
FTC and DOJ Issue New Premerger (HSR) Notification Form

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The Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) announced the long-awaited changes to the Hart-Scott-Rodino premerger notification form (HSR form). The changes will go into effect August 18, 2011. A copy of the FTC notice may be found [here](#). The new form can be found [here](#).

The FTC and DOJ first sought comments on proposed changes to the HSR form in August 2010, but it took almost a year for the agencies to publish the proposed final amendments. According to the agencies, the revised HSR form will make the review of premerger notifications "more effective," including by "eliminat[ing] unnecessary or potentially overly burdensome reporting requirements for business[es]." FTC Press Release, available [here](#). Parties will no longer be required to provide revenue data for the 2002 "base year," provide detailed breakdowns of all of the voting securities to be acquired, or provide copies or electronic links to documents filed with the Securities and Exchange Commission.

The updated HSR form, however, requires filing parties to provide new information to the FTC and DOJ. Key changes include:

- A new Item 4(d) expands the scope of the business plans and other documents that HSR filers will need to submit with their notifications. Item 4(d) builds on the existing Item 4(c) document requirements, which require filers to produce (broadly speaking) documents created by or for officers and directors and that discuss the competitive effects of the acquisition. The language of new Item 4(d) closely parallels that of Item 4(c), but is designed to elicit documents that – according to the agencies – "were not always provided because parties have differing interpretations as to whether they were called for under current Item 4(c)."

With the addition of Item 4(d), parties are now obligated to produce the following categories of documents:

- Item 4(d)(i) *Confidential Information Memoranda ("CIM") or documents serving similar functions* – Parties will be required to submit any CIM if such documents: (a) were prepared by or for certain officers or directors specified by the rule; (b) specifically relate to the sale of the acquired entity or assets; (c) were produced within one year of the date of filing; and (d) are not ordinary course and/or financial data shared in the course of due diligence. If there is no CIM, the parties are required to produce documents given to officers or directors of the buyer meant to serve the same function. Ordinary course documents and financial data shared in the course of due diligence are outside the scope of Item 4(d)(i) unless they served as a substitute for a CIM. Unlike Item 4(c), Item 4(d)(i) can capture a CIM that does not have competition-related content.
- Item 4(d)(ii) *Third-Party Advisor Studies, Surveys, Analyses and Reports* – Parties will be required to submit materials prepared by investment bankers, consultants, or other third-party advisors, if such documents were: (a) prepared for certain officer(s) or director(s) specified by the rule; (b) created for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets; (c) specifically related to the sale of the acquired entity or assets; (d) developed by third-party advisors during an engagement or for the purpose of seeking an engagement; and (e) created within one year of the date of filing.

Among other documents, the Commission expects Item 4(d)(ii) to capture reports created by third parties analyzing courses of action available to a company (e.g., whether to buy another business or sell a particular business) and that have competition-related content. Unlike Item 4(c), Item 4(d)(ii) can capture reports that do not analyze the specific transaction that is the subject of the notification.

- Item 4(d)(iii) *Synergy/Efficiency Documents* – Finally, parties will be required to submit documents (a) analyzing or evaluating synergies or efficiencies; (b) prepared by or for officer(s) or director(s) specified by the rule; and (c) prepared for the purpose of evaluating or analyzing the acquisition. Financial models (e.g., spreadsheets) without stated assumptions are not captured by this item. This item may capture documents that discuss cost-cutting synergies, which are not responsive to Item 4(c).
- Item 5 *Revenue Data* – Currently both the acquiring and acquired persons must report revenue and lines of business information for operations conducted in the United States using the North American Industry Classification System (NAICS) designated by the U.S. Census Bureau. The new HSR rules alter reporting requirements for Item 5 in two significant ways. First, they eliminate the need to report revenues for the 2002 "base year." Filing parties must report non-manufacturing revenues by 6-digit NAICS code and manufacturing revenues by 10-digit NAICS code only for the most recent financial year. Second, the new rules modify how revenues from goods manufactured in a company's

foreign facilities and imported into the United States must be listed. Under current rules, revenues from the sale of imported products made in company-owned facilities abroad are listed as wholesale revenues. Under the new rules, these revenues will be listed as manufacturing revenues.

- Items 6(c) and 7 have been expanded to require submission of additional information on the holdings of "associates" that overlap with the buyer or its assets. Specifically, the new HSR rules define an "associate" of the buyer as an entity (other than an affiliate) that "(A) has the right, directly or indirectly, to manage the operations or investment decisions of [the buyer] (a 'managing entity'); or (B) has its operations or investment decisions, directly or indirectly, managed by [the buyer]; 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." §801.1(d)(2) (proposed final rule). Under the new HSR form, parties will need to identify any "associates" meeting this definition if they operate in the target industry (Item 6(c)) and provide geographic information about those associates' operations (Item 7).

Overall we expect that the revised notification requirements will increase the burden for parties filing HSR notifications. The increased burden is likely to be greatest for foreign manufacturers because of the increased revenue detail that they will need to provide in response to Item 5, and for companies that regularly employ outside advisors in their acquisition planning and are therefore likely to produce the greatest number of additional documents in response to Item 4(d).

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