PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL

Some mergers and acquisitions may become subject to simultaneous federal and state investigations by either the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") or the Federal Trade Commission ("FTC"), and one or more State Attorneys General. To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger. This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties.

I. CONFIDENTIALITY

These joint investigations are generally nonpublic in nature and will routinely involve materials and information that are subject to statutes, rules, and policies governing when and how they may be disclosed. Participating agencies are required to protect confidential information and materials ("confidential information") from improper disclosure. Confidentiality obligations continue even if a receiving agency subsequently decides to pursue an enforcement avenue different from that chosen by one or more of the other agencies.

Agencies receiving confidential information from another agency ("the originating agency") will agree to take all appropriate steps to maintain its confidentiality, including:

1. timely notification to the originating agency of discovery requests or public access requests for that information;

2. a vigorous assertion of all privileges or exemptions from disclosure claimed by the originating agency;

3. intervention in legal proceedings, or provision of assistance to the originating agency in intervening in legal proceedings, if necessary, to assert such privileges or exemptions; and

4. complying with any conditions imposed by an agency that shares information it deems to be confidential.

Any agency that becomes aware that confidential information has been disclosed in contravention of this Protocol will promptly advise all other agencies conducting the joint investigation of the disclosure so that its significance and implications for further information-sharing can be assessed.

II. PROCEDURES INVOLVING THE MERGING PARTIES

The merging parties may be required to produce documents or other information to the Antitrust Division or FTC pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), Civil Investigative Demands, or other compulsory process, and to State Attorneys General pursuant to subpoena or other compulsory process. To minimize the burden on the merging parties and to expedite review of the transaction, the merging parties may wish to facilitate coordination between the enforcement agencies.

The Antitrust Division and the FTC will, with the consent of the merging parties, provide certain otherwise confidential information to State Attorneys General. The acquiring and

acquired persons in the transaction must:

A. agree to provide the states, according to the National Association of Attorneys General Voluntary Premerger Disclosure Compact, or otherwise, all information submitted to the Antitrust Division or the FTC pursuant to the HSR Act, Civil Investigative Demands, or other compulsory process, or voluntarily; and

B. submit a letter to the Antitrust Division or the FTC that waives the confidentiality provisions under applicable statutes and regulations to allow communications between the Antitrust Division or FTC and State Attorneys General.[1]

Where these requirements have been satisfied, the Antitrust Division or FTC will provide to the state investigating the merger or, if there is a multistate working group, to the coordinating state:[2]

1. copies of requests for additional information issued pursuant to the HSR Act ("second requests");

2. copies of civil investigative demands issued pursuant to the Antitrust Civil Process Act and
copies of subpoenas and civil investigative demands issued by the FTC; and

3. the expiration dates of applicable waiting periods under the HSR Act.

III. CONDUCT OF JOINT INVESTIGATION

The following is intended to set forth suggested guidelines that may be followed to coordinate merger investigations by State Attorneys General and the FTC or Antitrust Division. All applicable investigatory, work product, or other privileges shall apply to any material exchanged.

A. STRATEGIC PLANNING

Coordination between federal and state enforcement agencies may be most effective at the earliest possible stage of a joint investigation. It should begin with an initial conference call among the FTC or Antitrust Division and State Attorneys General. To the extent lawful, practicable, and desirable in the circumstances of a particular case, subjects of the conference calls should include:

1. Identification of lawyers and other legal and economic team members working on the case, and assignment of areas of responsibility.

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[1] Examples of such a letter are annexed hereto as Exhibit 1.

[2] Pursuant to the NAAG Voluntary Pre-Merger Disclosure Compact, the merging parties may reduce their burden of complying with multiple state subpoenas by providing a set of all required materials to the designated "liaison state." The role of the liaison state is ministerial in nature. It differs from that of the "coordinating state," which is responsible for coordinating the investigation and any resulting litigation. The differences between the roles of the liaison and coordinating states are described more fully in the memorandum annexed hereto as Exhibit 2. Depending on the investigation, these roles may be performed by the same state or different states.

