MERGER ANTITRUST LAW

Unit 4: The DOJ/FTC Merger Review Process

Class 4

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Premerger Notification

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Premerger Notification and the Merger Review Process

Under the Hart-Scott-Rodino (HSR) Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. The FTC administers the premerger notification program, and its staff members answer questions and maintain a website with helpful information about how and when to file. The FTC also provides daily updates of deals that receive early termination.

Steps in the Merger Review Process

Step One: Filing Notice of a Proposed Deal

Not all mergers or acquisitions require a premerger filing. Generally, the deal must first have a minimum value and the parties must be a minimum size. These filing thresholds are updated annually. In addition, some stock or asset purchases are exempt, as are purchases of some types of real property. For further help with filing requirements, see the FTC's Guides to the Premerger Notification Program. There is a filing fee for premerger filings.

For most transactions requiring a filing, both buyer and seller must file forms and provide data about the industry and their own businesses. Once the filing is complete, the parties must wait 30 days (15 days in the case of a cash tender offer or a bankruptcy) or until the agencies grant early termination of the waiting period before they can consummate the deal.

Step Two: Clearance to One Antitrust Agency

Parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger. Staff from the FTC and DOJ consult and the matter is "cleared" to one agency or the other for review (this is known as the "clearance process"). Once clearance is granted, the investigating agency can obtain non-public information from various sources, including the parties to the deal or other industry participants.

Step Three: Waiting Period Expires or Agency Issues Second Request

After a preliminary review of the premerger filing, the agency can:

1. terminate the waiting period prior to the end of the waiting period (grant Early Termination or "ET");
2. allow the initial waiting period to expire; or
3. issue a Request for Additional Information ("Second Request") to each party, asking for more information.

If the waiting period expires or is terminated, the parties are free to close their deal. If the agency has determined that it needs more information to assess the proposed deal, it sends both parties a Second Request. This extends the waiting period and prevents the companies from completing their deal until they have "substantially complied" with the Second Request and observed a second waiting period. A Second Request typically asks for business documents and data that will inform the agency about the company's products or services, market conditions where the company does business, and the likely competitive effects of the merger. The agency may conduct interviews (either informally or by sworn testimony) of company personnel or others with knowledge about the industry.

Step Four: Parties Substantially Comply with the Second Requests

Typically, once both companies have substantially complied with the Second Request, the agency has an additional 30 days to review the materials and take action, if necessary. (In the case of a cash tender offer or bankruptcy, the agency has 10 days to complete its review and the time begins to run as soon as the buyer has substantially complied.) The length of time for this phase of review may be extended by agreement between the parties and the government in an effort to resolve any remaining issues without litigation.

Step Five: The Waiting Period Expires or the Agency Challenges the Deal

The potential outcomes at this stage are:

1. close the investigation and let the deal go forward unchallenged;
2. enter into a negotiated consent agreement with the companies that includes provisions that will restore competition; or
3. seek to stop the entire transaction by filing for a preliminary injunction in federal court pending an administrative trial on the merits.

Unless the agency takes some action that results in a court order stopping the merger, the parties can close their deal at the end of the waiting period. Sometimes, the parties will abandon their plans once they learn that the agency is likely to challenge the proposed merger.

In many merger investigations, the potential for competitive harm is not a result of the transaction as a whole, but rather occurs only in certain lines of business. One example would be when a buyer competes in a limited line of products with the company it seeks to buy. In this situation the parties may resolve the concerns about the merger by agreeing to sell off the particular overlapping business unit or assets of one of the merging parties, but then complete the remainder of the merger as proposed. This allows the procompetitive benefits of the merger to be realized without creating the potential for anticompetitive harm. Many merger challenges are resolved with a consent agreement between the agency and the merging parties.

ftc.gov

Hart-Scott-Rodino
Premerger Notification Program

Introductory Guide I

What is the Premerger Notification Program?
An Overview

Revised March 2009

AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr.

Other Guides in this series provide more detailed information. Guide II explains in greater detail certain terms used in the Act and the Rules, and analyzes a hypothetical transaction to determine whether it is reportable and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you not only consult the Act, the Rules, and the other Guides in this series, but also the additional material referenced in Section XII of this Guide. If you have specific questions not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the "enforcement agencies") before consummating the proposed acquisition. The parties must wait a specific period of time while the enforcement agencies review the proposed transaction. The Program became effective September 5, 1978, after final promulgation of the Rules.[1]

The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission ("FTC" or the "Commission") and the Department of Justice ("DOJ") to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.

