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Filers learn to adapt to changes under Hart-Scott-Rodino

New rules eliminate some forms of information and add others to make what's required more relevant to antitrust review.

by Gregory L. Kinzelman

As of August, new rules have made substantial changes to the information required in the notification and report form required for certain transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

The HSR Act requires parties to notify the Federal Trade Commission and U.S. Department of Justice Antitrust Division of proposed transactions that meet the act's jurisdictional thresholds and to observe a statutory waiting period while the FTC and DOJ review the potential impact of the transaction on competition.

The changes to the HSR form eliminate the need to provide certain information that the agencies have found to be of little use in analyzing the competitive effects of transactions. They also impose requirements for filers to provide additional information potentially relevant to antitrust review.

The antitrust bar has generally welcomed the changes that reduce the burden for filing parties. Most significantly, these reductions include elimination of the need to provide information for all the classes of securities of an acquired issuer, the need to list each U.S. Securities and Exchange Commission filing and the need to supply revenue data for a nine-year-old base year. In addition, the new form gets rid of the need to provide organizational information when there is no competition nexus, such as lists of foreign subsidiaries and minority holdings in other entities that do not have revenues in lines of business in common with the target company.

Although the elimination of these items from the form was significant, the new form also added new requirements for filers. A new "Item 4(d)" requires parties to submit confidential information memoranda, certain investment banker presentations and analyses of potential efficiencies resulting from the transaction in addition to the Item 4(c) requirement for parties to produce certain documents that relate to the competitive aspects of the notified transaction.

On the data side, the new HSR form increases the need to provide detail on foreign manufactured products sold in the United States by requiring reporting by 10-digit North American Industry Classification System (NAICS) revenue code. The form also adds a requirement that "associates" of the acquiring party be identified if the revenues reported by its minority-owned holdings overlap with the target.

Given these many changes, the FTC's Premerger Notification Office (PNO) has provided additional guidance in the form of speeches and written materials, some of which have been posted on the FTC Web site. The PNO has developed tip sheets for the changes overall and specific tip sheets covering issues specifically related to items 5, 6 and 7, and the use of 2007 NAICS codes. In addition, the PNO has issued a number of informal interpretations in response to specific questions received from parties requesting clarification of the application of the new reporting rules to particular fact situations.

FILING BY PDF

In an effort to make filing easier and to enable future electronic filing, the PNO developed the new form as a dynamic Adobe PDF document rather than using Microsoft Word, as with the previous form. The new PDF version is intended to automate the entry of information by populating repeated information in related boxes and headers. As an added convenience, the form provides a drop-down menu containing descriptions for all of the thousands of NAICS codes.

Due to time constraints, the PDF document template was not able to be fully tested prior to release. As a result, the PDF template suffers from several bugs that cause it to drop inputted data and to autopopulate fields incorrectly. These problems are most notable when the PDF form is used with a version of Adobe Reader prior to 9.4 or with Apple computers.

The numbering used for the HSR form tip sheets on the PNO Web sites that references versions such as "1.0.3" has led some to believe that there have been multiple versions of the PDF form. However, these version numbers refer to versions of the tip sheet, not the PDF, as there exists only the initial version of the PDF form as of November. A new, corrected PDF version of the form is expected to be released in the coming months. Until the bugs are fixed, a large number of filers have created their own Microsoft Word versions of the new form to use in the meantime. Electronic filing is not yet available.

The long-term hope of the PNO and filers is that a new and more convenient electronic filing system will emerge. Such a system would allow filing of affidavits and the certification page with facsimile signature pages rather than the electronic signatures previously required of electronic filers. Under the previous electronic filing system, the company making a filing needed to obtain an electronic signature from an outside vendor several weeks prior to filing. This signature had to reside on the filer's computer.

Because most HSR forms are filed by law firms on behalf of their clients, this meant that a law firm would need to register each of its clients with an electronic signature and the filing would need to be made directly from the client's computer. Because this was incredibly inconvenient, most filers using legal counsel continued to avoid the cumbersome electronic process and made their filings in hard copy. Such a new filing system is some time off, as FTC budgetary concerns have put off conversion to electronic filing for the foreseeable future.

In light of the new HSR form changes, the American Bar Association's Antitrust Section has begun preparations to revise and update its *Premerger Notification Practice Manual*. This

manual is a key reference for those having questions relating to HSR reportability and filing procedures. It is prepared by Antitrust Section members who specialize in HSR issues. The members work in conjunction with the PNO to ensure it accurately reflects the current views of the PNO. The revised fifth edition version of the manual is expected to be released in December 2012.

SMOOTH TRANSITION

The transition to the new HSR filing form has been fairly smooth from the PNO's perspective. According to the PNO, in the first three months of the new form, no HSR filings have been rejected for being deficient by failing to follow the new rules. The most frequent mistakes the PNO has observed have been relatively minor, such as filers not providing the name of a secondary contact person or not following the recommended method for identifying attachments.

Some of the early reaction to the proposed changes predicted that they could have an unduly burdensome impact on filers. However, preliminary results suggest that the requirements for additional information have not led to a significant increase in the amount of information being submitted. While the expanded range of documents required under Item 4(d) may increase the search burden for filers, according to the PNO, Item 4(d) has not resulted in an exceptionally larger volume of documentary attachments as many in the private bar had feared.

The PNO has also indicated in a number of presentations to bar groups that the new associate requirement may not be affecting a large number of filers. According to figures referenced by the PNO, out of the first 96 HSR transactions notified under the new form, only 30 were made by investment funds or master limited partnerships that might have associates. Of these, only four investment funds and no master limited partnerships reported information for associates in Item 6.

Thus, the new Item 4(d) and "associate" items do not seem to have resulted in a significant increase in the amount of information parties have submitted.

In sum, the initial overall assessment of the changes to the HSR form seems to suggest that for the majority of filers the burden of complying with the HSR notification requirements has been reduced. The anticipated changes to improve the PDF template form and to convert to a new electronic filing system hold the promise of further relief for filers.

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