The 2011 Changes to the HSR Act Notification Form: A Guide for Practitioners

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On July 7, 2011, the Federal Trade Commission[1] announced final rules adopting changes to the Notification and Report Form (Form) required for certain transactions under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976.[2] These Form changes, which will become effective in mid-August 2011,[3] are the most significant ones to be made since the introduction of the program.[4]

The FTC first put out these changes for public comment on August 13, 2010.[5] In response to public comments, several important clarifications and adjustments were made. The resulting final changes eliminate requirements for certain information that the Agencies found to be of little use as well as impose requirements for additional information potentially relevant to antitrust review.

The antitrust bar will no doubt welcome the many changes that reduce the burden for filing parties. Most significantly, these reductions include:

- Elimination of the need to list asset classifications and values in asset and non-corporate acquisitions. (Item 3(b)(i), (ii), and (iii))[6]
- Elimination of the need to list and provide information for all the classes of securities of an acquired issuer (a benefit for funds that take partial positions in companies). (Item 3(c))
- Elimination of the need to list each SEC filing made by the person filing the Form. (Item 4(a))
- Elimination of the need for a balance sheet (a benefit to equity funds that do not consolidate and to natural persons who are extremely reluctant to disclose such information). (Item 4(b))
- Elimination of the base year, manufactured products added and deleted, and elimination of the need to double count certain manufacturing revenues. (Item 5(a), (b)(i), and b(ii))
- Elimination of the need to provide the address, description of contracts, and credit guarantees for joint venture formations. (Item 5(d)(i), d(ii)(B), and d(ii)(C))

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[1] With the concurrence of the Department of Justice (DOJ).

[2] The HSR Act requires parties to notify the FTC and the DOJ of proposed transactions that meet the Act's jurisdictional thresholds and to observe a statutory waiting period while the Agencies review the potential impact of the transaction on competition. *See* 15 U.S.C. § 18a.

[3] 76 Fed. Reg. 42,471 (July 19, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-07-19/pdf/2011-17822.pdf. By operation of law, the new rules take effect thirty days after publication, which will be August 18, 2011.

[4] Significant prior changes to the Form include the elimination of an annex for insurance providers and an item related to vendor-vendee (vertical) relationships between the acquired and acquiring persons. 66 Fed. Reg. 23,561 (May 9, 2001); 66 Fed. Reg, 8680, 8686 (Feb. 1, 2001). Given the recent revival of what had seemed a minimal interest in vertical mergers by the DOJ, the latter change may have been premature. Other prior significant changes pertained to the acquisition of non-corporate interests, the implementation of annual changes to the HSR thresholds, and increased filing fees.

[5] 75 Fed. Reg. 57,110 (Sept. 17, 2010).

[6] Item numbers reflect those of the current Form.

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- Elimination of the need for acquiring persons to list foreign subsidiaries without a U.S. nexus and to provide street addresses. (Item 6(a))
- Elimination of the need to list shareholders and other owners of all controlled entities other than the ultimate parent and the actual entity making the acquisition or being acquired. (Item 6(b))
- Elimination of the need for acquiring persons to list minority holdings in other entities that do not have overlapping NAICS industry codes with the acquired person. (Item 6(c))

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While the elimination of these items from the Form is significant, there will no doubt be greater interest among practitioners in the interpretation and administration of the additional requirements for documents and information by the FTC's Premerger Notification Office (PNO). The changes that increase the information required from filers have been the subject of vigorous comment from the private bar. These additional requirements include:

- Parties must now provide three additional classes of documents. (Item 4(d))[7]
- Parties must now provide most recent year NAICS codes at the 10-digit level for products that the filing person manufactures in a foreign country. (Item 5(a))
- Acquiring persons must now determine their "associates" and provide certain information regarding their holdings that overlap with the target. (Items 6 and 7)

Given these changes, practitioners should carefully review the revised Form, the instructions, and the Statement of Basis and Purpose published in the Federal Register as a starting point. The PNO is expected to provide additional guidance in the form of speeches and additional written materials, and may post additional information on the FTC website. It also is expected that the ABA's *Premerger Notification Manual* will soon be revised to take into account the new changes,[8] though that will likely take several months. Filing parties who have specific questions not answered by these sources may contact the PNO to determine its position with respect to specific situations.

The following discussion and assessment of the new requirements is based on consultation with the PNO and comments from the private bar.

