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October 18, 2010

BY HAND

The Honorable Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Notice of Proposed Rulemaking Relating to the Premerger Notification and Report Form

Dear Secretary Clark:

I am pleased to submit, on behalf of Skadden, Arps, Slate, Meagher & Flom LLP, the attached original and five (5) copies of comments addressing certain issues arising from the Notice of Proposed Rulemaking announced by the Federal Trade Commission on August 13, 2010, which was later published in the Federal Register on September 17, 2010. Please note that these comments are being submitted only on behalf of Skadden, Arps, Slate, Meagher & Flom LLP and should not be construed as representing the views or policy of any of the Firm's clients.

If you have questions after reviewing these comments, we would be happy to provide further comments.

Very truly yours,

Brian C. Mohr

Enclosures

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RE: Notice of Proposed Rulemaking Relating to the Premerger Notification and Report Form

Dear Secretary Clark:

On behalf of Skadden, Arps, Slate, Meagher & Flom LLP, we hereby submit comments addressing certain issues arising from the Notice of Proposed Rulemaking ("NPR") that the Federal Trade Commission (the "FTC") announced on August 13, 2010, which was later published in the Federal Register on September 17, 2010. The NPR sets forth and explains the reasons for the changes that both the Antitrust Division of the Department of Justice (the "DOJ") and the FTC have proposed to improve the Notification and Report Form for Certain Mergers and Acquisitions (the "Form") that parties must submit pursuant to the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, as amended (the "Act").

Several of the proposed changes, particularly those involving new or expanded requests for information and documents, seek material for the initial HSR filing that likely will be arduous to collect and will impose excessive and unnecessary time and cost burdens upon the filing parties. These comments address two of the proposed changes:

1) the request for documents prepared by third-party advisors, referred to herein as "Item 4(d)(ii) Documents"; and

2) the new definition of "associate" entity and the corresponding requests that pertain to that definition in proposed HSR Rule 801.1(d)(2) and Form Items 6(c)(ii) and 7, referred to herein as "Associate Requests."

Contrary to the FTC's belief that the proposed changes "will, on balance, reduce the burden of completing the Form," the proposed changes relating to Item 4(d)(ii) Documents and Associate Requests will impose an even greater burden on the filing parties than any benefit that might be gained by deleting certain other items in the Form. If implemented, the Item 4(d)(ii) and Associate Requests will materially increase the filing parties' costs and time required to prepare an initial HSR filing and will disrupt the parties' businesses related to both the transaction and the management and administration of their headquarters' operations. The proposed changes, as drafted, will i) make it difficult for parties to announce and file HSR notification on a time line of their choosing; ii) significantly increase the number of custodians and documents (hard and electronic) that will need to be searched for potentially responsive Item 4(d)(ii) Documents; iii) potentially subject the filing parties to otherwise unnecessary regulatory disclosure and reporting obligations; and iv) likely require filing parties to establish burdensome protocols and incur significant additional expense to collect and provide the newly requested information and documents.

Ironically, the proposed rules, if promulgated as drafted, could well increase the FTC and DOJ staffs' burden. Since the Act's introduction, agency staff have complained that 30 days was insufficient to review filings and make informed decisions concerning the closure or extension of transaction investigations. At the persistent requests of staff for more time to complete their initial evaluations, filing parties often have elected to withdraw and refile their HSR notifications rather than incur a draconian request for additional information and documents ("Second Request"). However marginal to their investigation, the more information the FTC and DOJ staffs receive with the parties' initial notifications that will have to be assimilated and understood, the more frequently staff will likely be to request an extension of the statutory 30-day initial waiting period. Such an outcome was not intended by Congress in 1976 or required by substantive changes in the enforcement of Section 7 of the Clayton Act.