In general, the Act requires that certain proposed acquisitions of voting securities, non-corporate interests ("NCI") or assets be reported to the FTC and the DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a "second request"). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a bankruptcy sale), after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

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[1] The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

The Program has been a success. Compliance with the Act's notification requirements has been excellent, and has minimized the number of post-merger challenges the enforcement agencies have had to pursue. In addition, although the agencies retain the power to challenge mergers post-consummation, and will do so under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the Program as a helpful tool in advising their clients about particular acquisition proposals.

The Rules, which govern compliance with the Program, are necessarily technical and complex. We have prepared Guide I to introduce some of the Program's specially defined terms and concepts. This should assist you in determining if proposed business transactions are subject to the requirements of the Program.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal and informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $200 million (as adjusted)[2], regardless of the sales or assets of the acquiring and acquired persons[3]; or

2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less; and

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[2] The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year.

[3] *See* § 7A(a)(2) of the Act.

3. One person has sales or assets of at least $100 million (as adjusted); and

4. The other person has sales or assets of at least $10 million (as adjusted).

A. Size of Transaction Test

The first step is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be "held as a result of the acquisition." Calculating what will be held as a result of the acquisition (referred to as the "size of the transaction") is complicated and requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.[4]

If the value of the voting securities, NCI, assets or combination thereof exceeds $200 million (as adjusted) and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the parties must look to the size of person test.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the "acquiring person" and "acquired person." "Person" is defined in Rules 801.1(a)(1) and is the "ultimate parent entity" or "UPE" of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.[5] The "acquired entity" is the specific entity whose assets, NCI or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the

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[4] The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

[5] *See* "control" under 801.1(b).

issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Oftentimes the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.[6] For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.[7]

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act's minimum size criteria. This "size of person" test generally measures a company based on the person's last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.[8] The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired, but also the UPE and any other entities the UPE controls.[9]

If the value of the voting securities, NCI, assets or combination thereof exceeds $50 million (as adjusted) but is $200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than $50 million (as adjusted) worth of the voting securities of another issuer crosses the first of five staggered "notification thresholds."[9] The rules identify four additional thresholds: voting securities valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted); voting securities valued at $500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than $1 billion (as adjusted);

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[6] *See* Rule 801.1; Rule 801.30.

[7] *See* Rule 803.5.

[8] *See* Rule 801.11.

[9] *See* Rule 801.1(a)(1).

and 50 percent of the voting securities of an issuer if valued at greater than $50 million (as adjusted).

The thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing.[10] If within that year the person reaches the stated threshold (or any lower threshold), it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.[11] For example, if you file to acquire $100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B's voting securities did not exceed either $500 million (as adjusted) or 50 percent, *i.e.*, additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.[12]

These notification thresholds apply only to acquisitions of voting securities. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.[13] For example, certain acquisitions of assets in the ordinary course of a person's business are exempted, including new goods and current supplies (*e.g.*, an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor).[14] The acquisition of certain types of real property also would not require notification. These include certain new and used facilities, not being acquired with a business, unproductive real property (*e.g.*, raw land), office and residential buildings, hotels (excluding hotel casinos), certain recreational land, agricultural land and retail rental space and warehouses.[15] In addition, the acquisition of foreign assets would be exempt where the sales in or

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[10] *See* Rule 803.7.

[11] *See* Rule 802.21.

[12] *See* § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

[13] *See* § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

[14] *See* Rules 802.1(b) and 802.1(c).

[15] *See* Rules 802.2(c) - (h).

into the U.S. attributable to those assets were $50 million (as adjusted) or less.[16] Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, *see* IV below).

III. THE FORM

The Notification and Report Form ("the Form") solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO, (202) 326-3100, as well as the FTC website at http://www.ftc.gov/bc/hsr.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as copies of certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product North American Industry Classification System ("NAICS") codes,[17] and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also describe certain previous acquisitions in the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.[18] In addition, the acquired person does not need to respond to Item 6 in a pure asset transaction.

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[16] *See* Rules 802.50 and 802.51.

[17] For information concerning NAICS codes *see* the *North American Industry Classification System, 2002*, published by the Executive Office of the President, Office of Management and Budget and available from the National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161 (Order Number PB 2002-101430) or online at http://www.ntis.gov/search/product.aspx?ABBR=PB2002101430; and The *2002 Economic Census Numerical List of Manufactured and Mineral Products* published by Bureau of the Census, available from the Government Printing Office or online at http://www.census.gov/prod/ec02/02numlist/m31r-nl.pdf. Information regarding NAICS also is available at the Bureau of the Census website at http://www.census.gov/epcd/www/naics.html.

[18] *See* 803.2(b).