Item 4(d) Documents

Item 4(c) of the HSR notification requires submission of documents prepared by or for an officer or director "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." The new Item 4(d) may in some cases add to the Item 4(c) list of documents "prepared by or for an officer or director" that must be submitted with the Form.[9]

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[7] Item numbers reflect those of the revised Form.

[8] ABA Section of Antitrust Law, Premerger Notification Manual (4th ed. 2007).

[9] There has been a history of agency efforts to expand the scope of Item 4(c) documents parties are required to submit with the Form. The original Form proposed for HSR notifications called for a significant volume of documentary attachments, including, for example, "any documents that pertain to markets, competitors, expansion, etc., into any product or services manufactured or sold by the other reporting company." 43 Fed. Reg. 33,526 (July 31, 1978). In the end, in response to public comments the Agencies concluded that the Second Request process was the proper tool for them to obtain such documents, not the initial filing. *Id.* In 1994, the Agencies proposed a new Item 4(c)(ii) requiring submission of "all investment bankers' books, offering memoranda, and similar documents which have been prepared by any person for the purpose of soliciting expressions of interest from prospective purchasers of the assets or entity to be acquired." 59 Fed. Reg. 30,545, 30,549 (June 14, 1994). The 1994 proposed changes also would have expanded Item 4(c) to require submission of documents relating to "the integration of the operations of the acquiring person and the business enterprise to be acquired." *Id.* Neither was adopted.

New Item 4(d) will require filing parties to provide:

i. All Confidential Information Memoranda (CIMs) that specifically relate to the sale of the acquired entity or assets. If no such CIM exists, parties must submit any document(s) given to the buyer's officers or directors that is meant to serve the same purpose as a CIM;

ii. All studies, surveys, analyses, and reports prepared by investment bankers, consultants, or other third-party advisors during an engagement or for the purpose of seeking an engagement for any officer(s) or director(s) of the filing person that meet the competitive information prong of Item 4(c) and that specifically relate to the sale of the acquired entity or assets; and,

iii. All studies, surveys, analyses or reports evaluating or analyzing synergies or efficiencies, prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition.

The same formal and informal interpretations that apply to Item 4(c) documents will likely also apply to Item 4(d) documents.

Items 4(d)(i) and 4(d)(ii) require the filing person to provide responsive documents prepared within one year of the HSR filing date.

Several public comments interpreted the language first proposed for Item 4(d), particularly Item 4(d)(ii), as requiring submission of ordinary course studies and competitive analyses prepared within two years[10] prior to HSR filing, even if they had no connection to the notified transaction. In adopting the final rules, the FTC stated in the Statement of Basis and Purpose that the comments received overstated the intended scope of the requirement, and consequently language was added to ensure that only documents related to the sale of the assets or business being reported would be required.

As explained in the Statement of Basis and Purpose for the final rules, the FTC was reluctant to use the terms "transaction" or "acquisition" in Items 4(d)(i) and 4(d)(ii) and instead referred to the "acquired entity or assets" to prevent filers from claiming that certain documents were not required. For example, the PNO has long interpreted Item 4(c) as requiring parties to submit offering memoranda and other documents prepared by an investment banker for purposes of soliciting expressions of interest from potential buyers of the target if they evaluate competitive topics listed in the Item 4(c) instruction. Nonetheless, in the FTC's experience some parties have taken the position that these documents do not fit within Item 4(c) because they may not have been prepared "for the purpose of evaluating or analyzing" the notified transaction between the seller and the specific identified buyer.[11] One could view Items 4(d)(i) and (ii) as closing a potential Item 4(c) loophole, in that they create little, if any, additional burden for parties that do not take such an aggressive position on such documents.

The same formal and informal interpretations that apply to Item 4(c) documents will likely also apply to Item 4(d) documents.[12] In particular, as applied to Item 4(d) in general, this would suggest that:

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[10] The final change scaled this requirement back from two years to one.

[11] Of course, in some instances offering memoranda do not contain an evaluation of competitive issues, and in such cases the offering memoranda are properly not included in an HSR filing under Item 4(c) but are nonetheless responsive to Item 4(d)(i).

[12] The author consulted with the PNO in the preparation of this section. Because informal interpretations by the PNO are not binding on the Agencies, and may evolve over time in response to Agency experience, parties are cautioned to consult the latest information when preparing a notification. For a more extensive overview of the PNO's informal interpretation process, see Gregory L. Kinzelman, United States v. Malone—*Lessons for HSR Practitioners on FTC Premerger Notification Office Informal Interpretations*, ANTITRUST SOURCE, Feb. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Kinzelman2_25f.authcheckdam.pdf.

