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Landmark Revisions To The HSR Rules And Form Announced

On August 13, 2010, the U.S. Federal Trade Commission ("FTC") proposed landmark revisions to the Hart-Scott-Rodino ("HSR Act") Notification and Report Form ("HSR Form"), as well as to the rules and regulations promulgated under the HSR Act (the "Proposed Revisions"). The Proposed Revisions, which affect nearly every item in the HSR Form, are the most significant since the HSR Act became effective in 1978.

Overall, the Proposed Revisions impose new and significant burdens on all transacting parties whose deals are captured by the HSR filing thresholds (which remain unchanged). The Proposed Revisions were published in the *Federal Register* and are subject to a comment period that closes on October 18, 2010; therefore, the changes discussed below may not ultimately be adopted.

The HSR Act requires that parties to certain mergers or acquisitions file the HSR Form with the two federal agencies charged with the enforcement of the antitrust laws, the FTC and the Antitrust Division of the U.S. Department of Justice (the "DOJ" and, collectively with the FTC, the "Agencies"). Parties whose transaction falls within the HSR Act's jurisdiction must wait for a specified period of time (typically 30 days) before consummating their deal. The reporting requirement and waiting period provides the Agencies with both an opportunity to investigate the transaction for possible violations of U.S. antitrust laws and time to seek a preliminary injunction in federal court to enjoin the parties from closing. The Proposed Revisions are designed to accomplish two broad goals. First, the FTC proposes to add new requirements to the HSR Form designed to aid their analysis of the competitive effects of a proposed transaction. Second, the FTC proposes to streamline the HSR Form by eliminating those sections deemed obsolete or otherwise surplus to requirements. Many of those requirements eliminated are ministerial in nature and not discussed herein.

Proposed Item 4(d) — Requirement to Produce Additional Documents

The HSR Form has long required transacting parties to produce, pursuant to Item 4(c), those documents that (i) were prepared by or for an officer or director of the filing party, (ii) were prepared for the purpose of evaluating or analyzing the proposed transaction, and (iii) which discuss "market shares, competition, competitors, markets, potential for sales growth, and the potential for expansion into new products or geographic markets" (the latter requirement referred to as "4(c) content"). To this requirement, the FTC proposes to add three further categories of documents that must be collected and produced along with the HSR Form:

- ***Proposed Item 4(d)(i)*** requires the submission of all offering memoranda (or functional equivalents) that were prepared within two years of the filing date and reference the acquired assets or entity, regardless of whether the document was prepared in connection with the proposed transaction, was prepared for an officer or director, or contains 4(c) content. Although this requirement mirrors typical Agency requests at the start of an investigation, proposed Item 4(d)(i) imposes this requirement on all transacting parties, regardless of the likely competitive effects of their transaction. Moreover, by eliminating the Item 4(c) officers and directors limitation, proposed Item 4(d)(i) extends the required search of files to any company employee who may have received such documents at any time over the last two years.
- ***Proposed Item 4(d)(ii)*** requires the production of all documents prepared by

investment bankers, third party consultants and other advisors within two years of filing that reference the acquired assets or entity and which evaluate or analyze 4(c) content. Proposed Item 4(d)(ii) likewise dispenses with the caveat that the documents must have been prepared for the purpose of analyzing or evaluating the proposed transaction and, accordingly, potentially captures a much wider array of documents, including documents that were prepared for transactions that have been long since abandoned or were never seriously considered.

- ***Proposed Item 4(d)(iii)*** requires the production of all studies, analyses, or reports that (i) were prepared for the proposed transaction, (ii) evaluate or analyze the expected synergies or efficiencies of the proposed transaction, and (iii) were prepared by or for an officer or director of the filing party. Proposed Item 4(d)(iii) is a sensible response to the frequent criticism that Item 4(c) fails to include documents discussing efficiencies or synergies produced by the proposed transaction. Although this new requirement will impose an additional burden on transacting parties, the benefit of providing the Agencies with greater insight into the transaction rationale prior to the clearance determination far outweighs that burden.

Proposed Revisions to Item 5

Item 5 of the HSR Form currently requires each filing party to report revenue by reference to North American Industrial Classification System ("NAICS") Codes for both the so-called "base year" (currently, 2002) and the filing party's most recent fiscal year. The Proposed Revisions eliminate the requirement to report base year revenues as well as data for products added or deleted between the base year and the current year. These revisions eliminate what had been for many parties an overly burdensome exercise compiling information that the Agencies consider to be of limited value.

The Proposed Revisions also make two substantive changes to the Item 5 requirements that promise to increase burdens substantially for filing parties, particularly those parties with overseas operations. First, the Proposed Revisions require the filing person to allocate manufacturing revenues under the more detailed 10-digit NAICS codes, rather than the 7-digit codes currently required. Secondly, the Proposed Revisions fundamentally change the universe of manufacturing revenues that must be disclosed in Item 5. Presently, the rules do not require filing parties to report in Item 5 those revenues generated through direct sales of foreign manufactured goods into the U.S. The proposed revisions eliminate the distinction between domestically-produced and foreign-produced goods, requiring all revenues to be reported under 10-digit NAICS codes.

Proposed Revisions to Items 6 and 7 — Extension of Reporting Requirements to "Associates"

Item 6 of the HSR Form requires the filing parties to disclose their majority owned subsidiaries, major shareholders (5% or more of outstanding voting securities), and minority holdings. Item 7 of the HSR Form requires the filing parties to identify any NAICS code overlaps between the parties and to describe the geographic markets where the relevant revenues were earned. Presently, the Items 6 and 7 requirements apply only to entities controlled by the ultimate parent entity of each filing party. As such, the current rules do not capture information on entities that are not controlled by the ultimate parent entity but which share common management. Those related entities are defined in the Proposed Revisions as "associates" and would include, for example, the general partners of a limited partnership, oil and gas master limited partnerships and the portfolio companies of private equity funds. Pursuant to proposed Item 6(c)(ii), the acquiring person would have to disclose, to the best of its knowledge and belief, all minority holdings of 5% or more of any of its "associates" that derived revenues in any of the 6-digit NAICS codes that overlap with the acquired entity or assets. Pursuant to proposed Item 7, the acquiring person would have to disclose, to the best of its knowledge and belief, all entities controlled by any of its "associates" that derived revenue in any of the 6-digit NAICS codes that overlap with the acquired entity or assets, as well as the geographic markets in which those revenues were earned.

Other Proposed Revisions

The Proposed Revisions include a number of changes to Items 1, 2 and 3 of the HSR Form that are primarily designed to conform to current best practices. Of particular note is the requirement to

produce either the executed final, or most recent draft, of any non-compete agreements under proposed Item 3(b). The Proposed Revisions also amend the financial information requested in Items 4(a)-(b) in a manner designed to reduce the burdens on filing parties.

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As noted above, the Proposed Revisions are open for public comment until October 18, 2010. It is therefore possible that additional changes will be made to the Proposed Revisions following the comment period. In any event, we expect that the final rules will become effective late this year and are likely to require some modification to current best practices, not least of which may be whether the standard five-day filing requirement for HSR is still practical. If you have any questions or would like to discuss how the Proposed Revisions may affect your best practices, please contact Ethan Litwin (212-837-6540; litwin@hugheshubbard.com) of the Antitrust Practice Group.

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