B. Contact Person

The parties are required to identify an individual (listed in Item 1(g) of the Form) who is a representative of the reporting person and is familiar with the content of the Form. This contact person is, in most cases, either counsel for the party or an officer of the company. This person must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.[19] In all other transactions, each of the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. These required statements govern when the parties may make a premerger notification filing. The affidavit is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review.[20]

Rule 803.6 provides that the Form must be certified and the rule specifies who must make the certification.[21] One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an individual to ensure that information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.[22]

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[19] See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

[20] *See* Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

[21] The certification may be signed by a general partner of a partnership; an officer or director of a corporation; or, in the case of a natural person, the natural person or his/her legal representative.

[22] 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury *under the laws of the United States of America* that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

D. Voluntary Information

The rules provide that reporting persons also may submit information that is not required by the Form.[23] If persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, the enforcement agencies' review of a proposed transaction may be more rapid. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.[24] However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.[25] The fact that a transaction is under investigation also may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The parties should complete and return the original and one copy of the Form, along with one set of documentary attachments, to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. Three copies of the Form, along with one set of documentary attachments, should be sent to the Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530 (for non-USPS deliveries, use zip code 20004).

IV. THE FILING FEE

In connection with the filing of a Form, Congress also mandated the collection of a fee from each acquiring person. The filing fee is based on a three-tiered system that ties the amount paid to the total value of the voting securities, NCI or assets held as a result of the acquisition:[26]

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[23] *See* Rule 803.1(b).

[24] *See* Section 7A(h) of the Act.

[25] A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

[26] The filing fee thresholds are adjusted annually for changes in the GNP during the previous year. The fees themselves are not adjusted.

VALUE OF VOTING SECURITIES, NCI OR ASSETS TO BE HELD	FEE AMOUNT
greater than $50 million (as adjusted) but less than $100 million (as adjusted)	**$45,000**
$100 million (as adjusted) or greater but less than $500 million (as adjusted)	**$125,000**
$500 million (as adjusted) or greater	**$280,000**

For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).[27] In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.[28]

The filing fee must be paid at the time of filing to "The Federal Trade Commission" by electronic wire transfer, bank cashier's check or certified check. Rule 803.9 contains specific instructions for payment of the filing fee. In addition, information is available at http://www.ftc.gov/bc/hsr/filing2.htm.

V. THE WAITING PERIOD

After filing, the filing parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for reportable acquisitions by means of a cash tender offer, as well as acquisitions subject to certain federal bankruptcy provisions, and 30 days for all other types of reportable transactions.[29] The waiting period may be extended by issuance of a request for additional information and documentary material.[30] Any waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys

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[27] For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 responses would be identical.

[28] *See* Rule 803.9(a) - (c).

[29] *See* Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

[30] *See* Section VIII(C), *infra*.

voting securities from persons other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.[31] It is important to note that failure to pay the filing fee or the submission of an incorrect or incomplete filing will delay the start of the waiting period.[32]

B. Early Termination

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for "early termination" will be granted only if (1) at least one of the persons specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.[33]

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC's website at http://www.ftc.gov/bc/earlyterm/index.html.

When it's requested, early termination is granted for most transactions. On the average, requests for early termination are granted within two weeks from the beginning of the waiting period. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its potential competitive impact, and the number of filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether the Form complies with the Act and the Rules.

The Form is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to correct the errors as soon as possible because the waiting period does not begin to run until the Form is filled out accurately, all required

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[31] The joint venture entity does not file. *See* Rule 802.41.

[32] *See* Rules 803.3 and 803.10(a).

[33] *See* Formal Interpretation 13 issued August 20, 1982.

information and documentary material are supplied and payment of the filing fee is received.[34]

When the PNO determines that the Forms comply with all filing requirements, letters are sent to the parties identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction.[35] This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual persons at different times about the same matter. The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may inform the PNO of that fact; the PNO will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation, or provide written information or documents.

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[34] For transactions in which a person buys voting securities from someone other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

[35] Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a "second request."[36] As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is contained in *Guide III*. Because every transaction is unique, however, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies also have adopted a formal internal appeals process that centralizes in one decision maker in each agency the review of issues relating to the scope of and compliance with second requests.[37]

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency's staff may suggest use of the informal "quick look" procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address the critical issues (*e.g.,* product market definition or ease of entry). If the submitted information resolves the staff's concerns in these areas, the waiting period will be terminated on a *sua sponte* basis and the parties will not have to expend the time and cost of responding to the full second request. Of course, if the submitted information does not resolve the staff's concerns on determinative issues, then the parties will need to respond to the full

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[36] *See* Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

[37] *See* 66 Fed. Reg. 8721-8722, February 1, 2001.

second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or certain bankruptcy filings,[38] 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).[39] During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to any person to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time.[40] All of the agencies' other investigative tools are available to them in such investigations.[41]

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no reason to believe competition will be reduced substantially in any market, it will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the

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[38] See 11 U.S.C. § 363(b), as amended (1994).

