

Fried Frank Antitrust & Competition Law Alert[®]



[Please click here to view our archives](#)

FTC Proposes Amendments to the HSR Act Form

Major Changes Include Extending Coverage to Associates of the Acquiring Party and Expanding Scope of Request For Transaction-Related Documents

Amendments Likely to Increase Burden for Private Equity Firms and Other Filing Parties

The Federal Trade Commission ("FTC") has announced proposed modifications to the Form that must be submitted for reportable transactions subject to premerger notification under the Hart-Scott-Rodino Act of 1976 (the "HSR Act"). The HSR Act applies generally to certain acquisitions of assets and voting securities valued above the applicable size-of-transaction threshold (currently \$63.4 million), and where relevant, size-of-party thresholds are satisfied and no exemption applies. The proposed amendments do not change the HSR reporting requirements themselves, but are limited to the categories and scope of information that must be submitted with the Form.

According to the FTC, the proposed modifications to the Form are intended to serve the dual purposes of streamlining the Form and capturing additional information to better assist the FTC and the Antitrust Division of the Department of Justice (the "Agencies") in conducting their initial review of the competitive impact of proposed transactions. While the information required for many parties will be reduced, certain parties, such as private equity firms, will face additional burdens. This is because, among other changes, the new Form will require information for "associates" of the acquiring party – entities that are not currently included within the acquiring party.

The FTC will accept public comments on the proposed changes through October 18, 2010. There is no current timetable for when these proposed amendments will become effective.

Expansion of Information Requested

The following are the key changes proposed by the FTC that are likely to increase the burden on filing parties.

- **Additional Information for "Associates."** Item 7 of the Form currently requires a filing party to identify 6-digit NAICS industry codes in which it derives revenues and in which any other party to the acquisition also derives revenues (commonly described as a NAICS "overlap"). Item 7 is intended to identify potential product overlaps between the parties to assist in the review of the transaction. The FTC is proposing to expand the NAICS overlap reporting requirement to cover "associates" of the acquiring person.

The proposed amendments define an associate as a person that: (i) has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a “managing entity”); (ii) has its affairs and/or investments, directly or indirectly, managed, directed, or overseen by the acquiring person; (iii) directly or indirectly, controls, is controlled by, or is under common management with the acquiring person, but are not under common control with the managing entity; or (iv) directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.

Examples of such “associates” may include general partners of a limited partnership, other partnerships with the same general partner, investment funds whose investments are managed by a common entity, investment advisors of a fund and other funds advised by that entity.

According to the FTC, the submission of information relating to associates will provide the Agencies with a more complete picture of the competitive impact of a proposed acquisition, particularly with respect to investment funds structured as a family of funds under common management (common in the private equity context) and Master Limited Partnerships (common in energy sectors). According to the FTC’s Statement of Basis and Purpose accompanying these proposed amendments, the current Form “does not elicit sufficient information about ties between acquiring investment funds and other entities that are associated with these acquiring entities, which have holdings in the same line of business as the target.”

This amendment is likely to be a significant change for private equity firms, Master Limited Partnerships, and others that invest through multiple funds or a family of funds that have previously been treated as separate persons for HSR purposes. For example, whereas the current HSR Form may require revenue data for only the fund making an acquisition, including its respective portfolio companies, the amended Item 7 will require revenue data for the general partner and its other funds and their portfolio companies even though those other funds may have no involvement in the transaction being reported. Although the Form will only require information for associates with overlapping NAICs, parties will be required to identify and review the business of their associates to determine whether information for such associates will be required. Large financial institutions that have diverse investments and other financial relationships may have numerous associates for which additional information may be required.

Further, as discussed below, the concept of “associate” also expands the information to be reported in Item 6(b) and 6(c) of the Form relating to third-party minority shareholders of 5% or more and minority shareholdings.

