

## HOW THE PROPOSED HSR FORM AND MERGER GUIDELINES MAY AFFECT PRIVATE EQUITY DEALS

The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (Agencies) recently published proposed key changes to the Merger Guidelines and the Premerger Notification and Report Form for transactions that trigger a notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Form). These proposed changes are subject to public comment before being finalized and implemented. The Merger Guidelines serve as a roadmap for how the Agencies will evaluate potential effects from mergers and acquisitions, while the proposed new HSR Form seeks to collect more information from merging parties that would purport to aid Agency investigations under the new Merger Guidelines.

The expanded scope of requested information in the new HSR Form will significantly increase time, cost, and complexity of compliance for private equity (PE) firms. Some estimates indicate the time and cost could triple compared to the current HSR Form. These substantive changes will impact not only HSR Form preparation but could also alter everyday practices for deal teams.

Below, we highlight key HSR Form changes for PE firms and provide tips on how to begin to prepare. Many items called for in the HSR Form are highly technical and require an in-depth understanding of the HSR Form, its definitions, and related rules. Therefore, it is always best to work with an experienced HSR practitioner when completing a HSR Form.

### New Merger Guidelines: Implications for PE

- **Merger Guideline 9 addresses "serial acquisitions."** This guideline states that the Agencies will investigate "multiple small acquisitions in the same or related business lines [that] may violate [Clayton Act] Section 7." *In re JAB Consumer Partners/ VIPW/ Ethos Veterinary Health* saw divestitures in the emergency and specialty veterinary services market due to market concentration concerns attributed to multiple regional acquisitions.
- **Merger Guideline 12 addresses partial ownership acquisitions of competing entities.** It states that partial ownership and minority interests may be anticompetitive if it allows undue influence over the business organization of a competitor. This encapsulates the renewed focus on interlocking directorates (Section 8), which resulted in the resignation of a director from the board of a healthcare intelligence firm; one of five Section 8 matters settled with the DOJ. Most recently, the FTC required a structural remedy in the board composition of a PE firm, unwound a joint venture, and forced a sale of shares in a PE deal involving natural gas. *In re QEP Partners/ EQT Partners*.
- **Merger Guideline 11 captures the Agencies' goal in protecting labor markets,** which correlates to the new request for information about employment classification and wage/equity practices.

## KEY CHANGES FOR PRIVATE EQUITY DEALS<sup>1</sup>

### 1) Expanded Scope of Documents

The new HSR Form goes far beyond the original current scope of required Item 4(c) and 4(d) documents – competition, markets, and synergy documents analyzing the transaction and prepared by or for an officer or director – by requiring the submission of:

Documents created by or for "supervisory deal team lead(s)." For PE firms, this could include members of the firm who have not historically been included within the scope of "HSR Item 4" officers or directors, but who play an active role in leading potential transactions.

All drafts of responsive documents. For PE firms, this could capture a large volume of draft documents generated throughout the internal transaction process. Historically, with limited exceptions, only the "final" version of a responsive document was required to be attached to the HSR Form.

Ordinary Course Documents. This new requirement will capture ordinary course documents that discuss "market shares, competition, competitors, or markets" for any overlapping product or service that were provided to the board of directors, which is typically interpreted to include investment committees, of either company within a year of the filing date. The current form only required production of documents that were specifically created for purposes of the transaction, i.e., not ordinary course business or board documents.

### 2) Expanded Information about the Filing Person

Filing parties, particularly the Ultimate Parent Entity ("UPE")<sup>2</sup> of the acquiring entity, must provide more information about themselves and the other entities under their control, as that term is defined under the HSR Act. For many PE firms, the UPE can often be a newly created special purpose vehicle, a fund limited partnership, or even an individual limited partner investor into a fund depending upon how the fund and investment is structured.

Minority Holders. The acquiring party will have to disclose all entities or individuals that hold at least 5% of the voting securities for itself, as well as any entity that it directly or indirectly controls or that controls the acquiring entity. For PE firms, this could increase disclosure obligations regarding minority investments. Whereas before limited partners could simply disclose their general partner, they now must disclose not only their general partner, but also certain limited partner investors. The proposed change would also require disclosing minority investors within the

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<sup>1</sup> The changes noted herein are not an exhaustive list of every proposed change and requirement in the new HSR Form, but instead highlight some of the most significant proposed changes.

