

**For Better or Worse?
FTC and DOJ Remake Hart-Scott-Rodino Act Premerger Notification Form and Rules**

July 12, 2011

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) recently modified the premerger notification form and rules for transactions reportable under the Hart-Scott-Rodino Act (HSR Act). The new form and the amendments to the HSR rules will become effective 30 days after publication in the *Federal Register*, which is expected shortly. Transactions filed with the FTC and the DOJ prior to this date, meaning at least prior to August 10, 2011, will NOT be required to comply with the new rules.

Almost every aspect of the form will be affected in some way. With the exceptions noted below, the changes will reduce the burden on filing parties, particularly for acquisitive clients such as private equity firms and certain strategic buyers.

Reduced Burdens

The FTC recognized that many items in the HSR Form do not generate information useful to antitrust enforcement. As a result, many of these items have been modified or dropped completely. The most significant of these changes are summarized below:

Item	Current	Change
4(b)	Provide the most recent balance sheet (even if unaudited) for all unconsolidated U.S. corporations within the filing person ¹	Eliminated
5(a), 5(b)(i)	Provide 2002 base year revenue by 6-digit NAICS code and 10-digit product code even for companies not owned by the filing person in 2002	Eliminated

1. Under the HSR Rules, “person” here refers to the “Ultimate Parent” of the filing acquiring party and any entity it “Controls.” To avoid reader exhaustion, we have not incorporated the detailed rules relating to “ultimate parent” and “control” in this LawFlash.

5(b)(ii)	List 10-digit product codes and revenues for manufactured products added or codes deleted between the 2002 base year and most recent year by the filing person	Eliminated
6(a)	List names and addresses of all entities with at least \$10 million in assets within the person filing notification	Limited to entities that generate U.S. revenues with at least \$10 million in assets
6(b)	Provide all 5% or greater shareholders of corporations within the person filing	Limited to holders of 5% or more of the voting securities or noncorporate interests of the Ultimate Parent of the Acquiring Person and the Acquiring Entity. For limited partnerships such as private equity funds <i>only</i> general partners need to be named regardless of percentage held (private equity investor limited partners need NOT be listed)
6(c)	List shareholdings of at least 5% of corporations with at least \$10 million in assets for person filing notification	Now 6(c)(i); added holdings of noncorporate interests, but limited to holdings of at least 5% but less than 50% in entities that derive revenues in the same NAICS code(s) as the target firm

New Items

In addition to removing or altering certain items on the HSR Form, the new rules also require parties to submit additional information. These new requirements are intended to permit the agencies to more thoughtfully study the competitive effects of the proposed transaction. In some cases, these changes formalize long-standing informal FTC requirements and practices. Some of the key changes are:

Item(s)	Current	Change
4(d)(i)	None	Provide all Confidential Information Memoranda or, if none exist, similar documents provided to potential buyer(s) specifically relating to the sale of the target business, created up to one (1) year prior to filing; this is limited to documents prepared by or for an officer, director, or its equivalent, but need not include traditional “4(c)” content (i.e., not limited to documents that analyze the target with respect to competition, sales growth, or expansion in product and geographic areas)

4(d)(ii)	None	Provide studies created by third-party advisors (e.g., investment bankers and consultants) during an engagement or for the purpose of being engaged by the filing parties, seen by an officer, director, or its equivalent, created up to one (1) year prior to filing and including “4(c)” content <i>that relate to the sale of the target</i> , even if not prepared specifically for the transaction to which the filing relates
4(d)(iii)	None	Provide all studies prepared for the transaction (except those without stated assumptions) seen by an officer, director, or its equivalent that evaluate or analyze efficiencies and/or synergies created for the transaction to which the filing relates
5(a)	5(b)(iii), 5(c)	Provide revenues derived in the United States by 6-digit NAICS code for nonmanufactured products and by 10-digit product code for manufactured products, including for products manufactured outside the United States
7(b)(ii)	None	Identify any “Associate” of the Acquiring Person that reports revenues in the same NAICS code(s) as the target (e.g., identify any investment funds managed by the same private equity firm as the fund making such acquisition that derive revenue in the same NAICS code(s) as the target even if different than the fund making such acquisition)

Morgan Lewis is commonly retained to make HSR filings on behalf of private equity firms and global Fortune 100 companies for transactions in which other firms have been retained to handle the M&A aspect of the same transaction. Over the last nine months, Morgan Lewis has made HSR Act filings for nearly 4% of all reportable transactions.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

New York

Harry T. Robins	212.309.6728	hrobins@morganlewis.com
Martin H. d’Halluin	212.309.6838	mdhalluin@morganlewis.com
Heather E. Fuentes	212.309.6695	hfuentes@morganlewis.com
Sarah Sandok Rabinovici	212.309.7101	srabinovici@morganlewis.com
Tee St. Matthew-Daniel	212.309.7156	tstmatthew-daniel@morganlewis.com

Washington, D.C.

Jonathan M. Rich	202.739.5433	jrich@morganlewis.com
David Brenneman	202.739.5056	dbrenneman@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to

clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2011 Morgan, Lewis & Bockius LLP. All Rights Reserved.

