FTC/DOJ Announce Changes to HSR Rules and Notification Form

The Federal Trade Commission ("FTC"), with the concurrence of the Antitrust Division of the Department of Justice ("DOJ"), recently announced substantial changes to the Hart-Scott-Rodino ("HSR") Act Premerger Notification Rules (the "Rules"), the Premerger Notification and Report Form (the "Form"), and related Instructions to the Form. The HSR Act requires premerger notification and clearance for most large mergers and transactions involving acquisitions of assets, voting securities, and/or non-corporate interests. The changes will be effective thirty days after publication in the Federal Register.

Many of the changes streamline the Form by removing requirements that are obsolete or likely to yield information of little or no value in assessing the competitive impact of a proposed transaction. Other changes, however, are likely to increase the burden on reporting parties with respect to the time, effort, and expense necessary to gather and analyze the additional information and documents that the Form now requires. Private equity and other investment funds and master limited partnerships are among the entities most likely to be affected adversely by these changes. To insure informed planning for future transactions, reporting parties will find it useful to understand the additional burden of compliance that the new Form will impose upon them and to account for the additional time necessary to satisfy the new requirements of the Form.

We summarize below the Form changes that will have the most impact on reporting parties in terms of additional preparation time and expense.

Item 4(d) — Additional Documents

Item 4(d) will expand the universe of documents potentially responsive to Item 4. Unlike Item 4(c) of the current Form, Items 4(d)(i) and 4(d)(ii) are not limited to the transaction that is the subject of the HSR filing. Instead, the FTC has expanded these items to documents that "specifically relate" to the acquired entity(s) or assets in order to capture documents that some reporting parties claimed were not covered by Item 4(c). Item 4(d)(iii) requests synergy/efficiency studies not called for under Item 4(c).

Confidential Information Memoranda. Item 4(d)(i) requires the production of all Confidential Information Memoranda ("CIM") prepared by or for officers or directors of the reporting persons (or in the case of unincorporated entities, individuals exercising similar functions) or their controlled entities involved in the transaction, that "specifically relate" to the sale of the acquired entity(s) or assets. Documents responsive to this item are limited to those produced up to one year before the date of the HSR filing. In situations where no CIM exists, the parties must produce any materials provided to the buyer specifically to serve the purpose of a CIM. Thus, unlike Item 4(c), new Item 4(d)(i) requires the production of documents regardless of whether prepared in connection with the transaction for which HSR is being filed or whether the documents discuss traditional 4(c) topics such as markets, market shares, competition, competitors, or the potential for expansion into product or geographic markets.

Attorney Advertising

Outside Consultant/Advisor Documents. Item 4(d)(ii) requires production of all documents prepared for officers or directors of the reporting persons or their controlled entities involved in the transaction, by "investment bankers, consultants or other third party advisors" that "specifically relate" to the sale of the acquired entity(s) or assets, and discuss traditional Item 4(c) topics. Documents responsive to this item are limited to those produced up to one year before the date of the HSR filing. Like Item 4(d)(i), new Item 4(d)(ii) requires the production of documents regardless of whether prepared in connection with the transaction for which HSR is being filed.

Synergy/Efficiency Analyses. Item 4(d)(iii) requires the production of all documents prepared by or for officers or directors of the reporting persons or their controlled entities that evaluate or analyze synergies and/or efficiencies in connection with the transaction that is the subject of the HSR filing. These documents are not required under the current Item 4(c) unless they otherwise discuss competition-related topics. Item 4(d)(iii) is broader than Items 4(d)(i) and 4(d)(ii) in that it requires production of documents prepared by or for an officer or director of the reporting persons and any of their controlled entities, not just those controlled entities involved in the transaction.

Item 5 — Products Manufactured Outside of the U.S.

Item 5 of the current Form requires reporting persons to identify their revenues from operations conducted in the U.S. by North American Industry Classification System (NAICS) code. Revised Item 5, however, expands this reporting requirement to include revenues for products the reporting person manufactured outside of the U.S. and then sold in or into the U.S. in the most recent year. Thus, reporting persons now must identify by 10-digit NAICS product code the revenues for each product they manufacture outside of the U.S. and sell in or into the U.S. This change to Item 5 will impose an additional burden on reporting persons (both U.S. and foreign) with overseas manufacturing facilities that sell products into the U.S.

In an effort to reduce somewhat the burden on reporting persons, however, the FTC further revised Item 5 to eliminate the double-counting that resulted from the current practice of requiring manufacturers to report revenues under both manufacturing codes and wholesaling codes if their products are sold from establishments separate from their manufacturing facilities. Under revised Item 5, any manufacturer, whether foreign or domestic, now must report revenues from the sale of its manufactured products only under 10-digit NAICS manufacturing codes, and not also under 6-digit NAICS wholesaling codes. Elimination of this double-counting will simplify reporting requirements and remove any distortion of revenues reported in Item 5.