Skadden has more than 30 years of experience in counseling a broad range of clients, including private equity, hedge and other types of investment funds, with hundreds of millions of dollars of assets under management, on the provisions

of the Act and advising clients on how to comply properly with the Act's rules and regulations. We have spent countless hours helping clients i) understand the requests on the Form; ii) assess their internal data and document record-keeping processes; iii) establish plans and implement systems for gathering the necessary material for an HSR filing; and iv) complete and file the Form, including, where applicable, providing explanations for data and documents that are unavailable. As such, we are very knowledgeable about i) the actual information gathering and document collection capabilities of corporations, investment funds and other entities; ii) the practical effort that is generally required for companies to complete an HSR filing, while simultaneously trying to complete the diligence and other steps necessary for closing a transaction; and iii) the realistic amount of time and money that is needed to prepare and submit an HSR filing.

Analysis

I. Proposed Item 4(d)(ii)

> Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors if they were prepared for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and that also reference the acquired entity(s) or assets. Documents responsive to this item are limited to those produced up to two years before the date of filing.

75 Fed. Reg. 57110, 57131 (Sept. 17, 2010).

Although the entire proposed Item 4(d) arguably goes well beyond what is appropriate or necessary for an initial HSR filing, Item 4(d)(ii), as drafted, raises a particular concern because its broad scope will make it very burdensome for parties to search for responsive material. In addition, it will have the likely effect of making it more difficult for parties to certify filings with any degree of certainty that the filings are "true, correct, and complete." Id. at 57143. Moreover, the scope of the Item 4(d)(ii) request will enhance the risk that a party's HSR filing can be "bounced" and the initial waiting period restarted because an arguably responsive document is discovered after the initial Form is submitted, perhaps months later in the course of a Second Request response.

As Item 4(d)(ii) is currently drafted, responsive documents can include those prepared by bankers, consultants or other third parties that a party receives in the ordinary course of its business operations that have nothing to do with the analysis or consideration of the transaction being reported. Accordingly, in addition to the transaction files of the people who are on the "Transaction Team," filing parties now will need to search the team members' other files, including their ordinary course of business documents, such as files pertaining to and analyses of the company's business and perhaps other transactions considered or even consummated in the past two years. Further, persons not on the Transaction Team may also have responsive Item 4(d)(ii) material, potentially expanding the scope of the search well beyond those involved with the reportable transaction.

Importantly, the Commission addressed a similar "scope-of-search" issue in 1978 in the context of defining Item 4(c) documents. The original proposal called for all documents prepared within the three years preceding notification that discussed or analyzed the transaction, including "any documents that pertain to markets, competitors, expansion, etc., into any product or service manufactured or sold by the other reporting company." 43 Fed. Reg. 33450, 33526 (July 31, 1978). Then, as should be the case now, the Commission decided to limit the scope of the request. As stated in the Statement of Basis and Purpose ("SBP") to the original HSR Rules:

> By so limiting the scope of documents required under Item 4(c), the Commission acknowledges that the agencies may not gain access to some relevant documents at the time of their initial review. However, requiring the submission of a broader range of documents would entail searches of historical files by reporting persons for documents prepared at other times for other purposes, and could produce too large a number of documents for purposes of effective preliminary antirust review. Since additional documents may be sought by either agency in a request for additional information and documentary material under section 7A(e) and § 803.20 or other discovery procedures, the limitation on the scope of documents required under [I]tem 4(c) is unlikely to impede effective review of reported acquisitions. . . .
>
> The criterion in the item is easily administrable and should yield a reasonable number of genuinely important documents.

Id. at 33526.

As currently proposed, Item 4(d)(ii) requests documents that can be responsive if they were created up to two years before the date of the HSR filing for the reportable transaction. In the overwhelming majority of cases, this time frame will predate the period encompassing the parties' consideration and analysis of the reportable transaction and thus will capture historical and, most likely, "stale" material not related to the reportable transaction or the parties' current business prospects or plans. Moreover, limiting the time period to two years does not relieve the burden of having to search an expanded list of custodians because, once an additional individual must be searched, there is not a substantial difference between searching for documents from one, two or three years past. In one fell swoop, as the proposal is currently drafted, the Commission, if it accepts the proposed item, will also eradicate more than 30 years of informal staff opinions and HSR practice that recognize a "hiatus" in negotiations or consideration of a transaction as an acceptable break that obviates the need to provide 4(c) documents from the earlier time period.