- ***Expansion of Requirements for Submission of Transaction-Related and Other Business Documents.*** The HSR Form currently require parties to submit transaction-related documents prepared by officers or directors of the parties that analyze the proposed transaction with respect to competitors, competition, markets, market shares or expansion into product or geographic markets (known as Item 4(c) documents). The

Agencies rely heavily on Item 4(c) documents in their initial review of a transaction. The new Form will include an additional “Item 4(d),” which expands upon Item 4(c) to require:

- Offering memoranda (or documents that served that function) relating to the transaction produced up to two years before the date of filing.
- Item 4(c)-type documents prepared by investment bankers, consultants or other third-party advisors up to two years before the date of filing.
- Documents evaluating or analyzing synergies and/or efficiencies prepared by or for officers or directors for the purpose of evaluating or analyzing the transaction.

With respect to offering memorandum and documents prepared by investment bankers and other third parties, many documents covered by Item 4(d) are already covered by Item 4(c). However, the HSR Form will also require such documents to be submitted even if they are not related to the transaction being notified. Another key addition is for synergy/efficiency documents, though many parties often include such documents in their Item 4(c) response.

- **More Detailed Transaction Descriptions.** Item 3(a) will be modified to require additional information in the transaction description, such as the names of all issuers and non-corporate entities whose shares or interests are being acquired, and in asset acquisitions, a description of the business the assets being acquired comprise. In addition, if part of the reported transaction is exempt under any of the exemption rules, parties will be required to identify the exemption.
- **Foreign Manufactured Product Revenue Reporting.** Item 5, which requires U.S. revenues to be reported by NAICS code, will be modified to require filing persons to identify revenues for products manufactured outside the U.S. and sold in the U.S. at the wholesale or retail level, or through direct sales to customers located in the U.S. (thereby eliminating the existing limitation to operations conducted within the U.S.). Such foreign manufactured product revenue will not have to be separately reported, but instead would be aggregated with other U.S. revenues within the same NAICS code.
- **Identification of Prior Acquisitions by Both Corporations and Unincorporated Entities.** Item 8 currently requires acquiring persons to list certain prior acquisitions of corporations that report revenue under the same NAICS code(s) in which there is a NAICS overlap. Consistent with other proposed amendments, Item 8 will be modified to align the treatment of corporations and unincorporated entities. Thus, acquiring persons will be required to identify previous acquisitions of entities (corporations or unincorporated entities) that derived revenues in any overlapping NAICS code identified in Item 7.

Streamlining the Form

The amendments also contain several proposed changes that are designed to reduce the burden on filing parties by eliminating or modifying requests that have proven to be unhelpful to the Agencies in conducting their initial review of proposed transactions.

Some of the key proposed changes are as follows:

- **Prior Held Assets, Voting Securities or Noncorporate Interests.** The proposed amendments would eliminate the Item 2(d) requirement to provide certain information relating to assets, noncorporate interests and voting securities of the acquired person held by the acquiring person prior to and following the proposed transaction (as reported in Item 3(b) and 3(c) of the current Form) that is currently required. Items 3(b) and 3(c) will accordingly be deleted. Parties still will be required to include the percentage and value of voting securities and noncorporate interests held prior to and following the transaction.
- **Fair Market Valuation Contact.** The proposed amendments would eliminate Item 2(e), which requires identification of the person(s) who performed any fair market valuation used as the basis for the transaction value. Item 2(e) has not proven useful because the Form elsewhere requires a contact person to be identified in the event that questions arise, including with respect to transaction value.
- **Reporting for Certain SEC Materials.** Item 4(a) will no longer require the submission of certain materials submitted to the SEC (e.g., certain 10-K, 10-Q and 8-K filings, registration statements filed in connection with the transaction and Schedule TO if the acquisition is a tender offer). Instead, filing parties will only be required to provide a list of all entities within the party that file annual reports with the SEC and to provide the Central Index Key number for each entity.
- **Elimination of Most Recent Balance Sheet Requirement.** Item 4(b) will no longer require the submission of a company's most recent regularly prepared balance sheet. Personal balance sheets for natural persons also will no longer be required. Parties must continue to provide the most recent annual report and/or audit report for the filing person and any unconsolidated U.S. issuers.
- **Elimination of Base Year Revenue Reporting.** Item 5 currently requires revenue data for the current year and the base year (now 2002). The proposed amendments will eliminate revenue reporting requirements for the base year, along with the requirement to list revenues for products added or deleted between the base year and the most recent year.
- **Streamlining Reporting of Revenue Data by NAICS Code.** Item 5 will be streamlined to only one reporting section (in lieu of the five reporting subsections in the current Form), and will require filing parties to list manufacturing revenues by 10-digit product codes and non-manufacturing revenues by 6-digit industry codes for the most recent completed fiscal year.