[39] *See* § 7A(e) of the Act.

[40] *See* § 7(A)(i)(1) of the Act.

[41] *See* § 7(A)(i)(2) of the Act.

acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.[42] The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The staff of the FTC is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. A proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to $16,000 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the person to divest assets or voting securities acquired in violation of the Act.[43]

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

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[42] FTC Act Section 13(b).

[43] *See* § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996).

Washington DC 20580.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.[44] For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of the assets being acquired is actually above the threshold.[45]

XI. OTHER GUIDES IN THIS SERIES

Guide I is the first in a series of guides prepared by the PNO. Others include:

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

Guide III: *A Model Request for Additional Information and Documentary Material (Second Request)*, which contains materials designed for the attorneys of the antitrust enforcement agencies in preparing requests for additional information. It is included in this series to provide an example of what you might expect if either enforcement agency issues a second request.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult:

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and amended by Pub. L. No. 106-553, 114 Stat. 2762.

2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2008).

3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978); 48 Fed. Reg. 34428 (July 29, 1983); 52 Fed. Reg. 7066

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[44] *See* Rule 801.90.

[45] *See, e.g., United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

(March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 61 Fed. Reg. 13666 (March 28, 1996); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4987 (January 31, 2005); 70 Fed. Reg. 11502 (March 8, 2005); 70 Fed. Reg. 73369 (December 12, 2005); 71 Fed. Reg. 35995 (June 23, 2006).

4. The formal interpretations issued pursuant to the Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

It is advisable to check the Federal Register for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see http://www.ftc.gov/bc/hsr/basispurp.shtm. For other HSR-related rulemakings, see http://www.ftc.gov/bc/hsr/rulemaking.shtm. Amendments and formal interpretations, as well as the other material referenced above, are available on the Premerger Notification Office website at http://www.ftc.gov/bc/hsr.

There are also non-governmental publications that, while not officially endorsed by the FTC, contain useful compilations of materials relevant to the Program:

1. Commerce Clearing House's *Trade Regulation Reporter* reprints the Act, the Rules, the Form, and the Formal Interpretations.

2. The American Bar Association's Section of Antitrust Law publishes a *Premerger Notification Practice Manual (2007 Edition)* that provides a collection of informal interpretations of the PNO.

3. A loose-leaf treatise by Axinn, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act* (published by Law Journal SeminarsPress), explains requirements of the Form, the Rules, and the Act, and includes a discussion of the legislative history of the Act.

Finally, if you have questions about the program or a particular transaction not answered by the Commission's HSR website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction and completion of the Form. For general questions, contact the PNO at (202) 326-3100.

☐☐☐☐☐☐☐☐ TRANSACTION NUMBER ASSIGNED

FEE INFORMATION *(For Payer Only)*

TAXPAYER IDENTIFICATION NUMBER _____
OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

AMOUNT PAID $ _____

NAME OF PAYER *(if different from PERSON FILING)* _____

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. _____

FROM (NAME OF INSTITUTION) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO | CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? ☐ YES ☐ NO
(Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(*voluntary*) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO
IF YES, list jurisdictions:

ITEM 1

1(a) PERSON FILING

NAME
HEADQUARTERS ADDRESS
ADDRESS LINE 2
CITY, STATE, COUNTRY
ZIP CODE
WEB SITE

1(b) PERSON FILING NOTIFICATION IS ☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION
☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other *(Specify)* _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period):* _____ (month/year) to _____ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable

☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.

☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) %

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1		CONTACT PERSON 2	
FIRM NAME		FIRM NAME	
BUSINESS ADDRESS		BUSINESS ADDRESS	
CITY, STATE, COUNTRY		CITY, STATE, COUNTRY	
ZIP CODE		ZIP CODE	
TELEPHONE NUMBER		TELEPHONE NUMBER	
FAX NUMBER		FAX NUMBER	
E-MAIL ADDRESS		E-MAIL ADDRESS	

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME
FIRM NAME
BUSINESS ADDRESS
CITY, STATE, COUNTRY
ZIP CODE
TELEPHONE NUMBER
FAX NUMBER
E-MAIL ADDRESS

☐☐☐☐☐☐☐☐ TRANSACTION NUMBER ASSIGNED

FEE INFORMATION *(For Payer Only)*

TAXPAYER IDENTIFICATION NUMBER _____
OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

AMOUNT PAID $ _____

NAME OF PAYER *(if different from PERSON FILING)* _____

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. _____

FROM (NAME OF INSTITUTION) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO | CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? ☐ YES ☐ NO
(Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(*voluntary*) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO
IF YES, list jurisdictions:

ITEM 1

1(a) PERSON FILING

NAME
HEADQUARTERS ADDRESS
ADDRESS LINE 2
CITY, STATE, COUNTRY
ZIP CODE
WEB SITE

1(b) PERSON FILING NOTIFICATION IS ☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION
☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other *(Specify)* _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period):* _____ (month/year) to _____ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable

☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.

☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) %

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1		CONTACT PERSON 2	
FIRM NAME		FIRM NAME	
BUSINESS ADDRESS		BUSINESS ADDRESS	
CITY, STATE, COUNTRY		CITY, STATE, COUNTRY	
ZIP CODE		ZIP CODE	
TELEPHONE NUMBER		TELEPHONE NUMBER	
FAX NUMBER		FAX NUMBER	
E-MAIL ADDRESS		E-MAIL ADDRESS	

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME
FIRM NAME
BUSINESS ADDRESS
CITY, STATE, COUNTRY
ZIP CODE
TELEPHONE NUMBER
FAX NUMBER
E-MAIL ADDRESS

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS

NAME	NON-REPORTABLE
	☐

LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

NAME	NON-REPORTABLE
	☐

2(b) THIS ACQUISITION IS *(put an "X" in all the boxes that apply)*

- ☐ an acquisition of assets
- ☐ a merger (see § 801.2)
- ☐ an acquisition subject to § 801.2 (e)
- ☐ a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50)
- ☐ an acquisition subject to § 801.30 *(specify type)*
- ☐ a consolidation (see § 801.2)
- ☐ an acquisition of voting securities
- ☐ a secondary acquisition
- ☐ an acquisition subject to § 801.31
- ☐ an acquisition of non-corporate interests
- ☐ other *(specify)*

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED
(acquiring person only in an acquisition of voting securities)

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% (see Instructions) (as adjusted) ☐ 50% ☐ N/A

2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD ($MM) $	**(v)** VALUE OF NON-CORPORATE INTERESTS ALREADY HELD ($MM) $	
(ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD %	**(vi)** PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD %	
(iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(vii)** TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(ix)** VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $
(iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION %	**(viii)** TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION %	**(x)** AGGREGATE TOTAL VALUE ($MM) $

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

ACQUIRING UPE(S)	ACQUIRED UPE(S)
NAME	NAME
ADDRESS	ADDRESS
ADDRESS LINE 2	ADDRESS LINE 2
CITY, STATE	CITY, STATE
ZIP CODE, COUNTRY	ZIP CODE, COUNTRY

ACQUIRING ENTITY(S)	ACQUIRED ENTITY(S)
NAME	NAME
ADDRESS	ADDRESS
ADDRESS LINE 2	ADDRESS LINE 2
CITY, STATE	CITY, STATE
ZIP CODE, COUNTRY	ZIP CODE, COUNTRY

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT *(or letter of intent to merge or acquire)*

(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE) ATTACHMENT NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 *(See Item by Item instructions)*. THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION ☐ None

	CENTRAL INDEX KEY NUMBER

4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

4(d) ADDITIONAL DOCUMENTS ☐ None

	ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

Check None at the bottom of the page and provide explanation if you are not reporting revenue

6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE	DESCRIPTION	YEAR TOTAL DOLLAR REVENUES ($MM)	
Attachment:			
			☐ Overlap

NONE ☐ *(PROVIDE EXPLANATION)*

NAME OF PERSON FILING NOTIFICATION	DATE

5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY

☒ Not Applicable

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

Attachment:

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

Attachment:

CODE	DESCRIPTION

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

Attachment:

NAME	CITY	STATE	COUNTRY

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

ISSUER/ UNINCORPORATED ENTITY	SHAREHOLDER/ INTEREST HOLDER	HQ ADDRESS	% HELD

6(c)(i) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

UPE OF FILING PERSON	ISSUER/ UNINCORPORATED ENTITY	% HELD

6(c)(ii) HOLDINGS OF ASSOCIATES *(ACQUIRING PERSON ONLY)*

Attachment:

TOP LEVEL ASSOCIATE	ISSUER/ UNINCORPORATED ENTITY	% HELD

ITEM 7

OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

☐ None

CODE	DESCRIPTION	PERSON / ASSOCIATE / BOTH

7(b)(i) LIST THE NAME OF EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

UPE OF OTHER FILING PERSON	ENTITY THAT OVERLAPS (IF DIFFERENT)