Particularly troubling is the fact that the responsive Item 4(d)(ii) Documents can be located anywhere within a filing "entity." As stated above, the universe of potential custodians is apparently not limited to people with knowledge of or involvement with the proposed transaction that is being reported. Rather, a complete search for this now wider range of documents will necessarily involve searching additional people who are not on the Transaction Team and not likely to know anything about or have any need to know anything about the proposed transaction, but for the company's need to now conduct a wider search for Item 4(d)(ii) Documents. This expanded universe of custodians also impacts a company's consideration of its disclosure obligations under the Securities and Exchange Commission's rules and regulations. It may be that some parties will be prevented from making a timely filing because complying with the breadth of the request would require the companies to disclose the fact of a potential transaction to persons heretofore not "in the know" before all of the elements of the potential transaction are finalized or before the parties are ready to announce a proposed transaction. The potential result is that the disclosure obligations could render some types of transactions and early filing options nearly impossible. For example, the need to search outside of the Transaction Team for potential Item 4(d)(ii) documents may make it difficult for a buyer to execute a hostile cash tender offer or other 801.30 transaction. Similarly, the disclosure obligation may make it impossible for a private seller to submit an HSR filing on a letter of intent because the seller does not want to disclose the fact of a sale of the company to others within the company before a final merger or stock purchase agreement is executed. In both instances, the breadth of documents requested in proposed Item 4(d)(ii) would require the buyer and seller, respectively, to seek responsive documents from employee custodians who are not otherwise involved in the reportable transaction.

The enforcement agencies have made it clear that they will reject an HSR filing (and assess a fine in some circumstances), if it is later determined that a document was created prior to the HSR filing that was responsive to Item 4(c), but was not submitted at the time the filing was submitted. As such, the enforcement agencies do not, for example, accept a statement of reasons for noncompliance concerning Item 4(c) requirements (unless known responsive documents are unavailable, for example, because they were destroyed in a fire or not recoverable from a computer).

Generally speaking, parties have accepted this very high 4(c) compliance standard because they have been able to manage and minimize the downside risk of being deemed not in "substantial compliance." That's because they previously were able to conduct a thorough search of a defined universe of document custodians and, after having searched that universe and applied the Item 4(c) definition to the collected documents, most parties are comfortable that they have identified and produced all Item 4(c) responsive documents. And, at the same time, they have the added benefit of significantly reducing the risk of having the filing be deemed incomplete because of a later-discovered responsive Item 4(c) document.

By contrast, assuming the same enforcement approach is applied to the production of Item 4(d) documents, and there is no reason to think that will change, parties will have to conduct a much broader search for responsive documents – likely similar to the type of search conducted for a Second Request, but without the benefit of being able to negotiate the list of custodians and the scope of responsive material.

As opposed to implementing this proposal, the enforcement agencies should continue to utilize their mechanisms for requesting additional non-transaction-specific documents through access letters and other discovery tools. See SBP at 33526. Through these tools, the parties can provide agency staff with additional information and documents on a voluntary basis and without jeopardizing the substantial compliance of their initial HSR filing as the statutory HSR waiting period is running.

Proposed Solution: Proposed Item 4(d)(ii) should be rejected.

II. Proposed Associate Requests

Rule 801.1(d)(2)-Definition of Associate:

> [A]n associate of an acquiring person shall be an entity that is not an affiliate of such person but: (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"); or (ii) Has its affairs and/or investments, directly or indirectly, managed, directed or overseen by the acquiring person; or (iii) Directly or indirectly, controls, is controlled by, or is under common control with a 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.

75 Fed. Reg. 57110, 57123 (Sept. 17, 2010).

By adding this new term, the enforcement agencies are seeking heretofore unrequested information from acquiring parties that are part of a family or network of funds under a common manager in the hope that obtaining this information will "allow for a more complete analysis of the . . . types of transactions without imposing substantial additional burden on the acquiring person." Id. at 57112. However, with this new, proposed definition, the Commission seeks a dramatic departure from the historical HSR paradigm and the types of information that previously have been deemed responsive and relevant to the enforcement agencies' ability to conduct an initial review of a reportable transaction. The current HSR rules limit the filing person's reporting obligation to information about the UPE of each party to the transaction and all entities "controlled" by each such UPE. This limitation was an intentional restriction to minimize the filing party's burden to provide information in its initial HSR filing, and the import of the new, proposed definition cannot be overstated.