- The term "officer" remains limited to those positions designated by the bylaws or articles of incorporation, or appointed by the board of directors (or to individuals designated in a similar way by an unincorporated entity).[13]
- Draft documents are not called for so long as the final or most recent superseding version is submitted (unless a draft is found in the files of a member of the board of directors, in which case it must be produced).
- The same rules on attorney-client communication and attorney work product apply, and a privilege log is required for documents withheld (or redacted) from production under 4(d) in the same format as for Item 4(c).
- If an officer or director never receives a document and it is not found in his or her files, then it does not qualify for inclusion even if it was prepared for an officer or director by someone else.
- Where parties break off negotiations or agree not to pursue a transaction but subsequently do enter into a transaction, a document prepared prior to the breakoff is not responsive to Item 4(d). Of course, just as with Item 4(c), whether a clear breakoff occurred would be a question of fact that would depend on individual circumstances. Given the one year look-back limit for Item 4(d), as a practical matter it may be difficult to show that a clear stop and restart occurred within such a short period, so parties should be careful when applying this informal interpretation.
- Rule 803.8(a)[14] applies to all "documentary materials," and thus there is no requirement to translate foreign language Item 4(d) documents into English, although if an English language version or summary exists, that must be submitted.

More specifically, as applied to the sub-items of Item 4(d), the current body of informal interpretations relating to Item 4(c) leads to the following conclusions:

Item 4(d)(i) CIMs.

- For Item 4(d)(i), only one version of the CIM need be produced regardless of whether there are other copies of the same presentation that contain extra handwritten marginalia of an officer or director (so long as any such writing does not reference Item 4(c) topics, which could make it a separate Item 4(c) document).
- If a CIM (or equivalent) was given to the buyer, that version should be produced, with no need to produce the versions given to unsuccessful bidders. (However, if a CIM was not given to the buyer, but one exists, it must be produced.)
- If an investment bank prepares both a short "teaser" and a full-length CIM, the "teaser" does not need to be submitted under Item 4(d)(i) because it was superseded by the final full CIM. Note that if the teaser was never followed up with a more recent full CIM, however, the teaser would need to be submitted under Item 4(d)(i).
- CIMs containing information limited to non-reportable assets/businesses, such as non-U.S. assets without U.S. sales, need not be included in a notification. (For example, a seller with operations in Germany, the United States, and Brazil is selling each of these three businesses separately and prepares a CIM for each. Only the acquisition of the U.S. operations

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[13] Given the broader scope of documents now required, it may be worth the effort for HSR counsel to obtain a specific list of such positions from their clients rather than to presume that all senior management at the VP level or above are so invested.

[14] 16 C.F.R. § 803.8(a).

is HSR reportable, so the seller need only include the CIM for the U.S. portion, not the other two CIMs.)

- CIMs from a prior acquisition of the same company or assets are not called for under Item 4(d)(i). (For example, if an equity fund acquired Company A in January 2011 and then proposes to flip (sell) Company A to another party in October 2011, a CIM prepared by the first seller for the fund would not be required to be included in the October HSR filing.)

In sum, based on the Statement of Basis and Purpose and prior informal interpretations regarding Item 4(c) documents, at most only one document would need to be submitted under Item 4(d)(i) if there is a CIM.[15] Once that document is found, then that is the end of the search under this Item. Where there is no CIM, parties may in some circumstances need to produce more than one document. Given the usual purpose of a CIM, however, it is likely that there would only be one or a limited number of documents given to a buyer that would specifically serve the same purpose. Most parties already collect and review all CIMs and other documents prepared by investment bankers when preparing a notification, so Item 4(d)(i) should not impose any additional burden on filers. CIMs often contain a competitive assessment in order to provide potential buyers with information they need to consider and value an acquisition and therefore should, in most instances, be produced already under Item 4(c).

Item 4(d)(ii) Third Party Advisor Documents. The purpose of this requirement, according to the FTC, is to require submission of bankers' books that might not be submitted under Item 4(c) if a filing party takes the view that documents prepared before a specific buyer emerges are not responsive to Item 4(c). Thus, for parties interpreting Item 4(c) commensurate with the PNO's longstanding position, Item 4(d)(ii) should not require the production of any additional documents.