7(b)(ii) LIST THE NAME OF EACH ASSOCIATE OF THE ACQUIRING PERSON THAT ALSO DERIVED DOLLAR REVENUES (*ACQUIRING PERSON ONLY)*

TOP LEVEL ASSOCIATE	ENTITY THAT OVERLAPS (IF DIFFERENT)

7(c) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

CODE	GEOGRAPHIC MARKET INFORMATION

7(d) GEOGRAPHIC MARKET INFORMATION FOR ASSOCIATES OF THE ACQUIRING PERSON (*ACQUIRING PERSON ONLY)*

CODE	GEOGRAPHIC MARKET INFORMATION

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 8

PRIOR ACQUISITIONS *(ACQUIRING PERSON ONLY)*

NAICS Code				
Acquired Entity				
Former HQ Address				
Acquisition Type	☐ Securities	☐ Assets	☐ Non Corporate Interests	Date of Acquisition:
Notes				

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the

City of _____ , State of _____ [SEAL]

this _____ day of _____ , the year _____

Signature _____

My Commission expires _____

16 C.F.R. Part 803 - Appendix **NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS**	Approved by OMB 3084-0005

Attach the Affidavit required by § 803.5 to the Form.

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. §18a. The maximum daily civil penalty amount is listed in 16 C.F.R. §1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, Federal Trade Commission, 400 7th St. SW, Room #5301, Washington, DC 20024
and
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

ENDNOTES

ENDNOTE NUMBER	PERTAINING TO	ENDNOTE TEXT

NAME OF PERSON FILING NOTIFICATION	DATE

ATTACHMENTS

AttachTotal:

ATTACHMENT NUMBER	ATTACHMENT DESCRIPTION		
		DESCRIPTION	
	ATTACHED TO ITEM		

PREMERGER NOTIFICATION REPORTING UNDER THE HSR ACT

ITEMS 4(c) AND 4(d) OF THE HSR FORM

Item 4(c)(and 4(d) documents

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), parties submitting premerger notification reports are required to submit so-called "4(c) documents" in response to Item 4(c) of the HSR Form. Item 4(c) requires the filing party to include the following materials with its initial premerger notification filing:

> [Any] studies, surveys, analyses and reports prepared by or for an officer or director for the purpose of analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

The documents submitted under this section can include offering memoranda or analyses prepared by investment bankers, capital authorization requests, board memoranda, slide presentations, and other internal analyses,

In addition, effective as of August 18, 2011, the HSR form added a new Item 4(d) requiring reporting parties to submit three other classes of documents:

- **Confidential Information Memoranda ("CIM")**:[1] Item 4(d)(i) requires a filing party to submit any CIM prepared by or for any officers or directors that specifically relate to the sale of the target. If no CIM exists, the parties have to submit any documents given to officers or directors of the buyer meant to serve the function of a CIM. Only documents prepared within a year of the HSR filing date need to be submitted.
- **Third-party advisor documents**: Item 4(d)(ii) requires a filing party to submit all studies, surveys, analyses and reports prepared by investment

[1] A "confidential information memorandum" is a sales document, usually prepared by the seller's investment bankers and typically from 50 to 100 pages long, given to prospective buyers that describes the business to be sold (the "target"). It typically includes an executive summary, an investment thesis (i.e., why the target is valuable), an overview of the market in which the target operates (perhaps including competitors), an overview of the target's business and a more detail description of its products and services, customer profitles, financial statements, and a description of the management team. As a sales document, CIMs are prepared to make the company look attractive as attrative as possible and sell for maximum value. This often means that the investment bankers will want to define the target's markets narrowly to maximize their market share and minimize their competitors. The bankers may also try to emphasize any possible barriers to entry that shield the target from potential competition. Not surprisingly, the antitrust agencies want a copy of any CIMs in the initial filing. Also not surprisingly, there can be a significant tension between the investment bankers and the merger antitrust lawyers over what the CIM should contain.

bankers, consultants, or other third-party advisors for any of its officers or directors for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. Only materials developed by third-party advisors during an engagement or for the purpose of seeking an engagement, including unsolicited materials, are required.[2]

- **Synergy and efficiency documents**: Item 4(d)(iii) requires a filing party to submit all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officers or directors for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

Many parties were already submitting these documents in response to Item 4(c), but to ensure that all parties submitted the documents, the FTC made the requirement explicit in Item 4(d).

The content of 4(c) and 4(d) documents can be instrumental in determining whether the U.S. antitrust agencies decide to conduct an in-depth investigation of a transaction, issue a second request for information, or seek to block or restructure a transaction. This is particularly true if the documents support a possible theory of anticompetitive harm.

