August 24, 2010

The FTC Proposes Amendments to the HSR Rules and Notification Form

New Rules Governing Filings by Private Equity and Other Funds

New Requirements for Submission of Business Documents

On August 13, 2010, the FTC published a notice of proposed rulemaking, setting forth substantial proposed revisions and amendments to the Hart-Scott-Rodino ("**HSR**") Premerger Notification Rules (the "**Rules**") and the Premerger Notification and Report Form (the "**Form**"). Public comments to the proposed Rules and Form changes will be accepted until October 18, 2010.

The HSR Act requires parties to mergers and acquisitions that exceed certain jurisdictional thresholds to make filings with the FTC and the DOJ and to observe a waiting period before closing. Parties are required to provide notification pursuant to the Rules and on the prescribed Form. The Form is designed to provide the agencies with the information and documents necessary to conduct an initial review of a transaction during the waiting period.

The August 13 proposals do ***not*** affect the determination of whether an HSR filing will be required for a given transaction. Instead, they focus on the information that must be included in the HSR filing itself. Certain revisions are intended to eliminate information requests that the FTC no longer deems useful in the initial review of transactions. The more controversial revisions, however, would expand – in some cases substantially – the types and amount of information that must be collected and included in the HSR filing. Whether the net effect of the revisions would increase or decrease the burden on filing parties will, of course, depend on the type of entities involved and the nature of the transaction. The major proposed revisions are described below.

Proposals Relating to Private Equity and Other Investment Funds

Perhaps the most controversial proposed revisions will be those aimed at acquisitions by private equity and other investment or merchant banking funds.

As noted above, the proposed revisions would **not** change the rules governing whether or not an HSR filing is required. Instead, the revisions focus on the **type and detail of information that must be provided** in the event that a filing is required. The revisions may signal increased antitrust scrutiny for private equity fund transactions.

Here are the specifics:

- The revisions would define a new concept of an "associate" of a fund or other limited partnership for purposes of collecting and providing information in an HSR filing.
- An "associate" would be defined to include all funds that are managed by the same adviser or general partner as the fund making the filing, as well as the adviser/general partner itself. The specific definition of "associate," as set forth in the proposal is:

> *an entity that . . . : (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 by or overseen by, or is under common management with a managing entity.*

- Under the proposed rules, a fund making an HSR filing would have to include in its filing not only detailed information about its own holdings, but also the following types of information regarding all "associates":
    - a list of all *minority* holdings (i.e., greater than 5% but less than 50% interest) of each associate which, to the knowledge or belief of the filing party, derive revenue in a NAICS code which overlaps with, or is in the same "industry" as, the target entity or assets.
    - a list of all NAICS codes or industries in which, to the knowledge or belief of the filing party, both the target entity and any associate, including its *majority-owned* holdings (50% or greater interest), generate revenue, including the name of the holding(s) generating that revenue.
- **Practical implications:** For each filing, the filing party (that is, the fund or limited partnership) would have to gather potentially detailed information about the holdings of its "managing entity" as well as the holdings of all other funds managed by that entity. Depending on the extent of the relationships among funds and their advisers, this could impose a *substantial* additional burden in preparing an HSR filing.

New Requirements for Submission of Business Documents

Business Documents to Be Submitted With the Filing. Currently, Item 4(c) requires the submission of:

> *"all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) of [the ultimate parent entity and/or any entity controlled by the UPE] . . . for the purpose of evaluating or analyzing the proposed acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. . . ."*

The new Rules and Form would require the submission of additional documents currently outside the scope of the typical "4(c)" request. The main changes are as follows:

- *First*, all "offering memoranda" prepared within the two years prior to filing, whether or not prepared by or for any officer or director, and whether or not prepared to evaluate or analyze the proposed acquisition reported, would be required if these memoranda "reference" the acquired entity(s) or assets.
- *Second*, investment bank documents prepared within the last two years, by or for any officer or director, and which "reference" the acquired entity(s) or assets would be required, whether or not prepared for the proposed acquisition reported.
- *Third*, efficiencies and synergies documents prepared by or for any officer or director and to evaluate or analyze the proposed acquisition reported would be required. However, "financial models with no stated assumptions" may be excluded.
- *Fourth*, the revisions would make clear that all non-compete agreements between the filing parties must be submitted, whether executed or in most recent draft form.

Other Proposed Revisions

Reporting of Revenue Information: The revisions would simplify revenue reporting to require only revenue by NAICS code for the most recent fiscal year. They also will require reporting of revenue for products manufactured outside of the U.S. for import into the U.S.

- Filing parties currently are required to submit U.S. revenue data by NAICS codes for both a "base year" (currently 2002), and the most recent fiscal year. The new rules would eliminate the requirement of providing information for the base year – that will eliminate a task that has proven to be burdensome for many filers.
- Firms that manufacture products outside of the U.S. for import into the U.S., whether through a controlled entity or directly, would now be required to report revenue from the sale of such products at the 10-digit NAICS code level. Currently, firms either report this revenue under the simpler 6-digit "wholesaling" or "retailing" NAICS codes, or not at all.

Information regarding Corporate Structure: Requests for information regarding corporate structures, subsidiaries, and minority investments for most filers would be streamlined.

- The Form would require only the list of entities controlled by the filing person which are located in the U.S. or that have sales in or into the U.S., and then only by name and city/state or city/foreign country, rather than by full street address.
- Item 6(b) would be simplified to require listing 5% minority interest holders only of the ultimate parent entity of an acquirer and of its acquiring entity (if different), rather than of all entities controlled, but not wholly-owned by, the ultimate parent.
- Limited partnerships would be required to disclose their general partners, but not their limited partners.
- Finally, Item 6(c)(i) would require a listing of an acquirer's or target's minority interests of non-controlled entities of 5% or more only of those entities which, to the filing person's "knowledge or belief," derives revenues in the same 6-digit NAICS code, or in the same industry, as the target or acquirer, respectively.

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The revisions described above would, if adopted, change the way in which many HSR filings are prepared. Some of the revisions would reduce burden, while others may increase burden, in some cases substantially. We will continue to monitor the progress of these provisions.

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