Item 4(c) requires only those documents found in the files of an officer or director. Item 4(d) does not expand this: there is no requirement under Item 4(d) that the files of a third-party advisor be separately searched for responsive materials.[16] Thus, Item 4(d)(ii) does not expand the scope of the search for the kinds of documents already being filed with most HSR notifications.

Item 4(d)(iii) Efficiencies Documents. Based on prior informal interpretations relating to Item 4(c) documents, we can conclude the following with respect to Item 4(d)(iii):

- Press releases do not qualify even if they analyze or discuss efficiencies and/or synergies expected from the transaction.
- Filings made for other regulatory agencies (U.S. or foreign) that contain an analysis of efficiencies are not responsive.
- Only relevant portions of board minutes related to efficiencies need be supplied and not the entire board minutes. (In other words, the 4(c) allowance for redaction of non-responsive material applies to Item 4(d)(iii)).

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[15] An exception would be if there were separate CIMs for different parts of an acquisition. For example, where a buyer acquires (in the same transaction) two divisions from a seller and that seller had offered the two divisions for sale separately and prepared separate CIMs for each, then both CIMs would need to be produced.

[16] Both Agencies have served civil investigative demands (CIDs) to filing parties' advisors, such as management consultants involved in integration planning and investment bankers, as part of in-depth merger investigations. Given this practice, the addition of Item 4(d)(ii) calling for third-party advisor documents at the initial filing stage may cause concern among some practitioners that Item 4(d)(ii) may provide the Agencies with another opportunity to "bounce" a filing for non-compliance if third-party documents not submitted with the initial filing are produced in response to a Second Request or CID to a third-party advisor.

Often synergies are analyzed in Item 4(c) documents, and, where this is the case, Item 4(d)(iii) will not require any additional search effort. As companies often create stand-alone efficiency or synergy documents, particularly in connection with due diligence or integration planning, Item 4(d)(iii) may require a more careful search of the files of officers who deal with these considerations. While the Item 4(d)(iii) search universe remains limited to the files of officers and directors (and in some cases those reporting to them[17]), efficiency-related documents may be found in the files of officers who may not ordinarily be expected to have Item 4(c) documents, such as a Vice President of Human Resources or a Chief Information Officer, given the usual goal of achieving synergies through elimination of "overhead" and consolidation of IT systems.

Because ordinarily efficiencies are taken into account only once a competitive issue has been identified, it is questionable whether the Agencies will be able to do a better job of conducting an initial review of the proposed transaction by obtaining these documents with the initial filing rather than through a voluntary access letter or Second Request. At best, having an efficiency analysis up front may marginally aid the Agencies' preliminary review by showing a "good guy" story that justifies a merger for reasons other than raising prices or reducing output. At worst, some HSR counsel are concerned that the new Item 4(d)(iii) requirement may be more often used by the Agencies to discount efficiencies documents and analyses presented after submission of the notification, or to argue that any efficiencies claims that the parties did not first disclose via an Item 4(d)(iii) document should be discounted or viewed with suspicion.[18]

However, for transactions with no conceivable competitive issue, the search for efficiencies documents may be an additional burden for filers, without any corresponding benefit to the Agencies.

While the requirement to submit documents related to the efficiencies of a proposed transaction is new, in many instances Item 4(d) should not require more effort than most parties already devote to searching for Item 4(c) documents when preparing a HSR notification. In fact, where there are potential antitrust concerns with a transaction, counsel should already be reviewing efficiency-related documents to prepare a case as to how the efficiencies relate to the transaction, either to show that these efficiencies outweigh any harm to competition or to explain to the Agencies a procompetitive rationale for the transaction. However, for transactions with no conceivable competitive issue, the search for efficiencies documents may be an additional burden for filers, without any corresponding benefit to the Agencies.[19] In all instances, though, parties will not be required to search for documents beyond those prepared by or for an officer or director involved in the acquisition. Because CIMs, third-party consultant documents, and efficiencies documents are often already collected and reviewed by counsel to determine whether they meet the Item 4(c) criteria (and indeed they often do), the practical result of adding Item 4(d) is that most parties will produce a few more additional documents.

