FTC and DOJ Finalize Rules Changing Premerger Notification Requirements

On July 7, 2011, the Federal Trade Commission and Department of Justice (the Agencies) announced amendments to the premerger filing requirements under the Hart-Scott-Rodino Act (HSR). Although the Agencies billed the changes as a “streamline” to the existing rules that would reduce the burden for most filers with respect to some of the changes, such as the elimination of “base year” revenue reporting, it increased the categories of internal business documents that must be submitted with the application, and expanded the information required about certain associated entities. The new rules will take effect 30 days after formal publication, or about mid-August 2011.

Elimination of “base year” revenue reporting

One significant and uncontroversial change is the elimination of the requirement to provide “base year” data. Currently, HSR filers must report U.S. revenue for 2002 as a comparison “base year,” classified under the 2002 North American Industry Classification System (NAICS), in addition to such information for the most recent year. In practice, companies often did not maintain this information in the form sought, requiring the filing party to analyze and reclassify 2002 revenue using NAICS codes, including making adjustments to reflect subsequent acquisitions and divestitures. The rule changes eliminate this requirement and the attendant burden. Most recent year revenue information using NAICS codes must still be provided.

Submission of additional business documents

The amendments will require the submission of additional business documents that the Agencies consider helpful in assessing whether or not to challenge a merger or acquisition. Currently, filers must submit documents created by or for officers or directors in evaluating the

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transaction, what are commonly known as “4(c) documents” after the item on the form that requires them. The Agencies have added a new Item 4(d), requiring the following three additional categories of documents:

4(d)(i) **Confidential Information Memoranda.** The Agencies will now specifically require submission of offering memoranda or other material prepared for prospective buyers about the business or assets being sold within the past year. These materials must be submitted even if they do not contain the competition-related information sought in Item 4(c) or are not actually provided to prospective buyers.

4(d)(ii) **Material prepared by investment bankers, consultants or other third party advisors.** Filers must now also submit studies, surveys, analyses and reports prepared for any officer or director within the previous year relating to the proposed sale. This category includes “pitch books” that investment bankers or other consultants may use to seek an engagement, even if such material was unsolicited.

4(d)(iii) **Material evaluating or analyzing synergies and/or efficiencies.** The final new category of documents requires the submission of all studies, surveys, analyses and reports prepared by or for an officer that analyzes the synergies related to the proposed transaction. Financial models without stated assumptions do not need to be included.

**Addition of report on U.S. sales from foreign manufacturing**

The Agencies now under Item 5 will require filers to report and classify by NAICS code revenues for each product they manufacture outside the U.S. and sell in the U.S. This includes sales at the wholesale and retail level, and includes any sales directly to customers in the U.S.

**Expansion of reporting requirement about entities under common management**

The rule changes also expand the reporting requirements to include certain persons and entities under common management. Currently, the acquiring person only need file information for entities they “control,” effectively excluding entities that the filer may manage but that does not meet the threshold for “control,” as is the case for many private equity firms and other complex management organizations, such as a master limited partnership with multiple competitive overlaps among limited partners that share the same general partner.

The new rules introduce a new concept of an “associate,” defined as 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)

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3 Item 4(c) requires the submission of “studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” 16 C.F.R. § 803.
directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity.

For more information, please contact the following Barnes & Thornburg LLP’s attorneys: Kendall Millard (317-231-7461; kmillard@btlaw.com) or Kepten Carmichael (317-231-7524; kcarmichael@btlaw.com); or other members of our Antitrust and Competition Law Practice Group.

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