Items 6(c) and Item 7 — Expanded Reporting for Associate Entities

The amended Rules define a new entity — an "associate" — and thereby impose additional obligations on an acquiring person to report interests in minority holdings and industry overlaps with the acquired assets or business. The obligation to report information in connection with "associate" entities will increase significantly HSR reporting requirements, particularly with respect to private equity firms and master limited partnerships. The revised rule expands the acquiring person's obligations to report minority holdings and NAICs code overlaps with the acquired assets or businesses to include overlaps with "associates" of the acquiring person.

The new rules define an "associate" as follows:

[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 management with a managing entity.

The above definition establishes an eight-part test for an associate entity, with subparts (A) and (B) each setting forth a single test and subparts (C) and (D) each setting forth a three-part test. Entities that qualify as "associates," for example, include the general partner of a private equity fund that has authority to exercise investment discretion over the fund's acquisitions of

interests in portfolio companies, as well as any other private equity funds over which the general partner exercises similar investment discretion. An investment consultant that merely makes non-binding recommendations to the general partner or to the fund is not an "associate." Similarly, an entity that is under contract to manage a partnership's back office functions (accounting, IT, human resources, marketing) is not an "associate" since it does not manage the partnership's investments. In addition, individual officers and directors of an "associate" would not themselves be considered "associates," nor would employees who serve on investment committees.

Holdings of "Associates." New Item 6(c)(ii) requires the acquiring person to report minority holdings (5% or greater, but less than 50%) of its "associates" to the extent that these entities derive revenue in the same 6-digit NAICS industry code as the acquired entities or assets. The FTC recognizes that it may be difficult for an acquiring person to determine the NAICS code overlap(s) for entities that it does not control. Therefore, an acquiring person may respond based on information and belief and, if NAICS codes are unavailable, may report based on holdings in entities that have operations in the same industry as the acquired entities or assets. As is the case with respect to current Item 6(c), holdings of entities with total assets of less than $10 million may be omitted. In order to ensure compliance, the acquired person may list all entities in which its "associates" hold a minority interest.

NAICS Code Overlaps with "Associates." Revised Item 7 requires the acquiring person to report overlaps and geographic information for any "associates" that derive revenues in the same 6-digit NAICS code as the acquired businesses or assets. Unlike Item 6(c), entities with less than $10 million in assets may not be omitted from Item 7. All overlaps must be reported regardless of the dollar value.

Identifying and tracking the above information with respect to "associates" will increase greatly the recordkeeping and updating required by certain acquiring persons. HSR counsel will need to work closely with their clients in order to undertake a rigorous assessment of the complex web of entities in connection with any private equity fund or master limited partnership to insure that all appropriate "associate" entities are identified. Once this exercise has been completed, then the detailed task of identifying the relevant minority holdings and NAICS code industries of such "associates" can be undertaken.

Other Form Changes

Several other form changes of note are described briefly below. Many will eliminate existing requirements and streamline preparation of certain items of the Form.

NAICS Code Revenue Reporting. Under the revised Form, reporting persons no longer will be required to report NAICS code revenue for a specified base year. Consequently, the changes also eliminate the requirement to detail information for manufactured products added or deleted since the base year. In addition to the change in reporting foreign-manufactured goods discussed above, however, reporting persons under the revised Form now will need to report current year manufactured revenue in 10-digit product codes, as opposed to the 7-digit product class codes.

Controlled Entities. The list of controlled entities required in connection with Item 6(a) now is limited only to those entities located in the U.S. and those foreign entities that have sales in or into the U.S. Street addresses no longer are required — only city and state or city and foreign country designations.

Shareholders and Interest Holders. In response to Item 6(b), reporting persons now are required to list only holders of five percent or greater minority interests of voting securities or non-corporate interests in the acquired entity(s) or in the acquiring entity(s) and its ultimate parent, if different. Limited partnerships are required to disclose only their general partners, regardless of the percentage held. The $10 million asset threshold included in current Item 6(b) is eliminated.

Compiling and updating the additional information required by the Form changes could be extremely time-consuming. Reporting parties should expect to spend additional time revising their HSR processes to include collection and analysis of this additional information and should adjust their transaction timelines accordingly.

If you have any questions about the matters addressed in this *Kirkland Alert*,
please contact the following Kirkland authors or your regular Kirkland contact.

Ellen M. Jakovic
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, DC 20005-5793
www.kirkland.com/ejakovic
+1 (202) 879-5915

Jennifer Clarke-Smith
Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
www.kirkland.com/jclarkesmith
+1 (312) 862-2424

Daneen Jachino
Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
www.kirkland.com/djachino
+1 (312) 862-2137

This communication is distributed with the understanding that the author, publisher and distributor of this communication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this communication may constitute Attorney Advertising.

© 2011 KIRKLAND & ELLIS LLP. All rights reserved.

www.kirkland.com