First, the proposed definition will require the acquiring person to provide information about associate entities, who, by definition, it does not control and who likely do not maintain the requested information in the ordinary course of business. Second, the proposed term will impose a significant burden on the acquiring person's time, effort and expense to search for and provide responsive data about its associate entities.

As discussed in more detail below, the information about an "associate" entity will be requested from the acquiring person in both proposed Item 6(c)(ii) and in certain new subparts of Form Item 7.

Proposed Item 6(c)(ii) (Acquiring person only):

> For each associate (see §801.1(d)(2)) of the person filing notification holding five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year, list, based on the knowledge or belief of the acquiring person, the top level associate, the issuer or unincorporated entity and percentage held. If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. Holdings of entities with total assets of less than $10 million may be omitted. In responding to Item 6(c)(ii), it is permissible for the acquiring person to list all entities in which its associate(s) has a reportable minority interest.

Id. at 57110.

This request exceeds reasonable expectations about the type of information that an acquiring party can obtain when it does not have possession, custody or control of the requested data and does not maintain the data in the ordinary course of its business. In recognition and apparent concession to the difficulty that an acquiring party likely will have in searching for, obtaining, vetting and certifying the requested data, the Commission states that the acquiring person can provide responsive "associate" information based on "its knowledge or belief" and can, for example, "list all entities in which its associate(s) has a reportable minority interest." Id. at 57119. In other words, the Commission appears to acknowledge that associate entities likely will not readily provide this information to a filing person that does not "control" them, for HSR or other purposes, or may not have any data or current data available to provide.

In addition, the target company in which the associate has invested and holds a minority interest apparently can be located anywhere, not just within the United States. Nor do the proposed changes indicate that the target has to have operations in the United States. Rather, the proposed changes indicate that the target has to have "derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or

assets also derived dollar revenues in the most recent year." Id. at 57119. Although the proposed item permits the acquiring party to respond and certify its filing based on its "knowledge and belief" rather than definitive information, the Commission does not expound on the meaning of "knowledge and belief" and what types of efforts are required to satisfy that standard. By seeking this information, the Commission seems to think that an associate entity, such as a general partner, who serves as the manager of an acquiring fund making an HSR filing and also manages multiple other funds, will provide the requested data to the acquiring fund for its HSR filing. This assumption is not necessarily accurate.[1]

To the degree that general partners or other associates are willing to provide Item 6(c)(ii) data to acquiring funds, the general partners may find the task very difficult because the information regarding the minority investments of the funds they manage or oversee and the types of products and services of those entities are not usually maintained in the ordinary course of business. As such, this proposed data requirement likely will create a significant burden for the "associates" who are the general partners, investment managers and/or directors of various "associate" investment funds, who will now need to keep track of and report the minority holdings of the investment funds they oversee, even though the investment funds' holdings can and often do change on a weekly, if not a daily basis. Further, the general partner, manager or director will need to evaluate whether any of its funds' minority holdings include entities with businesses or products that may "overlap" with the acquired person in the transaction for which an HSR Form is being filed. Keeping track of frequently changing investment data for HSR purposes could require the need to create an "HSR data supervisor," an employee position that Congress certainly did not intend for third parties to have to establish to generate potentially responsive data for a different filing party's initial HSR notification.

Proposed Item 7:

> Item 7(a) would require reporting any 6-digit NAICS industry code in which the acquiring person, or any associate of the acquiring person, derives revenues and in which the acquired entity(s) or assets also derive revenues;

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[1] Investment funds and other types of unincorporated entities are widely known to be very circumspect about disclosing information about their structure and holdings. Many are privately held for that very reason. Often when a fund entity prepares an HSR filing, as the ultimate parent of an acquiring portfolio company, for example, the representatives of the fund are careful not to disclose the fund's separate financial data to the executives of the portfolio company, when the data is provided to outside counsel for filing.