- **Limitations on Information Regarding Controlled Subsidiaries.** Item 6(a) currently requires parties to list the name and headquarters address for all entities within the filing party having total assets of \$10 million or more, including foreign entities. The proposed modifications to Item 6(a) will limit the information to be reported to those located in the U.S. and foreign entities that have sales in or into the U.S. Further, parties will no longer be required to provide street addresses – identification of city and state or city and foreign country designations will suffice.
- **Information Regarding Third-Party Minority Shareholders.** Item 6(b), which currently requires parties to identify shareholders of 5% or more of any corporation included within the filing person having total assets of \$10 million or more, will be both trimmed down and expanded.
 - Information responsive to Item 6(b) will be limited to the acquired entity and the acquiring entity and its ultimate parent entity. Thus, Item 6(b) information will no longer be required for any other entity included within the ultimate parent.
 - Item 6(b) also will be expanded to include holders of 5% or more interests in non-corporate entities. Although limited partners will not need to be identified, any general partner must be listed, regardless of the percentage held.
 - The \$10 million or more asset threshold will be eliminated.
- **Limitation and Expansion of Information Regarding Minority Shareholdings.** Item 6(c), which requires parties to list its minority voting securities holdings of 5% or more in any entity that has total assets of \$10 million or more, will also be expanded and limited.
 - It will now cover qualifying holdings of interests in noncorporate entities.
 - It will be limited, based on the filing party's knowledge or belief, to entities that derive revenues in the same 6-digit NAICS industry code as the other party to the transaction.
 - As discussed in more detail above, Item 6(c) also will be significantly expanded to include minority holdings of its "associates."

* * *

Authors and Contributors

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or the attorneys listed below:

New York

[Peter Guryan](#)

Partner

+1.212.859.8477

[Alyson L. Redman](#)

Special Counsel

+1.212.859.8842

Washington DC

[Barry Nigro](#)

Partner

+1.202.639.7373

[Richard Park](#)

Partner

+1.202.639.7064

London

[Alasdair Balfour](#)

Partner

+44.20.7972.6274

Fried, Frank, Harris, Shriver & Jacobson LLP

New York

One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC

1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt

Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Shanghai

40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London

99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris

65-67, avenue des Champs
Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

Fried, Frank, Harris, Shriver & Jacobson

Hong Kong

9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

A Delaware Limited Liability Partnership

The information and materials offered in this publication are for general informational purposes only; it does not constitute legal advice and is presented without any representation or warranty whatsoever, including as to the accuracy or completeness of the information.

Fried Frank Antitrust & Competition Law Alert® is published by the Antitrust & Competition practice group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

Fried Frank Antitrust & Competition Law Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to Antitrust_Alert@friedfrank.com and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous Fried Frank Antitrust & Competition Law Alerts®, please visit our [archives](#) on the Fried Frank website.

To view previous Antitrust & Competition To Our Client Memoranda, please visit our [archives](#) on the Fried Frank website.

To unsubscribe from all Fried Frank Email Alerts and electronic mailings send a blank email to unsubscribe@friedfrank.com.