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CLIENT ALERT

August 2010

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Federal Trade Commission Proposes Substantial Changes to Hart-Scott-Rodino Act ("HSR") Report Form for Notifying Mergers and Other Transactions

On August 13, the Federal Trade Commission ("FTC") announced that it is seeking public comments on substantial proposed changes to the Hart-Scott-Rodino Act ("HSR") Report Form that companies must use when required to file.

The most significant proposed changes include:

- New document requests that could require, prior to filing, extensive e-discovery of the files of officers and directors going back two years;
- Requiring additional reporting detail for foreign manufacturing operations that sell products into the U.S.; and
- Requiring new information relating to companies or funds that are "associated" with the filing party.

Mergers, acquisitions and other transactions that meet certain HSR filing-size thresholds are required to be notified to the agencies prior to closing. The Report Form, which both agencies use, requires various types of information about the parties filing and the transaction being notified.

The FTC is seeking public comments on the proposed HSR Report Form changes by October 18, 2010. If your company feels it may be unduly burdened by these proposed changes, Hunton & Williams LLP can assist you in filing comments to express your concerns to the FTC and to request modification or withdrawal of the proposed changes.

New Document Requests To Be Included in the Initial Filing

The most substantial proposed change that would affect all filers is a new proposed Item 4(d) that adds to the burden companies already bear in identifying, reviewing and producing documents under Item 4(c). In particular, Item 4(d)(ii) requires that filing parties search the files of all officers and directors going back two years for documents that were prepared by investment bankers, consultants and other third-party advisers that merely "reference" the acquired party in the context of "market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets."

Unlike Item 4(c), this new Item 4(d)(ii) is not limited to documents prepared to analyze the notified transaction, but rather requires the production of ordinary course documents that may have little if anything to do with the transaction being notified. In addition, the FTC says under new Item 4(d) it would "deem" any document found in the files (presumably including electronic files) of an officer or director "to have been prepared for that individual." [Under existing interpretations for Item 4(c), there is only a presumption that a document found in an individual's files was prepared for that individual.] If the agencies take the same position that they do in Second Requests that an individual's files include all electronic drives, devices and file paths to which he/she stores or accesses documents, this new requirement could lead to extensive electronic discovery for every HSR filing. It is also unclear whether informal rules that limit Item 4(c) productions, such as the rule that excludes the submission of "draft" documents, will apply to the new Item 4(d)(ii).

More Detail on Foreign Manufacturing to be Required

The proposed Report Form could require the reporting of substantially more information by companies that own manufacturing facilities abroad that sell products into the United States. Under the proposal, filers must identify products sold in the U.S. that are manufactured by their foreign facilities using extremely detailed ten-digit NAICS codes. At present, these are categorized by broader six-digit wholesaling codes.

New Information To Be Required for Entities "Associated" With the Filer

The proposed rules would also add a new term to the HSR lexicon — "Associate," to refer to certain non-controlled affiliates of the reporting party. The new Report Form would require that certain items start including information for "Associate" entities as well as entities within the person filing. This new requirement will likely affect investment funds and other groups that hold or manage portfolio companies whose profits primarily accrue to third-party investors.

Some Benefits to the Proposed Changes

Despite these additional burdens, there are some benefits for filers. Most significant are the changes proposed to the reporting of a filer's revenues by NAICS codes. The new Report Form will eliminate the "base year," meaning that only revenues for the most recent year need to be reported. As it stands now, companies must report not only the most recent year's revenues but also revenues by NAICS code for 2002 sales. The proposed changes will also eliminate the need to provide in Item 6 what for some multinational companies can be a substantial amount of information regarding their non-U.S. subsidiaries that have no sales nexus to the United States.