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New HSR Merger Notification Rules Could Prove Costly

By **Melissa Lipman**

Law360, New York (July 7, 2011) -- The U.S. Department of Justice and Federal Trade Commission issued revised rules Thursday governing the type of information companies must submit to win antitrust clearance for transactions, requiring new materials that experts said would likely increase the burden for most filers significantly.

The antitrust agencies issued new rules for premerger filings under the Hart-Scott-Rodino Antitrust Improvements Act — which will take effect in 30 days — as well as a new streamlined version of the notification form that the agencies said was designed to ease the burden on companies by eliminating some of the information they had required in the past.

But the new data and documents required under the updated rules are likely to outweigh any cost savings and will probably end up considerably boosting the expense of HSR filings for most companies, attorneys said Thursday.

The most burdensome aspects of the new rules are those requiring companies to turn over information about associated entities, as well as pitchbooks and other materials created by third parties that aren't specifically related to the transaction. The requirement for companies to turn over different types of information on imported products could also prove nettlesome, attorneys say.

"We're fairly often called upon to give some estimates of what it will cost [to prepare an HSR filing] and we have some that we're going to have to change if they're not filed within the next 30 days," Clifford Chance LLP partner William Blumenthal said. "The things they've added on balance will tend to more than offset the reductions."

One of the biggest changes is the requirement that acquirers provide information about associated entities — those that are "commonly managed" by the same business as the purchaser but which have been excluded from premerger filings in the past because they aren't considered controlled by the ultimate parent entity of the acquirer under U.S. antitrust rules.

Without that information, the agencies haven't been getting everything they need to "get a complete picture of potential antitrust ramifications of an acquisition," particularly in deals involving families of hedge funds or transactions in the energy industry involving master limited partnerships, the FTC said.

But the type of information the agencies are seeking can be difficult and time-consuming for companies to track down, said Skadden Arps Slate Meagher & Flom LLP partner Neal R. Stoll.

"The rule relating to a definition of 'associate' bothers me both from an academic perspective as well as a practical perspective," Stoll said. "It creates a potential for parties to not be able to gather the required information easily or without going to entities that they really don't have any access to."

The change will likely have the biggest effect on private equity companies and hedge funds, which account for a sizeable portion of HSR filings, according to Blumenthal, a former FTC general counsel who chairs Clifford Chance's U.S. antitrust group.

In the past, when a portfolio company had several separate hedge funds, each fund was treated as a different entity for HSR purposes and filers owned by a fund only had to provide competitive information about other companies held by the same fund, Blumenthal said. Now, filers will have to expand their searches to include companies held by sister funds.

"That's not necessarily unreasonable in terms of whether there might be some competitive interaction between companies in fund one and fund three, but ... it imposes a significant burden," Blumenthal said.

Another key change to the rules deals with the types of materials that companies have to turn over to the agencies when seeking antitrust clearance.

Many companies were already providing some of the documents that will now be required under the new rule, such as offering memos and efficiencies analyses. But the changes now also require parties to submit materials that officers and directors receive from third-parties like investment bankers and consultants, even if the documents aren't directly related to the transaction.

Though the agencies did cut how far back filers must go for those types of documents from two years to one, the rule still covers often-unsolicited materials like pitchbooks from investment bankers trying to convince companies to do a deal — documents that are often found to be riddled with inaccuracies, attorneys say.

"Often the way you would do a search would be to tell people, 'Give me everything relating to the deal,' and that will be fairly thick but it's self-contained," Blumenthal said. "Instead here, the message is, 'Well if you're an officer or director give us anything under your control, anything your secretary or your support staff has that an investment banker has given you.'"

In addition to placing new requirements on the types of materials that must be turned over, the revised rules will also probably create more work for companies that manufacture a lot of their products outside the U.S. and then import them into the country, attorneys say.

Under the previous regulations, companies could provide data about how much revenue came from products manufactured abroad as imports, much as they do for U.S. Census filings. But the new rules require companies to provide product codes for foreign-manufactured goods just as they would for domestic items.

In some cases, these changes will help regulators identify competitive overlaps that they might otherwise have missed, Blumenthal said. In the past, if a buyer made a product in the U.S. and the target made the same kind of product in Europe, the data submitted to regulators wouldn't have identified the competitive overlap.

Though the new approach increases the chances that both products will show up with the same code in the HSR filing, Blumenthal said, there were tremendous imperfections in the classification system that meant some overlaps might still slip by as two companies could label similar products under different codes in good faith.

Moreover, sorting out the North American Industry Classification System code data can be quite burdensome for companies, said Akin Gump Strauss Hauer & Feld LLP antitrust group co-leader Paul B. Hewitt.

"People are going to hurt the most when they are time-pressured to get a Hart-Scott-Rodino filing in and they've never done one before," Hewitt said.

Despite the likely increased burden and cost for filers, the changes nevertheless bring more consistency to the way HSR filings will be handled, according to attorneys. They also provide guidance for attorneys who have taken different approaches on how broadly to read the agencies' requirements.

"It now provides certainty ... as to what you need to provide, and in that way it eliminates risk for companies that take the more aggressive approach," Baker Botts LLP partner Stephen Weissman said. "At the same time, for those who have always been conservative and taken a broad view, it doesn't penalize for that approach."

The changes also eliminate some of the types of data companies had to submit in the past, including filings with the U.S. Securities Exchange Commission, economic "base year" data or detailed listings of all the voting securities acquired in a transaction.

While some of the changes, like eliminating the SEC filing requirement, will provide little savings, getting rid of the base year requirement will make less work for companies, according to Blumenthal.

Still, many attorneys questioned whether the benefits the changes would yield for antitrust regulators were worth what were likely to be significantly increased compliance costs for companies.

"It is certainly true that in some kinds of transactions that the extra information the FTC is asking for will unquestionably be helpful to the FTC, and you would say in a rational world that they should see this information," Hewitt said. "The question is, is this more in the direction of a sledgehammer killing a fly."

--Editing by Jocelyn Allison and Andrew Park.

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