

For Better or Worse? FTC and DOJ Remake Hart-Scott-Rodino Act Premerger Notification Form and Rules

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The Federal Trade Commission (FTC) and the Department of Justice (DOJ) recently modified the premerger notification form and rules for transactions reportable under the Hart-Scott-Rodino Act (HSR Act). The new form and the amendments to the HSR rules will become effective 30 days after publication in the *Federal Register*, which is expected shortly. Transactions filed with the FTC and the DOJ prior to this date, meaning at least prior to August 10, 2011, will NOT be required to comply with the new rules.

Almost every aspect of the form will be affected in some way. With the exceptions noted below, the changes will reduce the burden on filing parties, particularly for acquisitive clients such as private equity firms and certain strategic buyers.

Reduced Burdens

The FTC recognized that many items in the HSR Form do not generate information useful to antitrust enforcement. As a result, many of these items have been modified or dropped completely. The most significant of these changes are summarized below:

Item	Current	Change
4(b)	Provide the most recent balance sheet (even if unaudited) for all unconsolidated U.S. corporations within the filing person ^[1]	Eliminated
5(a), 5(b)(i)	Provide 2002 base year revenue by 6-digit NAICS code and 10-digit product code even for companies not owned by the filing person in 2002	Eliminated

5(b)(ii)	List 10-digit product codes and revenues for manufactured products added or codes deleted between the 2002 base year and most recent year by the filing person	Eliminated
6(a)	List names and addresses of all entities with at least \$10 million in assets within the person filing notification	Limited to entities that generate U.S. revenue of at least \$10 million in assets
6(b)	Provide all 5% or greater shareholders of corporations within the person filing	Limited to holders of 5% or more of the voting or noncorporate interests of the Ultimate Parent Acquiring Person and the Acquiring Entity. Partnerships such as private equity funds or limited partnerships need to be named regardless of percentage held (private equity investor limited partners need to be listed)
6(c)	List shareholdings of at least 5% of corporations with at least \$10 million in assets for person filing notification	Now 6(c)(i); added holdings of noncorporate entities but limited to holdings of at least 5% but less than 10% in entities that derive revenues in the same NAICS code(s) as the target firm

New Items

In addition to removing or altering certain items on the HSR Form, the new rules also require parties to submit additional information. These new requirements are intended to permit the agencies to more thoughtfully study the competitive effects of the proposed transaction. In some cases, these changes formalize long-standing informal FTC requirements and practices. Some of the key changes are:

Item(s)	Current	Change
4(d)(i)	None	Provide all Confidential Information Memoranda or, if none exist, similar documents provided to potential buyer(s) specifically relating to the sale of the target, created up to one (1) year prior to filing; this is limited to documents prepared for an officer, director, or its equivalent, but need not include traditional "confidential" documents (i.e., not limited to documents that analyze the target with respect to competitive sales growth, or expansion in product and geographic areas)

4(d)(ii)	None	Provide studies created by third-party advisors (e.g., investment bankers, consultants) during an engagement or for the purpose of being engaged by the parties, seen by an officer, director, or its equivalent, created up to one year prior to filing and including "4(c)" content <i>that relate to the sale of the target</i> , and prepared specifically for the transaction to which the filing relates
4(d)(iii)	None	Provide all studies prepared for the transaction (except those without stated assumptions) seen by an officer, director, or its equivalent that evaluate efficiencies and/or synergies created for the transaction to which the filing relates
5(a)	5(b)(iii), 5(c)	Provide revenues derived in the United States by 6-digit NAICS code for nonmanufactured products and by 10-digit product code for manufactured products including for products manufactured outside the United States
7(b)(ii)	None	Identify any "Associate" of the Acquiring Person that reports revenues in the United States

		NAICS code(s) as the target (e.g., identify any investment funds managed by the same private equity firm as the fund making such acquisition that derive the same NAICS code(s) as the target even if different than the fund making the acquisition)
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[1]. Under the HSR Rules, "person" here refers to the "Ultimate Parent" of the filing acquiring party and any entity it "Controls." To avoid reader exhaustion, we have not incorporated the detailed rules relating to "ultimate parent" and "control" in this LawFlash.

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