

FTC and DOJ Announce HSR-Related Changes

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On November 28, 2016, the Premerger Notification Office of the Federal Trade Commission (PNO) and the Antitrust Division of the Department of Justice (DOJ) both announced potentially important changes in the way the agencies administer certain aspects of the Hart-Scott Rodino Act (HSR) premerger notification program.

HSR Filings – Item 4(c) and 4(d) Documents

In yet another departure from long-standing policy positions, the PNO announced via a blog posting on its website that it was revising its views with respect to certain documents that must be submitted with HSR premerger notification filings. The change relates to documents submitted in response to Items 4(c) and 4(d) of the HSR form, which include documents that evaluate or analyze certain competition-related aspects of the notified transaction, as well as confidential information memoranda, documents prepared by third-party advisers and documents analyzing synergies. Item 4 documents are typically the most informative part of parties' HSR filings, as they may contain information about the relevant products and markets, as well as the parties' rationale for entering into the transaction, which can inform the competitive effects analysis by the antitrust agencies.

Previously, the PNO position was that filing parties need not provide documents that would otherwise meet the criteria for inclusion under Item 4(c) or Item 4(d) if the responsive portions of such documents related only to foreign markets. The rationale for the previous position was that such information would not be relevant to the U.S. anti-trust analysis, and, therefore, the burden of identifying and producing such documents outweighed the potential probative value.

Under the PNO's new position, however, such documents must now be submitted with any HSR filing. In its posting, the PNO stated that, "given the increasingly interconnected global marketplace, we have determined that excluding documents that discuss only foreign markets can impair the agencies' initial competitive analysis. In particular, documents that discuss foreign markets or competitors located only in other countries without any specific reference to a U.S. market could be relevant to our review." As a practical matter, while many such documents likely would already be collected and reviewed in connection with a general search for Item 4(c) and 4(d) documents (but not produced), the change in approach by the PNO may require the file searches of additional document custodians, with responsibility solely related to geographic markets outside the U.S., thereby adding to the burden of the HSR filing. Though this change may be relatively narrow, it is yet another rejection of well-established precedent in recent years, which generally have either increased the types of documents required by the HSR filing or narrowed the scope or application of exemptions from the HSR filing requirements, the cumulative effect of which has materially increased the time and expense of preparing HSR filings.

DOJ Model Second Request

The DOJ also announced on November 28 that it had issued an updated version of its model Request for Additional Information and Documentary Material (known as the Model Second Request). The DOJ will issue a Second Request to parties to certain mergers and acquisitions when it has concerns about the competitive impacts of the transaction. Such requests require the parties to submit significant amounts of data and documents to the DOJ in order to aid the agency's investigation. In its announcement, the DOJ indicated that it believes the new Model Second Request — which will take effect on December 12, 2016 — contains revisions that could allow for easier compliance with the requests, including improved organization and elimination of duplication

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by grouping together specifications by subject matter. It also includes early requests to identify individuals and information that will better facilitate the DOJ's understanding of the transaction. In addition, in light of advancements in e-discovery practices and requirements, the updated model contains instructions about predictive coding and search terms.

As noted by the DOJ in its announcement, most of these changes were made to conform the Model Second Request to existing agency practice. For that reason, the implications of the new Model are likely to be limited. That said, the DOJ's move to address document collection parameters (*i.e.*, identifying custodians or individuals from whom documents must be collected) and critical transaction-related information at an earlier stage in the compli-

ance process — if implemented in a tailored way rather than as a sweeping requirement — holds some promise for merging parties. In addition to potentially expediting the DOJ's overall investigation, establishing early alignment with the DOJ on the key factual issues can streamline the compliance process by avoiding unnecessary custodians and facilitate agreements on modifications to narrow the scope of the Second Request. With respect to e-discovery, the Model's instructions on predictive coding signify a broader acceptance of this technology, which also has the potential to reduce document review time and expenses.

The FTC last revised its Model Second Request in August 2015.

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