CLEARY GOTTLIEB Alert Memo

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FTC Proposes HSR Changes: Would Require More Documents from All Filers, Extensive New Information from Private Equity Funds, Foreign Manufacturers, and Others

On August 16, the FTC published proposed changes to the form for filing a premerger notification under the Hart-Scott-Rodino Act. The proposed changes would broaden the scope of documents that must be submitted with the filing and, for the first time, would require the submission of information about non-U.S. manufacturing activities for products sold into the United States. They would also increase the information filers must provide in certain areas, which might particularly impact private equity funds, master limited partnerships, and other structures that have common management over entities that are not affiliated for HSR purposes. The proposed changes would also eliminate some of the information that filers currently must submit. The public has until October 18, 2010 to comment on the proposed changes.

More Documents About the Target Would Be Required

The proposed revisions would introduce a new category of documents, called Item 4(d), that filers must submit with the notification form. The new category would supplement the present Item 4(c), which would not be changed, and would potentially cover a much broader set of documents.

Outside consultant documents. Under present Item 4(c), filers need only submit documents prepared for officers or directors by third parties (including investment banks and outside consultants) if the documents analyze the *current transaction* with respect to competition, market shares, or other competition-relevant issues. Under the new 4(d), they would have to provide any of these documents that merely *reference* the acquired entity and contain an analysis with respect to competition, market shares, or other competition-relevant issues if they were created within two years of the filing. In other words, even if such a document were not prepared in connection with the transaction, it would still have to be submitted.

Offering memoranda. Under present Item 4(c) filers need only provide offering memoranda for the *current* transaction if they were prepared by or for officers and directors and contain an analysis with respect to competition, market shares, and other

competition-relevant issues. Under the new 4(d), they would have to provide *any* offering memoranda that merely *references* the acquired entity — regardless of whether it references competition or was prepared by or for an officer or director — if it was created within two years of the filing.

Analyses of efficiencies. Under present Item 4(c), filers do not need to provide documents discussing efficiencies or synergies unless they applied that analysis to sales growth, competitive position, or other competition-relevant issues. Under the new 4(d), they would have to provide all documents discussing efficiencies or synergies with respect to the current transaction that were prepared by or for an officer or director.

Revenue Information For Non-U.S. Manufacturing Would Be Required

The second major proposed change would require filers to provide information about revenue from non-U.S.-based manufacturing for products sold into the United States. Under the current rules, firms do not need to report revenues for products manufactured outside the United States that are exported to the United States. Under the new proposed form, such revenue would be reported as manufacturing revenue, broken out by 10-digit NAICS code (that is, the same level of detail currently required for U.S. manufacturing revenue). Firms that import products into the United States from manufacturing facilities abroad for distribution in the United States would be required to report both the non-U.S. manufacturing revenue (at their internal transfer price) and (as currently) the revenue from wholesaling in the United States.

Certain Information About "Associates" Would Be Required, Impacting Common Investment-Fund and Private-Equity Structures

The other major proposed change would require acquiring parties to include certain information about so-called "associates." Currently, filers need only provide information regarding the "Ultimate Parent Entity," which generally means the highest-level corporate parent that held a 50% stake, directly or indirectly, in the entity participating in the transaction, and all entities under common control as defined for purposes of the HSR Act.

Under the proposed rules, "associate" would be defined as "an entity that is not an affiliate of [the acquiring person] but: (A) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a "managing entity"); or (B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen by the acquiring person; or (C) directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity."

Filers would have to provide information about the minority holdings of "associates" and information about any revenue overlaps those "associates" have with the target.

This new requirement apparently aims to capture information about investment funds that are under common management, but not common control for HSR purposes (for example, multiple funds with the same managing member but no majority economic shareholders). It is not uncommon for fund managers to employ such structures and, where employed, the proposed changes could impose significant additional burden.

Certain Other Information Would No Longer Be Required

Most of the other proposed changes would eliminate requirements for certain information and documents. These changes should, for the most part, reduce the burden of preparing a filing.

Transaction structure. Under the revised form, filers would no longer need to provide the name of any person who prepared a fair-market valuation of the transaction, the details of shares to be acquired, or a detailed description of assets to be acquired. However, parties would have to provide a copy of any agreements not to compete in addition to the main transaction agreement between the parties.

Publicly available SEC filings. Under the revised form, filers would no longer need to list or provide certain documents filed with the SEC, but instead would only need to provide the Central Index Key number for each entity that makes filings (including, for the first time, Form 20-F filers). Similarly, filers would no longer need to include the company's most recent balance sheet.

Revenue under NAICS codes. Under the revised form, filers would no longer need to provide 2002 revenues by NAICS code. Instead, filers would only need to provide the most recent year's revenues by NAICS code. (But, as discussed above, filers would need to provide revenue from certain non-U.S. manufacturing operations.)

Corporate structure. Under the revised form, filers would no longer need to provide information about all worldwide subsidiaries and affiliates, but only those affiliates that are located in the United States or sell into the United States. Filers would also no longer need to provide information about minority shareholdings where the target had no past-year revenue in the same NAICS code and would no longer need to provide share class information. However, unincorporated entities like LLCs and partnerships would be treated the same as corporations for purposes of providing information about minority shareholdings and minority shareholders. (And, as discussed above, acquiring parties would need to include certain information about "associates.")

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Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the “Practices” section of our website, http://www.clearygottlieb.com/.

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