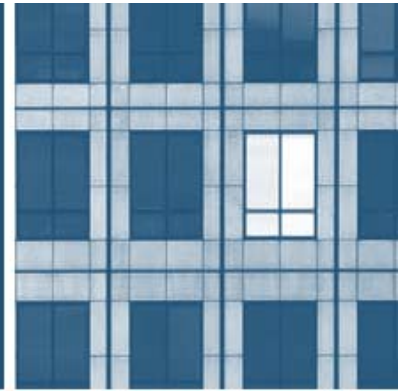


# On the Subject



## Antitrust & Competition

August 18, 2010

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While changes proposed by the FTC to the Hart-Scott-Rodino (HSR) Antitrust Improvements Act may decrease the burden of reporting by eliminating the need to gather certain data, they will significantly increase the burdens in other areas, and an overall net increase in the effort required to prepare HSR filings is expected.

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### FTC Proposes Changes to Hart-Scott-Rodino Notification Rules and Form

On August 13, 2010, the Federal Trade Commission (FTC) announced proposed changes to the rules and notification form parties to certain transactions must submit under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, as amended. The HSR act requires parties to notify the FTC and the U.S. Department of Justice (DOJ) of proposed transactions that meet the act's jurisdictional thresholds and to observe a statutory waiting period while the agencies review the competitive impact of the transaction. These proposed changes will eliminate disclosure requirements for information the FTC and DOJ no longer find helpful in their initial antitrust review, and introduce new provisions intended to capture additional information to make clear competitive relationships and implications not revealed by current HSR filings. The proposed changes also correct minor oversights from the FTC's 2005 rule making related to unincorporated entities.

As detailed below, the most significant of the proposed changes includes increased document disclosure requirements, revisions to the revenue data parties are required to report and the introduction of the concept of "associates." While the proposed changes may decrease the burden of reporting by eliminating the need to gather base-year revenue data, they will significantly increase the burdens in other areas, and an overall net increase in the effort required to prepare HSR filings is expected. The FTC is soliciting public comment on the proposed changes through October 18, 2010.

### Additional Document Disclosures: 4(d) Documents

Item 4(c) of the HSR notification currently requires submission of documents prepared by or for an officer or director "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." The proposed changes will add an Item 4(d) and expand the scope of documents parties will be required to submit.

In part, this new requirement codifies current interpretations of what constitutes a 4(c) document by explicitly requiring the submission of offering memoranda that reference the entity or assets to be acquired. Further, proposed Item 4(d) will require the submission of documents prepared by or for an officer or director of the notifying party that evaluate or analyze synergies and/or efficiencies related to the proposed transaction.

However, Item 4(d) will extend significantly beyond the parameters of Item 4(c) by requiring ordinary course studies and competitive analyses, even if they have no connection to the transaction. Proposed Item 4(d)(ii) will require submission of documents "prepared by investment bankers, consultants or other third party advisors" for an officer or director of the notifying party that reference the entity or assets to be acquired, and evaluate or analyze market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Unlike Item 4(c) though, there is no requirement that the documents were created for the purpose of evaluating or analyzing the proposed transaction. If this rule is implemented without change, it would significantly expand the scope and burden of document collection and search necessary for submission of an HSR filing, requiring a two-year search for documents from officers' or directors' files for potentially broad-ranging classes of documents.

### Changes to Required Revenue Data

Currently, the HSR notification and report form requires revenue data by North American Industry Classification System (NAICS) codes for a base year—at this time it's 2002—and the most

recently completed year. The FTC recognizes that providing data for a base year can be burdensome for some parties while not advancing the agencies' analysis of the transaction. The proposed changes eliminate the requirement for base-year revenue data, but also refine the data required for the most recently completed year. For example, parties will be required to provide manufacturing revenues for the most recently completed year by the more detailed 10-digit NAICS codes instead of the more general seven-digit NAICS code. Further, whereas the current form only requires revenues derived from U.S. operations, the proposed changes will require revenue data for products manufactured outside the United States but sold into the country. This will enable the agencies to better evaluate the parties' operations affecting the U.S. economy.

## Introduction of "Associates"

The current HSR form only requires information from the ultimate parent entities of the parties to the transaction, including data on any entities they "control." The HSR control rules are specific, and in many cases an ultimate parent entity does not control portfolio companies or other entities that are managed, but not majority owned. For example, two investment funds managed by the same organization may not be under common control for HSR purposes, and so if one fund made an acquisition, its form would not reveal any information regarding the operations of the second fund. The agencies view this data issue as a shortcoming of current HSR filings because they are interested in assessing the potential competitive impact of acquisitions by funds in those circumstances (and others).

To address these concerns and gather relevant information, the FTC's proposed changes introduce the concept of "associates." The definition of associate effectively captures entities under common management, as well as those entities controlled or managed by an associate. "Managing" refers to "the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments" of an acquiring entity in the proposed transaction.

With respect to associates, the proposed changes will require *acquiring* parties to report the following information:

- Associates' significant minority holdings (*i.e.*, between 5 percent and 49 percent) of entities that have revenues in NAICS codes that overlap with the acquired business
- The names of those entities that associates control that the acquiring person believes derive revenues in those NAICS codes that overlap with the acquired business, and the geographic areas in which the associates derive those revenues

The FTC recognizes that because associates are not controlled by the acquiring person, the acquiring person may not have perfect visibility into the operations of their associates. As such, acquiring persons will only be required to supply information about associates based on their knowledge and belief.

## Opportunity to Comment

While many of the proposed changes are ministerial in nature and will decrease parties' burdens in preparing HSR notifications, some of the changes will substantially increase the compliance burden for certain types of clients. Multinational businesses with overseas manufacturing operations that sell in to the United States will need to gather and report revenue data from those overseas operations, which has not previously been required. Private equity funds will need to report information on associates' operations which they have not previously had to gather and report. Also, the addition of Item 4(d) and the broader scope of responsive documents expand the categories of documents that could draw scrutiny from the agencies, and will likely significantly expand the scope of document searches needed to supply the documents called for by the form.

Firms that are likely to have HSR filings should begin to consider the changes to their processes that may be required, assuming the new rules are implemented later this year. Companies concerned by these requirements may wish to submit comments to the FTC with regards to the proposed changes before October 18, 2010.

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