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A legal update from Dechert's Antitrust/Competition Group

FTC, DOJ Announce Final HSR Rules Requiring Significant Additional Reporting Obligations, Including Expanded Scope of Document Production

Key Points

- The FTC and DOJ have announced final changes to the HSR filing rules, effective 30 days after publication in the Federal Register, which is expected to occur on or about July 18, 2011.
- The changes require parties to submit additional transaction-related information and may significantly increase the HSR filing burden.
- Filing parties should now expect to provide an expanded set of documents with the HSR form and will want to take into account the new HSR filing requirements when negotiating and drafting deal-related documents.
- Private equity firms and investment firms should consider updating their record-keeping procedures in light of the additional information they are now required to submit.
- Parties are well advised to develop clear and consistent articulations of the procompetitive rationales for the transaction, the potential synergies and efficiencies that will result, and the key themes to be communicated to customers, employees, and the antitrust agencies before the HSR notification is filed.

Under the Hart-Scott-Rodino ("HSR") Act, codified as Section 7A of the Clayton Act, 15 U.S.C. § 18a, parties to certain mergers and acquisitions must file notification and report forms with the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") and must observe a waiting period before consummating the transaction to allow the agencies to review the deal's potential competitive implications. The FTC and DOJ recently announced significant amendments to the HSR Premerger Notification Rules (the "Rules") and the instructions to the HSR form that expand the scope of information required to be filed with the HSR form. The new Rules do not affect whether a filing is required but are designed to ensure that the agencies receive relevant information to assist them in conducting their initial review. The rule changes will go into effect 30 days after publication in the Federal Register, which is expected to occur on or about July 18, 2011, and will apply to all HSR filings made on or after the effective date. Parties to potential transactions need to understand these rule changes and take them into account during pre-transaction planning.

New Rules Require Significant Additional Documentary Material Be Provided with the HSR Form

The most significant change in the Rules is the addition of a new Item 4(d) to the HSR form that requires submission of new categories of documents not previously required by the HSR form. Item 4(d) documents include confidential information memoranda ("CIMs") and similar documents, documents that evaluate or analyze synergies or efficiencies, and certain documents prepared by investment bankers, consultants

or other third-party advisers. These documents are in addition to the competition-related documents previously required to be submitted under Item 4(c), which is unchanged by the new Rules.

Under the current HSR Rules, Item 4(c) requires the parties to submit all documents created in connection with the transaction that were prepared by or for officers or directors of the company (or in the case of unincorporated entities, individuals exercising similar functions) and that discuss one or more of the "4(c) indicia"—market shares, competition, competitors, markets, or the potential for sales growth or expansion into new product or geographic markets. CIMs were often not submitted in response to Item 4(c), sometimes because they did not contain information responsive to the Item 4(c) indicia. The agencies believe, however, that the overview of the business typically contained in CIMs or similar documents is often quite helpful in understanding the companies and products involved.

Under the new HSR Rules, any CIM that specifically relates to the sale of the acquired entity or assets and was prepared within one year of the HSR filing must be submitted, as long as it was prepared by or for an officer or director (in the case of a corporation) or person exercising similar functions (in the case of a partnership) of the ultimate parent entity of the buyer or the seller. Under this new Rule, even if the CIM was not provided to the ultimate buyer, it must be provided with the seller's HSR filing if it meets the other requirements for submission. If there is no CIM, but the seller has given a pre-existing presentation to the buyer as an overview of the company, or has provided ordinary course materials or financial data to the buyer during due diligence specifically intended to serve the purpose of a CIM, such documents must now be submitted if they were given to an officer or director of the buyer. This change should not greatly increase the burden of production.

However, two other categories of requested documents are likely to increase the HSR filing burden substantially. Parties are now required to submit certain documents prepared by investment bankers, consultants, or other third-party advisers that (i) specifically relate to the transaction; (ii) were prepared during an engagement or for the purpose of seeking an engagement; (iii) were prepared within one year of the HSR filing; (iv) were prepared by or for an officer or director (in the case of a corporation) or person exercising similar functions (in the case of a partnership) of the ultimate parent entity of the buyer or the seller; and (v) were prepared for the purpose of evaluating or analyzing market shares, competition, competitors, markets, or the potential for sales growth or expansion into new product or geographic markets. This request is designed to capture "bankers' books"—presentations that often include discussions of strategic alternatives and analyses of the specific industry involved. This new requirement also seeks to capture materials that were prepared by third-party advisers hired by the company to develop or analyze strategic alternatives, including with respect to the transaction at issue.

The new HSR Rules will also require the submission of all documents that evaluate or analyze synergies or efficiencies that were created for the purpose of evaluating or analyzing the transaction. These documents, without any separate competition-related content, have not previously been captured by the Item 4(c) requirement. The agencies recognize that these types of documents can be quite useful to staff in evaluating the competitive implications and potential benefits of a transaction. To be responsive, the synergy or efficiency documents must have been prepared by or for an officer or director (in the case of a corporation) or person exercising similar functions (in the case of a partnership). The FTC and DOJ note that while filing parties are free to assert synergy arguments at any time, there is "a possibility" that documents submitted with an HSR filing may carry greater weight with the agencies than materials created and submitted post-filing, including during an investigation.

These expanded document requirements underscore the fact that it is essential to be cautious in creating deal-related documents. It is important for parties to have a clear understanding of the procompetitive rationale for a transaction and the potential synergies or efficiencies resulting from the transaction, and to be able to articulate the key transaction-related themes that will be emphasized to customers, employees, and the antitrust agencies, and parties are well advised to develop and articulate these explanations prior to the time the merger or acquisition agreement is signed and the filing is made. The key points and deal rationale should underlie all document creation once they have been articulated. It is important to consult with counsel early in a transaction to help shape and articulate these key themes and points.

Additional Information for Businesses "Associated" with, But Not Controlled by, the Buyer to the Transaction

The HSR program was designed to permit the agencies to review transactions of a certain size prior to closing to determine whether a proposed transaction may substantially lessen competition and violate the antitrust laws. To help the agencies with this analysis, the current HSR Rules require the parties to provide information regarding competitively relevant overlaps involving entities controlled by each party. However, because the current definition of "control" under the HSR Rules does not always capture entities that are under common investment or operational management with the buyer, the agencies have not been receiving information on competitively relevant holdings of entities "associated" with, but not "controlled" by, the buyer. The agencies have been asking for this type of information informally over the past few years. The new Rules formalize this data collection.

The new HSR Rules will require for the first time that buyers report any holdings of their "associates," *i.e.*, firms whose operations or investment decisions are under common management with the buyer, in any entity that overlaps in the same line of business with the seller—regardless of whether the buyer's interest is controlling or minority. This new requirement could significantly increase the burden of HSR compliance for some private equity funds and investment firms. The agencies believe that the burden will be greatest for a first-time filing and that the ongoing burden of maintaining this information will be limited. At a minimum, however, private equity firms and investment funds will be well advised to create and maintain an up-to-date list of all the businesses conducted by each of their portfolio companies, defined by 6-digit NAICS industry codes. This will allow for quick retrieval of overlap information under the time pressure usually associated with preparation of an HSR filing.

If you have any questions regarding these changes in the HSR Rules, please contact any of the Dechert LLP attorneys listed below.

A link to the press release announcing the final Rules is below. From the press release, you can access the official announcement by the FTC and DOJ.

FTC, DOJ Announce Changes to Streamline the Premerger Notification Form

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Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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