

**Reduction in Burdens or More Headaches?  
FTC to Change HSR Act Premerger Notification Form and Rules**

**August 23, 2010**

The Federal Trade Commission (FTC) has announced that it is proposing changes to the Hart-Scott-Rodino Act (HSR Act) premerger notification form and rules. Almost every aspect of the form will be affected in some way. With one or two exceptions, noted below, the proposed changes will reduce the burden on filing parties, particularly for acquisitive clients such as private equity firms and strategic buyers who are active in mergers and acquisitions.

No longer will a filing company's finance professionals need to dig up 2002 revenue broken down by the North American Industry Classification System (NAICS) code for businesses not even owned in 2002 nor will a private equity fund be required to collect the most recent nonpublic balance sheets from every company in its portfolio.

**Reduced Burdens**

The FTC recognized that many items in the HSR form do not generate information useful to antitrust enforcement and that they be modified or dropped completely. The most significant of these proposed changes are:

<i>Item</i>	<i>Current</i>	<i>Change</i>
4(b)	Provide the most recent balance sheet (even if unaudited) for all U.S. corporations within the filing person	Eliminated
5	Provide 2002 year revenue by 6-digit and 10-digit NAICS codes	Eliminated
6(b)	Provide all 5% or greater shareholders of corporations within the Acquiring Person	List only 5% or greater shareholders of the Ultimate Parent of the Acquiring Person filing. For limited partnerships such as private equity funds, <i>only</i> general partners need to be named (private equity investor limited partners need not be listed)

## Additional Burdens

The FTC has also proposed changes that codify two decades of informal FTC requirements and practice. As filers typically already provide much of this information, the actual additional burden should be light:

<i>Item(s)</i>	<i>Current</i>	<i>Change</i>
4(d)(i)	None	Provide offering memorandum, or similar type selling aids for the target business, even if not seen by an officer or director, created up to two years prior to filing
4(d)(ii)	None	Provide third-party studies ( <i>e.g.</i> , investment banker or industry consultant reports), seen by an officer or director, created up to two years prior to filing that analyze the target with respect to competition, sales growth, or expansion in product and geographic areas, even if not prepared for the transaction
4(d)(iii)	None	Provide all studies prepared for the transaction (except those without stated assumptions) seen by an officer or director that evaluate or analyze efficiencies and/or synergies created by the transaction
6(c)(ii), 7(b), and 7(d)	None	Provide certain information relating to any business (both 5% or greater minority and majority holdings) of the purchaser that competes with the target that is managed by the same general partner, even if such company investment is held in a fund that is not making the acquisition

Because the proposed changes could potentially lead to the disclosure to the antitrust authorities of documents prepared in the ordinary course of business by outside advisors, it is imperative that companies ensure that their outside advisors use care in their written analysis. Hyperbole, such as claims of “dominating the market,” should be avoided to prevent unnecessary government scrutiny of transactions.

While the proposed changes will be of significant help to filing parties, the form could be further streamlined, as many of the requirements (other than Item 4(c) and the new Item 4(d) described above) do not provide meaningful guidance as to the competitive effects of a proposed transaction. Fortunately, however, the FTC has not followed many foreign jurisdictions that require the parties to define affirmatively and analyze the market(s) in which the parties operate. Such foreign filings can take weeks (and even months) to prepare, often require numerous hours of attention from key business professionals within the parties, and result in substantial legal fees even for transactions that raise little antitrust concern.

**The public comment period is scheduled to end on October 18, 2010 and the new form and rules should go into effect shortly thereafter.**

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