Item 5 NAICS Code Revenue Information

The FTC has expanded the Item 5 revenue information requested for the most recent completed year's operations in two significant ways. First, a filing person is required to allocate manufacturing data by a detailed 10-digit NAICS code, rather than by a 7-digit NAICS code. Second, the filing person is required to provide information on products manufactured outside the United States

[17] Cautious filers will often search direct reports to some officers in a "belt and suspenders" approach to better ensure that a responsive document "prepared for an officer" is not overlooked.

[18] Indeed, publicly traded companies are often more focused on preparing synergy documents and calculations to show to the investment community that a merger makes financial sense than to do so for the benefit of antitrust regulators. Thus, companies may continue to create better informed synergy documents as due diligence and integration planning progress, well after an HSR filing is submitted.

[19] A possible solution for this problem would be to limit Item 4(d)(iii) to filings in which there is an Item 7 overlap.

but sold in or exported to the United States by a 10-digit NAICS code. Filers should note that, going forward, reporting for the most recently completed year will require use of the most recent version of the NAICS codes, meaning that the applicable codes will switch from the 2002 edition to the 2007 edition starting August 18, 2011.

The new rules also eliminate the need for double counting revenues for manufactured goods that are sold at the wholesale or retail level for both domestic and foreign manufactured goods. The new instruction requires that any manufacturer, whether foreign or domestic, report revenues from the sale of its manufactured products only under 10-digit manufacturing product codes. Products not manufactured by the parties but only sold by them would continue to be reported under 6-digit wholesale or retail codes.

[T]he Agencies often have received notifications from funds, particularly funds newly formed within a larger family of funds, that were largely blank and therefore did not provide sufficient information to assess the competitive significance of the transaction.

Under the prior rules for reporting revenues for Item 5, the Census Bureau required that there be a U.S. "establishment" involved in order for there to be NAICS revenue. These revisions to Item 5 eliminate the concept of "establishment" as that term is used by the Census Bureau from HSR reporting for manufactured goods.[20]

The new rule regarding the inclusion of U.S. sales of foreign-manufactured goods without regard to a U.S. establishment is only applicable to manufacturing, and not to sales of non-manufactured products. For example, if a filing person owns a farm in a foreign country and sells wheat directly to a U.S. customer, or owns a foreign oil well or mine and sells crude oil or iron ore to a U.S. customer from its foreign facility, the seller would still not report any revenues for that sale in Item 5 under the new rules.

While potentially burdensome to filers that manufacture their products abroad and then sell them into the United States, this rule change will not impose a new requirement on the many U.S. companies that use contracts with third-party manufacturers in or outside of the United States. Products sourced from contract manufacturers, such as those in China, will continue to be reported under wholesale or retail codes to the extent they are resold in the United States.

Item 6 and 7: Introduction of "Associates"

Perhaps the most significant change to the HSR rules is the introduction of the concept of "associates." The current HSR form requires only information about the ultimate parent entities of the parties to the transaction and any entities they "control."[21] Under the HSR definition of control, certain filers, such as investment funds, do not have to report information about related or affiliate entities, such as their general or managing partners. For example, often several investment funds are managed by the same general partner for organizational structure and decision purposes, but the general partner is not considered the controlling entity of the funds for HSR purposes because it does not satisfy the HSR definition of control. As a result, if one fund makes an acquisition, its HSR Form will not reveal information regarding the operations of the other funds or the identity of the general partner. Indeed, the Agencies often have received notifications from funds, particularly funds newly formed within a larger family of funds, that were largely blank and therefore did not provide sufficient information to assess the competitive significance of the transaction.

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[20] For example, under the old rules, if a party sold a manufactured product from a European facility directly to a U.S. customer from a sales office located in Europe, the sales would count toward the size-of-transaction test because the sales are "in or into the U.S." *See* 16 C.F.R. § 802.51(a)(2). However, because the sales were not made from a U.S. "establishment," no revenues were required to be reported for Item 5 under the old rules. In contrast, under the new rules, the sales to U.S. customers would be applicable to the § 802.51 exemption limits and reportable in Item 5.

[21] For non-corporate entities, control is defined as "having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity." 16 C.F.R § 801.1 (b)(1)(ii).

