

# Significant Hart-Scott-Rodino Reporting Changes To Take Effect

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The Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”) (collectively “the Agencies”) have announced a slate of new Hart-Scott-Rodino reporting rules for all filers, with expanded reporting requirements relating to business overlaps in strategic transactions. The new rules take effect in August, and have long been anticipated, though the final version of the rules was published only recently. In response to opposition voiced by the legal and business communities following the initial notice of proposed rulemaking published last August, the final rules scale back in important ways some of what the Agencies were originally seeking.

Parties to certain transactions are required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act” or the “Act”) to notify the FTC and the DOJ, and to observe a waiting period prior to closing. The submissions include detailed information about the transaction and the parties, and give antitrust regulators an opportunity to screen transactions for likely anticompetitive effects and initiate investigations to modify or block competitively problematic transactions.

The new rules do not impact filing fees, reporting thresholds or exemptions, so that transactions presently subject to the requirements of the Act will remain so. The changes address what is reported in the HSR Act submission, easing the burden in some areas while adding to it in others. With an eye to further changes, the FTC also announced that it will initiate a review of the HSR coverage rules, potentially impacting the types of transactions that are subject to notification and review. Notably, the reporting requirements relating to intellectual property licenses are widely expected to be impacted by that process.

The FTC has long recognized that some elements of the HSR reporting requirements have become outdated, and began several years ago to seek input from practitioners on potential updates. Some welcome changes have emerged from that process that will streamline reporting. These changes include the elimination of the requirements relating to certain historical revenue data and detailed stock class and voting rights information. Others include more simplified reporting with respect to joint venture formations and the elimination of detailed indices of public company SEC filings.

Two important added reporting elements include a new concept in the rules relating to “Associates” and expanded requirements relating to market and competitive analyses. The new rules essentially define an Associate as an entity that has managerial or operational authority over a filer, or is under common managerial or operational authority with a filer. Because the HSR rules historically have limited the information called for to entities in the chain of “Control,” as the term is narrowly defined by the rules, the Agencies have lamented not having access to information, for instance, from sister funds within a private equity firm.

This could be relevant in a case where a private equity firm has an investment held by Fund I, and makes an acquisition of a competing company using Fund II, where Fund I and Fund II are separate reporting persons under the HSR rules. The competitive overlap in that case is not revealed by the information contained in the HSR submission, and may go undetected by the Agencies. The new rules remove that limitation and now call for certain additional reporting that will require information from all funds within a firm. Reaction to the initial proposed rulemaking resulted in a somewhat narrower and more workable definition of “Associate” in the final rules; however, the resulting expanded reporting nevertheless will create new burdens on filing parties.

The new rules also call for additional transaction-related documents to be collected, reviewed, and submitted as part of the filing process. An addition to the notification and report form, Item 4(d), requires the submission of transaction offering materials, such as a Confidential Offering Memorandum, investment banker books and certain transaction synergy or efficiency analyses and models prepared within one year prior to filing.

To some extent these materials were called for under the existing Item 4(c). Item 4(c) already requires the submission of certain documents that analyze the transaction with respect to, among other things, competition, markets and market shares, but the new rules expand these requirements. An offering memorandum that does not address the Item 4(c) elements such as markets or market shares now would be required under the new Item 4(d). Likewise, synergy analyses were not specifically called for in the original Item 4(c), but now are specifically required to be submitted when they have been prepared for analysis of the transaction and have stated assumptions underlying the analyses. Pre-existing regular course documents not prepared for the transaction remain outside the scope of Item 4(c) and the new Item 4(d), with the one exception of pre-existing documents given to a buyer in lieu of formal offering materials.

While the new rules include notable clarifications over the initial notice of proposed rulemaking, some of the concepts the agency is trying to identify, such as offering materials or fund associates, are subject to differing interpretations. The precise scope of the additional documents and information to be submitted in filings under the new rules will necessarily develop over time as the agency issues new informal interpretations relating to these issues.

The FTC also has announced a new electronic filing system that is expected to go live shortly and will give filers an option to dispense with paper filings. The new electronic filing system is expected to be a significant improvement over the original electronic filing system introduced several years ago which was not widely adopted.

The HSR premerger notification system is an essential element of antitrust merger enforcement today. The Agencies clearly are focused on keeping the HSR coverage and reporting rules and procedures up-to-date and relevant as changes occur in the way businesses are organized and the way they operate, and in the way transactions are conducted. Stay tuned for more changes and new complexities to address.

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