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New Amendments To Hart-Scott-Rodino Premerger Notification Rules

On July 7, 2011, the Federal Trade Commission announced a final rule amending the Hart-Scott-Rodino Premerger Notification Rules (the "Rules") and the Premerger Notification and Report Form (the "Form") and associated Instructions to streamline the Form and obtain new information that the FTC and the Antitrust Division of the Department of Justice (the "Agencies") believe will help them in evaluating a proposed transaction's competitive impact.

The final rule makes both substantive and ministerial revisions, deletions and additions to the Form, as well as minor changes to the Rules primarily to address omissions from the FTC's 2005 rulemaking involving unincorporated entities. Many of the ministerial changes revise or delete items asking for information which the Agencies no longer consider necessary for their initial review, such as revenue data for 2002 by NAICS codes, a description of assets to be acquired, and detailed information regarding voting securities to be acquired. In addition, the final rule calls for additional information, such as current year revenues by 10-digit NAICS code, which the Agencies consider helpful.

The final rule makes three noteworthy substantive changes. The most significant change is the addition of the concept of an "Associate" of the acquiring person and the requirement to submit information on controlling and minority interests of Associates that have NAICS code overlaps with the entity or assets being acquired.

The final rule defines Associate as follows:

> **Associate.** For purposes of Items 6 and 7 of 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 the operations or investment decisions of an acquiring entity (a "managing entity"); or (B) has its operations or investment decisions, directly or indirectly, managed 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, is managed by, or is under common operational or investment management with a managing entity.

The purpose of this addition is to close a gap in information regarding entities that are commonly managed with the acquiring person, such as families of investment funds, but are not controlled, as defined by the Rules, by the Ultimate Parent Entity of the acquiring person. As a result, the Agencies do not receive the information regarding competitive overlaps necessary to get a complete picture of the potential antitrust ramifications of an acquisition.

The second substantive change is the addition of new Item 4(d) of the Form, which requires the submission of three categories of documents:

- Item 4(d)(i) calls for all Confidential Information Memoranda (or documents meant to serve such function) prepared by or for an officer or director that specifically relate to the sale of the acquired entity or assets produced up to one year before the filing.

- Item 4(d)(ii) requires all documents prepared by third party advisors for any officer or director that evaluate any competitive issue that specifically

relates to the sale of the acquired entity or assets produced up to one year before the filing.

- Item 4(d)(iii) calls for all documents evaluating or analyzing synergies and/or efficiencies prepared by or for any officer or director for the purpose of evaluating or analyzing the acquisition.

The third substantive change is an addition to Item 5(a) of the Form requiring revenue information by 10-digit NAICS code for products manufactured outside the U.S. but sold in or into the U.S.

The final rule had a long gestation period, as the notice of proposed rulemaking was published in the Federal Register on September 17, 2010, and the comment period closed on October 18, 2010. The final rule will become effective 30 days after the date of publication in the Federal Register.