

## MERGER ANTITRUST LAW

LAWJ/G-1469-05  
Georgetown University Law Center  
Fall 2018

Tuesdays and Thursdays, 3:30-4:55 pm

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### CLASS 4 WRITTEN ASSIGNMENT—INSTRUCTOR’S ANSWER

#### Instructions

Submit by email by 3:30 pm on Thursday, September 6

Send to [dale.collins@shearman.com](mailto:dale.collins@shearman.com)

Subject line: Merger Antitrust Law: Assignment for Class 4

#### Assignment

Time: Early 2014

Calls for a list of questions (with explanations) to be sent to the client

For more background, see the Albertsons/Safeway case study in Unit 3 and the instructor’s assignment and answer for Class 3

Alice Smith, the general counsel of Safeway (not really), having read your memorandum on how the antitrust laws are likely to apply to the transaction and the FTC’s merger review process, has taken you up on your offer to prepare an initial document and information request for the company in order to enable you to perform a preliminary antitrust analysis of the transaction.

In drafting this request, Ms. Smith asks you to keep two things in mind.

First, the Albertsons’ approach is very confidential and only Safeway’s most senior executives are aware of the offer. The company wants to keep it that way, so any response to your request will have to be collected by the senior executives. That said, Ms. Smith asks that you should ask for anything you think is important for a good but still preliminary analysis with the understanding that the company may not be able to provide you with everything at this time. If the deal goes forward, she tells you, it will be possible to bring more people into the loop later to get more detailed information.

Second, both to enable Ms. Smith to prioritize your requests (and explain their importance to other executives when she asks them to collect the documents and information), Ms. Smith asks that you give a brief explanation of how you will use each of your requests to inform your antitrust analysis. Although Ms. Smith knows the basic contours of antitrust law generally and its application to supermarket mergers in particular from your first memorandum, this is the first time she has been faced with an FTC merger review and she wants to be able to explain to the business people why it is important for them to collect the documents and information you are requesting. Smith tells you that you may assume that the business people have read your first memorandum and that you may (if you think it would be helpful) to give explanations for groups of requests rather than each request individually.

NB: For the purpose of this exercise, you may assume that Albertsons and Safeway only operate supermarkets, that is, full-line retail grocery stores that enable customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. The only customers of interest are retail consumers. Safeway operates 1335 supermarkets throughout the country, although it has been shrinking due to competitive pressures, especially from Walmart. Albertsons operates 1075 stores in much of the country. After the merger, the combined company will be the third largest company in the supermarket business nationwide after Walmart and Kroger.

If you have any questions, send me an e-mail. See you in class. Dale

### **Project Ceres: Initial Information Request**

1. The Company's national strategic plan (and, if one is prepared, its national advertising plan) for each of the last three years. If regional plans exist and are readily available, please provide those as well.
2. Any internal or external market research report on supermarket competition prepared within the last three years.
3. Any "Item 4(c) documents", that is, any studies, surveys, analyses, or reports prepared by or for the Company's officers or directors that evaluate or analyze the proposed transaction with respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets.
4. Any "Item 4(d) documents" that is, any Confidential Information Memoranda ("CIM") (if one was prepared in connection with the sale of the company), third-party advisor documents, or documents analyzing synergies or efficiencies that might arise out of the transaction.
5. Any documents that analyze or otherwise assess competitors (especially any documents that discuss the counterparty in this transaction).
6. Any documents prepared in the regular course of business that provide market shares.
7. Any documents discussing competition by supermarkets with other types of stores that sell groceries.
8. Any document that addresses how the Company sets its prices.
9. Any planning documents that discuss the methodology for deciding to open or close stores, including any programs or models used to analyze new store locations, expansions, remodeling and closures.
10. Any documents that discuss the effects of actual or projected opening of any competitive store.
11. Any maps showing (a) the location of each Company store and competitor stores, (b) trade/draw areas (the areas from which each store draws customers), or (c) price zones.
12. A list of each store owned, operated or planned by the Company, including (a) the full address, zip code, and square footage of the store, (b) the revenues of the store in the last three fiscal years, and (c) the month/year the store opened.
13. To the extent available, a list of each store the Company regards as competitor, including (a) the full address, zip code, and square footage, and (b) the month/year the store opened.
14. Any other documents that address the rationale for the transaction (including the most recent financial model).
15. Any documents that address likely present or future changes to business strategies as a result of the transaction.

If you specifically prepare any materials in response to this request, as opposed to simply collecting pre-existing documents, please mark the prepared materials as "PRIVILEGED & CONFIDENTIAL—PREPARED AT THE REQUEST OF COUNSEL." Thank you for your assistance.

Dale Collins  
Able & Baker LLP

### **Explanations for the requests**

*Requests 1-2.* The FTC staff will ask for us to voluntarily produce these documents in their initial call, which usually occurs seven to ten days after the filing of the HSR forms. The company's strategic plans and internal and external market research reports are likely to evaluate the strengths and weaknesses of competitors. The FTC will want to look at these documents to see how the company and outside analysts see the company's competition. Our defense of the transaction will need to be consistent with these documents (which were prepared in the regular course of business and presumably not influenced by the possible transaction being considered and therefore extremely difficult to impeach). Accordingly, it would be helpful to see these documents as soon as you can provide them to us.

*Requests 3-4.* These documents are required to be submitted with the HSR filing. The FTC will be interested generally in the business model for the transaction and in particular in any synergies from the transaction, especially if any store closings are contemplated. Store closings in order to consolidate operations in a surviving store strongly suggest that the stores are in competition with one another, and the FTC will want to investigate the local area to ensure that sufficient alternatives remain to keep the market competitive. Stores that are planned to be closed as a result of the transaction are often good candidates for divestiture.

*Requests 5-7.* These documents will help us assess the competition that may be lost as a result of the transaction as well as the competition that will remain.

*Requests 8-10.* These documents go to how the company sets its prices and how store closings and openings are likely to affect prices. The FTC, which will eventually obtain these documents (to the extent they exist) in the second request investigation, will use them to infer how the consolidation into a single company or two or more competing stores into a single company are likely to affect prices in the local area.

*Requests 11-13.* These documents will allow us to plot on a map the locations of the stores of the merging parties as well as third-party competitors for each local area. This is an essential part of analyzing which stores of the merging parties are likely to compete with one another and the other stores in the area with which they compete. Any maps prepared by the company showing trade/draw areas for individual stores or local areas or price zones will be especially important.

*Requests 14-15.* These documents are likely to overlap with the documents in Requests 3-4. Again, the purpose of requesting these documents is to see the business model for the transaction.