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CLIENT MEMORANDUM

July 8, 2011

The FTC Issues Amendments to HSR Rules and Notification Form

New Rules Governing Filings by Private Equity and Other Funds

New Requirements for Submission of Business Documents

On July 7, 2011, the FTC published on its website a notice of final rulemaking, setting forth substantial revisions and amendments to the Hart-Scott-Rodino ("**HSR**") Premerger Notification Rules (the "**Rules**") and the Premerger Notification and Report Form (the "**Form**"). The new Rules and Form will be effective in mid-August of this year, 30 days after official publication in the *Federal Register*, and must be used for all transactions notified on or after that date.

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.

These revisions and amendments 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. Other revisions, however, 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 most significant revisions and amendments are described below.

Proposals Relating to Private Equity and Other Investment Funds

Perhaps the most significant revisions are those aimed at acquisitions by private equity and other investment or merchant banking funds.

As noted above, the revisions do ***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. These revisions may signal increased antitrust scrutiny for private equity fund transactions.

Here are the specifics:

- The revisions 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" is 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 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.*

- Under the rules, a fund making an HSR filing as an acquirer must 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 of (i) the target and (ii) any entity that, to the knowledge or belief of the acquirer, derives 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 the associate's *controlled* holdings (50% or greater interest), generate revenue, including the name of the holding(s) generating that revenue.
    - for each NAICS code identified above, the geographic market for the activities of that associate, or entity controlled by the associate, generating revenue in that code
- **Practical implications:** For each filing, the filing party (that is, the fund or limited partnership) must now gather potentially detailed information about the holdings of its "managing entity" as well as the holdings of all other funds managed by that managing entity. Depending on the extent of the relationships among the funds and their managing entities, 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 require the submission of additional documents currently outside the scope of the typical "4(c)" request. The main changes are as follows:

- *First*, all "confidential information memoranda" for a target business prepared within one year prior to filing, prepared by or for any officer or director, that "specifically relate to the sale of the acquired entity(s) or assets," whether or not provided to the buyer, and all documents given to the buyer that are "meant to serve the function of" a CIM, if no CIM exists, must be submitted. (Many of these documents are already submitted as 4(c) material.)
- *Second*, "studies, surveys, analyses, and reports" prepared within one year prior to filing by investment banks, consultants, or other third-party advisers "for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets," and which "specifically relate to the sale of the acquired entity(s) or assets" must also be filed. This requirement goes beyond Item 4(c) in that it requires production of these documents from third parties "during an engagement or for the purposes of seeking an engagement" even if they were not prepared specifically for the purpose of analyzing the notified acquisition.
- *Third*, efficiencies and synergies documents prepared by or for any officer or director and to evaluate or analyze the proposed acquisition reported are required. However, "financial models without stated assumptions" may be excluded.

- *Fourth*, the revisions make clear that all non-compete agreements between the filing parties must be submitted, whether executed or in their most recent draft form.

Other Proposed Revisions

Reporting of Revenue Information: The revisions 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 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 eliminate the requirement of providing information for the base year; that will eliminate a task which has proven to be burdensome for many filers.
- Firms that manufacture products are now required to report revenue from the sale of such products at the 10-digit NAICS code level for the most recent fiscal year, whether or not those products were manufactured by the firm within or outside the U.S. Currently, firms either report revenue from products manufactured abroad under the simpler 6-digit "wholesaling" or "retailing" NAICS codes, or not at all. Firms that sell products manufactured by others would still report sales of those products using 6-digit NAICS codes.

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

- The new Item 6(a) of the Form now requires 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.
- The new Item 6(b) now requires 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 must disclose their general partners, but not their limited partners.
- Finally, the new Item 6(c)(i) now requires 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," derive revenues in the same 6-digit NAICS code, or in the same industry, as the target or acquirer, respectively.

Some of the revisions would reduce the burden of preparing HSR filings, while others may increase the burden, in some cases substantially.

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