The following is a non-exhaustive list of topics that are likely to attract the attention of the antitrust agencies and subject a transaction to closer regulatory scrutiny:

- Documents indicating that the price of some product will increase as a result of the transaction.
- Characterizing the market in which the firms compete (since such comments may be misread to endorse a view of the market that overstates the competitive impact of a transaction).
- Exaggerated claims about the extent to which the transaction will enhance the competitive position of the parties or disadvantage competitors.

[2] A sensitive part of merger antitrust counseling for buyers is modeling the likely financial impact of any divestiture that may be necessary to close the deal without litigation with the investigating agency. Investment bankers usually will need to be part of this process. It is critical that any assignment to the investment bankers or any other third-party advisor should be given by the general counsel or, even better, outside merger antitrust counsel. The bankers should be instructed that this work is to enable the lawyers to give legal advice to the company, that the work is highly confidential and should not be shared with anyone in the investment bank outside of those bankers working on this particular assignment or with anyone in the company other than the assigning lawyers without express authorization from the assigning lawyers. They should also be instructed that any document they prepare should contain the legend "PRIVILEGED AND CONFIDENTIAL-Prepared at the request of counsel for the purpose of giving legal advice." The idea is to ensure to the maximum extent that the work product of the bankers will be shielded from discovery in the merger investigation on attorney-client privilege and work product grounds. (This should also shield the investment bankers from depositions on the project.)

- Comments minimizing the strength of competitors, including smaller competitors or potential new competitors.
- Referring to the acquisition target as the closest competitor or suggesting that there are any market segments or niches in which the purchaser and the target are uniquely strong and do not face significant competition from others.
- Suggestions that there are high barriers to entry or expansion in the market.
- Suggestions that following the transaction, it will be easier for the parties or anyone else to raise prices or reduce any non-price aspect of competition.
- Suggestions that customers will be harmed or concerned about lack of competition as a result of the transaction.
- Suggestions that few synergies, efficiencies, or other cost-savings will be achieved as a result of the transaction.
- Suggestions that the transaction will lessen the pressure on either party to innovate or make quality or other improvements.

Consequences of failing to include all Item 4(c) and 4(d) documents

The agencies consider a filing that does not contain all 4(c) or 4(d) documents to be incomplete and ineffective. When the agencies discover a 4(c) or 4(d) document in a second request submission that was missing from the original premerger filing, the agencies frequently require the filing party to refile its premerger notification, restart all of the waiting periods, and subject all parties to another (or second) second request and substantial delay. The deficient company can also lose significant credibility and leverage at what is usually the worse possible time in the investigation.

Moreover, if the waiting period for the filing putatively expired and the missing documents emerge after the transaction closed, the agency can seek civil penalties for consummating the transaction without an effective HSR filing. Civil penalties accrue for each day after a transaction has closed where HSR Act's reporting and waiting requirements were not observed. The maximum civil penalty is adjusted annually.[3] Currently, the maximum civil penalty for violating the HSR Act is $46,517 per day.[4]

In *ADP/AutoInfo*,[5] ADP submitted an HSR filing on December 7, 1994, for the acquisition of AutoInfo. ADP's HSR filing contained no 4(c) documents. The investigating agency issued no second request and the transaction closed on April 1,

[3] *See* Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857 (Jan. 9, 2009) (effective Feb. 9, 2009). Curiously, the Federal Civil Penalties Inflation Adjustment Act of 1990 (''FCPIAA''), 28 U.S.C. § 2461 note, contains specific rules for rounding each increase based on the size of the penalty. Increases in civil penalties of greater than $10,000 and less than or equal to $100,000 must be in $5,000 increments, and the increase in the CPI between June 2009 and June 2013 was not high enough to round up any adjustment to $5,000.

[4] Adjustments to Civil Penalty Amounts, 87 Fed. Reg. 1070 (Jan. 10, 2022) (effective Jan. 10, 2022).

[5] United States v. Automatic Data Processing, Inc., No. 96 0606, 1996 WL 224758 (D.D.C. Apr. 10, 1996).

1995. Following the closing, however, a number of customers complained to the FTC about price increases. The FTC opened a non-HSR postclosing investigation into the transaction. In the course of the new investigation, the FTC discovered a number of Item 4(c) documents that were missing from ADP's original filing. One of these documents was a marketing plan that explained how the acquisition would enable ADP to "monopolize the [automobile] salvage [yard information services] industry in an expeditious and timely manner." The FTC concluded that the missing documents made ADP's original filing ineffective and hence the transaction violated the HSR Act because it closed without satisfying the Act's reporting and waiting period requirements.

