Major Revisions to HSR Form Adopted by U.S. Agencies

hugheshubbard.com

eALERT

Revisions streamline the process but complicate matters for financial sector and overseas manufacturers.

On July 7, 2011, the Federal Trade Commission and the Antitrust Division of the Department of Justice (the "Agencies") announced the adoption of long-awaited revisions to the Hart-Scott-Rodino Premerger Notification and Report Form ("HSR Form"). These revisions, the most comprehensive in U.S. history, will go into effect 30 days after their publication in the Federal Register.

In part, the revisions represent a welcome streamlining of the HSR Form. Notably, the Agencies have eliminated the requirement to provide detailed revenue information by relevant North American Industry Classification System ("NAICS") codes for the so-called "base year," along with the requirement to identify similar data for manufactured products subsequently "added or deleted." The revised HSR Form also removes the requirement of providing a detailed breakdown of the voting securities and assets to be acquired.

The Agencies, however, have also added three new and potentially burdensome requirements to the revised HSR Form. Certain changes will have a disproportionate impact on filing parties in the financial sector, as well as on overseas manufacturers.

"Associates"

The most significant revision to the HSR rules concerns the reporting of information from so-called "associates." Under the prior rules, information had been restricted to ultimate parent entities and entities controlled by such ultimate parent entities. Under the revised rules, however, parties are required to produce information for a wide range of entities that they do not control, namely "associated" entities that are under common management with the acquiring person, but not controlled by it. Principally, the reach of the new requirement to produce information for associates will fall on the shoulders of financial institutions such as private equity firms, which will now be required to report information for investments made by the various funds that have a common general partner. For all associates, parties will need to disclose at least the existence of investments of 5% or greater with revenues in the same 6-digit NAICS code as the target or are otherwise in the same industry. In all such cases, parties will also have to complete Item 7 for their associates.

New Requirement to Produce Additional Categories of Documents

Item 4(c) has long required the production of certain documents that were prepared by or for an officer or director of the parties to the transaction, if those documents both analyzed or evaluated the transaction and contained information related to markets, market shares, competition, competitors, potential for sales growth or expansion into product or geographic markets ("4(c) Content"). The 4(c) requirement is unchanged in the revised HSR Form. In addition to the 4(c) requirement, the Agencies now require the production of three categories of documents under the new Item 4(d). Although Item 4(d), as adopted, is substantially revised from the version first proposed last year, these new requirements will increase the burden on most filing parties. In sum, Item 4(d) now requires the production of these categories of additional documents:

- Item 4(d)(i) is intended to capture Confidential Information Memoranda ("CIM") or, if no CIM exists, documents serving the purpose of a CIM, that were prepared by or for an officer or director and specifically relate to the sale of the target, regardless of whether such documents contain 4(c) Content. In response to several comments on the 2010 proposed revisions, the Agencies have included three important limitations to this requirement. First, only documents prepared up to one year before the date of the filing need be included. Second, to avoid the inadvertent capture of ordinary course materials, the Agencies have clarified the requirement to exempt production of ordinary course material where either a CIM is submitted with the filing, or where no ordinary course material shared in due diligence served the function of a CIM. Third, the requirement to search for responsive documents is limited to officers and directors of the Ultimate Parent Entity of the parties. As a result of these helpful limitations, compliance with Item 4(d)(i) will be more straightforward.

- Item 4(d)(ii) is intended to capture a range of documents prepared by the parties' investment bankers, consultants or other third parties, regardless of whether the documents were prepared for the specific acquisition being notified. Responsive documents only need to be produced if they were prepared by or for an officer or director of the Ultimate Parent Entity of the parties within one year of the date of filing. Although the Agencies have limited this requirement to those materials that were prepared during an engagement or for the purpose of seeking an engagement, Item 4(d)(ii) raises significant privilege issues and will require the submission of a privilege log with most filings.

- Item 4(d)(iii) essentially adds an additional category to Item 4(c), adding to the list of 4(c) Content, documents that analyze or evaluate the synergies or efficiencies of the notified acquisition. Financial models without stated assumptions are exempt from this requirement.

Simplified Item 5

As noted above, Item 5 has been simplified to require only revenue data for the filing party's last fiscal year. In a significant departure from past practice, the Agencies now require parties to identify revenues by relevant 10-digit NAICS product codes for products manufactured outside of the U.S. and sold inside the U.S. Thus, regardless of where products are manufactured, revenues from U.S. sales of manufactured products must now all be reported by the relevant 10-digit NAICS code. Sales of products that were not manufactured by the parties continue to be reported under the applicable 6-digit NAICS wholesaling or retailing codes. This requirement places a new and very burdensome requirement on foreign manufacturers, who are largely unfamiliar with NAICS. Accordingly, foreign manufacturers may require additional time to complete their first HSR Form under the new rules.

■ ■ ■ ■ ■

The revisions to the HSR Form are the most significant changes to the U.S. premerger review in decades. If you have any questions or would like to discuss how the revisions may affect your best practices, please contact Ethan Litwin (212-837-6540; litwin@hugheshubbard.com), of our Antitrust Practice Group.

Antitrust Practice Group
July 2011

Hughes Hubbard
Critical matters. Critical thinking.®