2. Identification of potential legal and economic theories of the case to be developed and assignment of research projects. It may be appropriate for state and federal enforcers to share memoranda, papers and/or briefs prepared in similar prior matters with appropriate redactions for confidential information, as well as those prepared during the current investigation to the extent permitted by the participating agencies.

3. Identification of categories of data, documents, and witness testimony needed to be obtained, and strategies for obtaining and sharing such information, including to the extent lawful, practicable, and desirable, the initiation of requests seeking the consent of past and future submitters to disclosure of such information. State Attorneys General should particularly be encouraged to take responsibility for obtaining data located within their respective geographic areas or maintained by state or local governmental agencies.

4. Identification of potential consulting economists or other experts.

5. Where multiple states are involved, understandings should be reached on how information can be most conveniently exchanged. For example, the coordinating state might assume responsibility for transmitting documents received from the FTC or Antitrust Division to other State Attorneys General.

B. DOCUMENT PRODUCTION

Coordinating both the request for, and review of, documentary materials can reduce the parties' burden and facilitate the agencies' investigation. To the extent lawful, practicable, and desirable, three steps should be taken in connection with issuing a second request or subpoenas, CID's, or voluntary requests for information from the merging parties or third parties:

1. Consideration of ideas from other investigating agencies on the content and scope of the request.

2. Providing correspondence to other investigating agencies memorializing agreements with parties to narrow or eliminate request specifications.

3. Division of responsibility among investigating agencies for document review and exchange of summaries and indices.

C. WITNESS EVIDENCE/EXPERTS

To the extent lawful, practicable, and desirable in a particular case, the State Attorneys General and the FTC or Antitrust Division should coordinate the joint development of testimonial evidence. The investigating agencies should try to integrate their efforts to the maximum extent possible. Specifically:

1. Identification and development of lists of potential interviewees/deponents should be undertaken in a coordinated manner. States should be encouraged to use their greater familiarity with local conditions/business to identify interviewees and schedule interviews.

2. Joint interviews and/or depositions of witnesses should be coordinated whenever lawful, practicable and desirable. An early understanding

should be reached regarding the extent to which notes of interviews will be maintained and exchanged. Coordination of deposition summaries should also be discussed.

3. State Attorneys General and the FTC or the Antitrust Division should coordinate responsibility for the securing of declarations or affidavits.

4. State Attorneys General and the FTC or the Antitrust Division should discuss early during a joint investigation whether to employ experts jointly or separately. If the latter, a method should be provided for exchange of economic views/theories among the experts and with staff economists. The preparation of expert affidavits/testimony should be closely coordinated.

IV. SETTLEMENT DISCUSSIONS

To achieve the full benefits of cooperation it is imperative that federal and state antitrust enforcement agencies collaborate closely with respect to the settlement process. While each federal and state governmental entity is fully sovereign and independent, an optimal settlement is most likely to be achieved if negotiations with the merging parties are conducted, to the maximum extent possible, in a unified, coordinated manner.

It will normally be desirable for federal and state enforcement agencies to consult on settlement terms in advance of any meeting with the merging parties where settlement is likely to be discussed. Where possible, any such meeting should be attended by both federal and state representatives. Furthermore, each enforcement agency should keep the other enforcement agencies advised of communications regarding settlement with a merging party.

If any federal or state antitrust enforcement agency determines that circumstances require it to pursue a negotiation or settlement strategy different from that of the other investigating agencies, or decides to close its investigation, it should disclose that fact immediately.

V. STATEMENTS TO THE PRESS

It is important that understandings be reached between the enforcement agencies regarding the release of information to the news media. These agreements should cover the timing of and procedures for notifying the other enforcement agencies prior to the release of any information to the press.

EXHIBIT 1A

To: Assistant Director for Premerger Notification
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

With respect to [the proposed acquisition of X Corp. by Y Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq., and the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 et seq., insofar as these protections in any way limit confidential communications between the Federal Trade Commission and the Attorney(s) General of [insert pertinent State(s)].