<sup>2</sup> The UPE is the entity of the top of the chain of "control" that is not itself controlled by any other individual or entity. Unlike in many other jurisdictions, for HSR Filings, "control" is generally a 50% ownership test. A corporation is controlled by anyone holding at least 50% of its voting securities or holding the right to appoint at least 50% of the board, while a non-corporate entity (such as a limited partnership) is controlled by anyone having the right to at least 50% of its profits or assets upon dissolution.

various levels of the transaction structure. Where PE firms are still finalizing their capital calls or planning to syndicate post-signing, PE firms may be required to provide information that is available at the time of the filing with a note about what could possibly change. It is unclear whether the Agencies will require additional information as the structure is finalized.

Officers and Directors. All officers, directors, or board observers of the UPE of the acquired entity and all the entities that it controls for the two years prior to filing will need to be identified to the Agencies. Officers, directors, and board observers that shall be appointed to the target or any entity within the transaction structure following closing must also be identified. Each officer, director, and board observer listed will also need to disclose any other executive, officer, or observer position that he/she/they have held in the prior 2 years. For PE firms, depending upon who the UPE is of a given transaction, this could require the need to disclose information regarding officers, directors, and board observers of other controlled investments.

### 3) Expanded Narrative and Data Responses

Filers will now be required to provide more narrative responses than ever before, including a description of the strategic rationale for the transaction, citations to documents supporting that rationale, a diagram of the transaction structure, and an estimated transaction timeline.

Business Operations. The UPE of the acquiring person must provide a description of the business operations of all entities that it controls. PE filers may, therefore, need to provide a narrative description of other controlled investments.

Horizontal Relationships. The UPE of the acquiring entity must detail any products or services that overlap with those offered by the target. Depending on the UPE in each transaction, this could require looking at and describing overlaps across other controlled investments. Where an overlap exists, the filing party will need to provide detailed data regarding sales, customers, licensing agreements, and non-competition agreements. This may require more engagement and assistance from existing investments.

Vertical Relationships. The UPE of the acquiring party must detail any vertical relationships (such as acting as an input supplier) that exist between any of its controlled entities and the target, between the target and any competitor of a controlled entity, or between any controlled entity and competitors of the target. This may require looking closely at the operations and relationships of existing controlled investments. Where such relationships exist, the filing party will need to provide detailed data regarding sales, customers, licensing agreements, and non-competition agreements.

Employee/Labor Information. The new HSR Form requests employee classification information based on U.S. Standard Occupation Classification Codes ("SOC Codes") and workplace safety and labor law violations for a 5-year period. In the PE context, again depending upon the UPE, this may require collecting and detailing employee information for existing controlled investments.

Prior Transactions. The new HSR Form requests details of all prior transactions for the UPE of the acquiring entity and the target in the past 10 years of any entities or assets that overlap with the target of the proposed transaction. These expanded disclosure obligations would capture information on a series of transactions in the same product area regardless of whether those prior transactions were reportable under HSR.

#### **4) Other Significant Changes**

In addition to the changes above, the new HSR Form includes other requirements that could add to the burden for PE firms.

Foreign Subsidies. The filing party will need to disclose certain types of subsidies that it has received from a "government of concern," currently defined as foreign entity that is owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a "covered nation," which includes China, Russia, Iran, or North Korea.

Communication Systems. The filing party must disclose all communication and messaging systems that it uses.

Translation of Foreign Document. Filing parties must now provide translations of all foreign language documents that are submitted as part of a HSR Filing.

#### **TIPS FOR PREPARING FOR FUTURE FILINGS**

- Plan in advance regarding increased time, cost, and efforts to gather and track relevant information for the new draft HSR Form.
- Anticipate the new requirement for a broader scope of documents by setting up processes in advance to manage information flow and centralizing the tracking and collection of potentially responsive documents.
- Educate deal teams on the new requirement around providing all drafts of documents that meet specific HSR criteria, as these documents often play a critical role in how the Agencies initially view a transaction.
- Disseminate the new proposed HSR Form requirements to relevant teams in the firm that will need to gather information, e.g., human resources department for labor related requirements.

In anticipation of the proposed changes to the HSR Form, Clifford Chance's antitrust team has developed a comprehensive client friendly HSR Playbook, to guide companies and PE firms through these changes in more detail.

Contact Clifford Chance for access to the HSR Playbook or tailored advice on complying with the proposed changes.



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