> Item 7(b)(i) would require reporting the name of any entity(s) controlled by the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year and Item 7(b)(ii) would require reporting the name of any entity(s) controlled by an associate of the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year; and
>
> Item 7(c) would require reporting the geographic information for any entity(s) controlled by the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year and Item 7(d) would require reporting the geographic information for any entity(s) controlled by an associate of the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year.

Id. at 57112.

The previous analysis about the Associate Requests in proposed Item 6(c)(ii) applies equally to the request for associate data in Item 7. The acquiring person who is filing an HSR (be it a fund or other entity) has no authority under the HSR rules (nor under typical partnership, LLC or other agreements) to control the associate. It is neither reasonable nor fair to seek information from filing parties where the parties themselves do not and cannot control the means for collecting and providing the responsive data. The focus of Item 7, as currently defined, is on the parties. As such, the request for geographic and other data about an associate, an entity most likely not controlled by the person filing notification, seems contrary to the intended purpose of Item 7. As reported in the SBP:

> Item 7 is designed to provide information about geographic markets. Whenever any party to an acquisition knows or has reason to believe that it derives dollar revenues from any of the same four-digit (SIC code) industries as any other party, it must identify the geographic areas in which it derives those dollar revenues.

SBP at 33532.

As previously described, the general partner or investment manager or director may need to create a new position to maintain the records of all the investments in which the general partner or investment manager or director could be deemed to be an "associate" of the various funds or other investment vehicles that it

manages. Parties should not have to create a data caretaker position for the purpose of generating responsive data for HSR filings on future reportable transactions by "associated," but still HSR-unaffiliated, entities. Moreover, the Commission's notice is unclear about the compliance implications if the acquiring person submits a statement of reasons for noncompliance because its information on associate data is incomplete or unavailable from the associate entities. There is no guarantee that associate entities will be willing to provide sensitive financial data about their holdings, notwithstanding the proposed HSR rule changes, making certification of HSR filings very problematic. Finally, complying with the Associate Requests will mean that a general partner reveals overlap connections among all of the funds that it manages, information that likely would not be available in the ordinary course.

With respect to the information sought by the Associate Requests, the enforcement agencies can use the access letter and "other discovery procedures" to request voluntary submissions about "associates," as well as the identities of other participants in the marketplace, as they have been doing successfully for years. Id. at 33526. The agencies also can identify the participants in the acquired person's product and service areas and either check the SEC's EDGAR website for 13D or 13F filings or send those participants a civil investigative demand or subpoena duces tecum asking for the identities of their investors with 5% or greater holdings.

Proposed Solution to the Associate Requests: The Commission should not adopt the definition of "associate," proposed Item 6(c)(ii) or the related changes to Item 7.

Conclusion

In enacting the Act and the implementing rules and procedures, Congress did not intend to interfere with the transaction-related business strategies or protocols of companies. Rather, it sought to establish a balanced notification mechanism that would enable the Commission and DOJ to receive enough information and documents, initially, to evaluate the competitive aspects of transactions, without placing a significant up-front burden on the parties involved in the transaction.[2]

In our broad experience, the Transaction Team leaders at the companies galvanize the requisite people and resources to provide complete and accurate responses in a timely and efficient manner for both the initial HSR filing

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[2] See SBP at 33520 (discussing the role of the Form, including stating that the "form is not intended to elicit all potentially relevant information relating to an acquisition").

and during the initial waiting period. This process is neither easy nor inexpensive, even under the best circumstances, because completing an initial HSR filing necessarily takes business people away from their primary day-to-day and transaction-related responsibilities. If enacted, the proposed rule changes contained in Item 4(d)(ii), Rule 801.1(d)(2) and Items 6(c)(ii) and 7 will completely turn this long-existing, well-balanced filing ecosystem upside down and make the initial filing process unwieldy and more costly. We thus submit that the Commission should not enact these proposed changes.

Respectfully submitted,

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