Signed: _____

Position: _____

Telephone: _____

EXHIBIT 1B

To: Director of Civil Enforcement
Antitrust Division
Department of Justice
Office of Operations, Room 3207
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

With respect to [the proposed acquisition of X Corp. by Y Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq., and any other applicable confidentiality provisions, for the purpose of allowing the United States Department of Justice and the Attorney(s) General of [insert pertinent State(s)] to share documents, information and analyses.

Signed: _____

Position: _____

Telephone: _____

EXHIBIT 2

CORRESPONDENCE/MEMORANDUM DEPARTMENT OF JUSTICE

Date: September 6, 1996

To: Antitrust Contacts

From: Kevin J. O'Connor
Assistant Attorney General

Subject: Memorandum of Clarification of Liaison and Coordinating States
Under the NAAG Voluntary Pre-Merger Disclosure Compact

As our experience with the NAAG Voluntary Pre-Merger Disclosure Compact ("Compact") grows, additional questions concerning its application inevitably arise. The purpose of this memo is to clarify the distinction between the "liaison state" under the Compact and any multistate working groups or litigating groups which may be formed to deal with a matter that is the subject of a filing under the Compact.

LIAISON STATE

The function of the liaison state under the Compact is to receive the filing and to notify forthwith all signatories to the Compact of the filing and the identity of the merging parties. Upon request, the liaison state must permit signatories of the Compact to inspect the documents or obtain a photocopy of the filing from the liaison state. In short, the liaison state serves a ministerial function of receiving and distributing, upon request, copies of the confidential filings of the prospectively merging parties.[1]

COORDINATING STATE

In certain cases, two or more states may investigate or litigate regarding a particular transaction. This may occur whether or not the Compact has been invoked. As is the case with any Multistate Antitrust Task Force Working Group, the process of joint investigation and litigation operates largely by consensus. Although each enforcement agency retains its sovereignty, the synergies achievable from a joint investigation can only be realized if the states share a common interest in goals and process and organize effectively. Typically, the states most directly, and adversely, impacted by a proposed transaction, will take the lead in such investigations provided they have the resources to do so.

Chair Selection: Where a group of investigating states decides to work together, it will often be desirable to have a coordinating or "chair" state. The coordinating or "chair" state should be

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[1] The Compact lists the order of preference for identifying the liaison state upon whom the merging parties may serve a copy of their filings. This order of preference includes: First, the principal place of business of the acquiring party to the merger; second, the attorney general of the state which is the principal place of business of the acquired party; third, the attorney general of the state of incorporation of the acquiring party; and, fourth, the attorney general of the state of incorporation of the acquired party. If no member of the Compact falls within the foregoing four preferences, the parties may make a filing upon the chair of the Multistate Antitrust Task Force or any other member of the Compact who is willing to act as liaison state for such transaction.

determined by the states actively involved in the investigation and litigation after consultation with the Chair of the Multistate Antitrust Task Force. The criteria for choosing a "coordinating state" should include, for example, whether the prospective chair state is (a) likely to be adversely affected by a proposed transaction, (b) is in a position to commit resources to the investigation, and (c) can coordinate effectively with the other states and the federal agencies that may be involved in reviewing the same transaction. Under these criteria, the state assuming the role of coordinating state is not necessarily the same state identified by the Compact as the state undertaking the largely ministerial duties set forth in the Compact.

Chair Function: The function of the coordinating state shall be to coordinate the investigative and enforcement activities of the working group states, to coordinate with any federal agency collaborating with the states, and to facilitate settlement discussions. Again, because this is largely a consensual process, the coordinating state should do all of the above in consultation with the other investigating states and federal agencies.

Settlement Negotiations: Because merger investigations often occur in a very short time frame, and because the issue of settlement is often raised during that time frame, it is imperative that the coordinating states and the investigating federal agency consult and collaborate early and often regarding terms and process of settlement. The interested enforcement agencies are more likely to achieve an optimal resolution by presenting the merging parties, to the maximum extent feasible, with a united front. If an individual enforcement agency, state or federal, determines that its interests require pursuing a negotiation or settlement strategy separate from the cooperating states and federal agencies, it is incumbent upon that agency to disclose its posture at the earliest possible opportunity and to implement its strategy in a way which minimizes any adverse impact upon the other states and enforcement agencies.