The Agencies view this lack of disclosure as a significant shortcoming of the current HSR Form. The information reported on the current Form does not allow the Agencies to assess the potential competitive impact of acquisitions by entities that have minority stakes or are managed by other entities with overlapping interests in the same industry as the target. To address these concerns and gather relevant information, the FTC's revised rules introduce the concept of "associates." The definition of associate is meant to capture entities under common management, as well as those entities controlled or managed by an associate. "Associate" is defined as an entity that:

(A) has the right, directly, or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity");

(B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person;

(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.[22]

With respect to associates, the new rules will require acquiring parties to report the following information:

- Associates' significant minority holdings (i.e., more than 5 percent but less than 50 percent) of entities that have revenues with NAICS code overlaps with the acquired business. (Item 6(c)(ii))
- The names of those entities that associates control and that the acquiring person believes derive revenues in those NAICS codes that overlap with the acquired business, and the geographic areas in which the associates derive those revenues. (Item 7(b)(ii) and 7(d))

The reaction to the concept of associates has focused on the increased burden for some filers. The addition of these reporting requirements for associates will affect only acquiring persons that have associates. Acquired person filers are unaffected. The Statement of Basis and Purpose estimates that perhaps only 20 percent to 25 percent of acquiring person filers are investment funds, Master Limited Partnerships, or other entities that would be potentially affected by the addition of the associate reporting requirements.

The PNO has indicated that for strategic fund acquisitions, it is often the case that the filer's Item 4(c) documents themselves will assess the relationship of an acquisition target to other entities already held in the same industry. Also, investment fund families often organize themselves by industry, making it easier for such filers to assess holdings within the same industry. For investment funds that invest across a wide spectrum of industries, for example, funds that specialize in distressed companies, there may be no associates that have holdings in the same NAICS codes. In such cases, the changes would not impose additional reporting obligations.

For Item 6(c)(ii), the acquiring person may rely on its regularly prepared financials, provided that they are no more than three months old. This should allow funds to rely on information they already collect in the ordinary course of business and not require a complete top-to-bottom organizational review every time an HSR filing is made.[23] The FTC recognizes that because associates

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[22] 16 C.F.R. § 801.1(d)(2).

[23] This would imply that a party would need to determine the identity and NAICS activity of its associates and their holdings at most four times per year.

are not controlled by the acquiring person, the acquiring person may not have full access to information regarding the operations of their associates. As such, acquiring persons are only required to supply information about associates based on their knowledge and belief.

In connection with the associate concept, the FTC also has expanded Items 7(b)(ii) and 7(d) to require acquiring persons to identify any NAICS code overlaps between the acquired entity and associates of the acquiring person. If NAICS codes are unavailable, the filing person may limit its response to the holdings in entities that have operations in the same industry based on its knowledge and belief.

Conclusion

The elimination of a number of items on the HSR Form will save a considerable amount of effort for some filers. For other filers, the significant additional burden imposed by Items 4(d)(iii), 5, 6, and 7 will increase the amount of effort and expense that they must incur to supply additional data and documentation.

Some of the early reactions to the proposed version of the changes predicted that these changes would have an unduly burdensome impact on filers. As originally proposed, the wording for new Item 4(d) rightly caused alarm by requiring the search of two years' worth of documents, omitting any requirement for officer and director involvement, and calling for ordinary course documents that merely "referenced" the other party. Such changes would have significantly expanded both the number of officers whose files would have needed to be searched and the volume of documents produced. As adopted, Items 4(d)(i) and (ii) largely serve to codify the Agencies' interpretation of Item 4(c) scope, leaving Item 4(d)(iii) as the only significant expansion to the documentary requirements.

The need in revised Item 5 to provide revenue figures for foreign-manufactured products sold in the United States may create substantial work for some filers with significant foreign manufacturing operations. For most other filers, the elimination of the base year will result in significantly less work in calculating the filing party's Item 5 revenues.

For filers affected by the new associate requirements, namely investment funds and Master Limited Partnerships, it will be interesting to see whether the additional disclosures in Items 6 and 7 provide the Agencies with information that helps their review. Given the lack of transparency and public reporting for some private equity entities, these items may help provide information that would otherwise be difficult for the Agencies to obtain. On the other hand, the number of transactions in which competition is adversely affected by an associate holding a minority interest in a competitor may be small. It remains to be seen if the benefit of being able to identify such relationships will outweigh the greater burden on a number of filers.

Going forward, companies that sell a significant amount of foreign manufactured goods in the United States may choose to be proactive and compile annual Item 5 data as soon as it becomes available rather than wait until a deal is on the horizon. Companies with complicated ownership structures, such an investment funds or Master Limited Partnerships, also may be well advised to keep quarterly up-to-date lists of their associates so that they can more readily comply with Items 6 and 7 as reportable acquisitions arise. ●