FTC and DOJ Announce Changes to Premerger Reporting Requirements

The Federal Trade Commission ("FTC"), with the concurrence of the Antitrust Division of the Department of Justice (together the "agencies"), has announced the amendment of the form, related instructions, and rules for parties required to file for antitrust review of proposed mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended ("HSR Act") and the Premerger Notification Rules ("Rules"), effective in early August.[1] These changes increase the burden of premerger notification in some respects, but reduce the burden in others.

The HSR Act requires persons contemplating mergers or acquisitions of voting securities or assets that meet or exceed the size-of-transaction and size-of-person thresholds in the HSR Act to notify the agencies and observe a waiting period before completing those transactions. The amended form expands the set of documents to be produced as part of the merger review process, broadens the reporting of overlaps and holdings of related entities (mostly affecting private equity funds), and eliminates revenue reporting in the baseline years, among other changes.

The amended form includes a new section, Item 4(d), designed to require parties to provide categories of documents not fully captured by the current Item 4(c). These additional documents fall into three categories: (i) confidential information memoranda (*e.g.*, offering memoranda and similar documents) that relate to the sale of the acquired entity(s) or assets; (ii) materials prepared by investment bankers, consultants, or other third party advisors that contain competition-related content pertaining to the transaction, such as bankers' "pitch books" or analyses of strategic options including the proposed transaction; and (iii) documents that evaluate or analyze the synergies related to a particular acquisition. All three categories are limited to documents prepared by or for an officer or director (or persons fulfilling similar functions in non-corporate entities of the filing company).

The FTC will now require information about "associates"[2] of an acquiring party, in order to collect information about overlapping investments by related entities that are under common management with the acquiring party but not under common "control" (in the HSR sense of that term). This change will likely impact private equity funds and other similarly structured organizations that have not been required under the current form to provide information about holdings by related entities in the same family of funds. The acquiring party must report its associates' minority holdings of voting securities or non-corporate interests in (i) the acquired entity(s) and (ii) in entities having revenue overlaps in specific industry subgroups with the acquired entity(s) or assets in Item 6(c)(ii). The acquiring party must also report any overlap and related geographic information when any associate derives revenues in an overlapping industry with the acquired entity(s) or assets, under Item 7.

The FTC has eliminated the reporting of "baseline" year revenue in Item 5, which often required providing historical revenue information that is expensive and time-consuming to compile and has been found to

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1 *Premerger Notification; Reporting and Waiting Period Requirements*, Federal Trade Commission http://www.ftc.gov/os/fedreg/2011/07/110707hsrfrn.pdf.

2 "[A]n associate of an acquiring person shall be 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) directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity." 16 CFR 801(d)(2).

be of limited utility in evaluating transactions. Limiting revenue reporting to the most recent year will streamline this Item for filing parties. The FTC has also changed the revenue reporting requirements for foreign manufacturers and for domestic manufacturers who sell their product at wholesale or retail. For greater clarity, foreign manufacturers are now required to report all revenue derived from manufactured products sold in the United States as manufacturing revenues, and to avoid double counting, domestic manufacturers who sell at wholesale or retail will now be required to report manufacturing revenues only.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; Laurence T. Sorkin at 212.701.3209 or lsorkin@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.