In its complaint seeking civil penalties, the government alleged that ADP made little effort to locate its Item 4(c) documents for inclusion in the filing for the AutoInfo transaction and that it did not search the files of either its officers or directors or those persons who may have generated documents responsive to Item 4(c) for the officers or directors. ADP's in-house counsel, who had prepared the Notification and Report Form and was responsible for collecting 4(c) documents, at most asked only three persons whether they had documents like those covered by Item 4(c). Those persons did not search or have their files searched for Item 4(c) documents and did not produce 4(c) documents. As a result, ADP's in-house counsel was unaware of whether and what potentially responsive 4(c) documents were typically created by or for ADP officers during an ADP acquisition. In addition, ADP's chief financial officer, who certified the accuracy and completeness of the Notification and Report Form, did not supervise the preparation of the Notification and Report Form or review the completed Notification and Report Form, did not know what documents were required by Item 4(c), did not read the instructions to the Notification and Report Form, and had no understanding of the statute or rules referred to in the certification. The complaint alleged that ADP was in violation of the HSR Act from April 1, 1995, the date of the AutoInfo acquisition, to January 23, 1996, when ADP refiled its HSR form. At the time, the maximum penalty for violating the HSR Act was $10,000 per day for each day the company was in violation. This period comprised 297 calendar days, which would subject ADP to a maximum penalty of $2,970,000. The FTC obtained this maximum penalty in a settlement.[6]

In *Blackstone Capital/Prime Succession*,[7] Blackstone Capital Partners II Merchant Banking Fund L.P. and its general partner, Howard A. Lipson, settled an FTC investigation into violations of the HSR Act after the FTC discovered that a filing made by Blackstone and signed by Lipson in 1996 for Blackstone's involvement in the leveraged buyout of Prime Succession, Inc. did not include an important 4(c) document. The omission was discovered when a subsequent filing in 1997 by another

[6] Separately, at the end of the merits investigation the FTC challenged the acquisition as a violation of Section 7. Ultimately, the parties entered into a consent settlement requiring ADP to divest the computer systems and automobile salvage-yard parts trading network it acquired from AutoInfo. *See In re* Automatic Data Processing, Inc., 124 F.T.C. 456 (1977).

[7] United States v. Blackstone Capital Partners II Merchant Banking Fund L.P. & Howard Andrew Lipson, 99–CV–0795 R, 1999 WL 34814751 (D.D.C. Mar. 31, 1999).

party involved in the LBO included a memorandum authored by Lipson describing competitive issues in the 1996 transaction. This was the first time that the agencies sought to impose penalties against an individual. Given Lipson's personal involvement in the Prime transaction and the fact that he authored the Item 4(c) document in question, the agencies concluded that he knew or should have known that the filing was inaccurate when he signed it, and at the least had had "reckless disregard" for his obligations under the HSR Act. Blackstone paid a penalty of $2,785,000 and Lipson paid $50,000 in the settlement.

In *Hearst Trust/Medi-Span*,[8] Hearst Corporation settled charges of making an incomplete HSR filing for its 1998 acquisition of Medi-Span. As in the *ADP* case, in the wake of postmerger customer complaints, the FTC opened an investigation of the transaction. In the course of the investigation, Hearst submitted three documents the FTC concluded were responsive to Item 4(c) at the time of the original filing but were not submitted with the notification. On August 21, 2000, Hearst resubmitted its HSR Notification with the missing Item 4(c) documents, along with a privilege log identifying six other documents that had not been identified in the original filing. The waiting period for the resubmitted filing apparently expired on November 22, 2000. To settle the resulting civil penalties action, Hearst agreed to pay $4 million, the largest penalty ever by a single company to date for violating the premerger notification rules.[9]

Most recently, in *Iconix/Rocawear*,[10] Iconix Brand Group agreed to a $550,000 fine to settle charges of making an incomplete filing for its acquisition of Rocawear Brand. Iconix failed to submit any Item 4(c) documents with its filing, prompting the FTC to call the company's counsel to confirm that a thorough search was done. Although the agencies did not have any substantive antitrust concerns with the transaction and granted early termination of the HSR waiting period, the DOJ opened an investigation to determine whether Iconix had in fact undertaken an acquisition requiring more than $200 million in financing without its officers or directors having prepared or reviewed a single Item 4(c) document. In response to the DOJ's civil investigatory demand, Iconix produced several documents, including an email between its officers and directors, a presentation reviewed by an executive vice president, and materials prepared for an Iconix board, all of which evaluated and analyzed the Iconix' proposed acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth or expansion into product or geographic markets and should have been submitted at 4(c) documents with the original filing.

[8] United States v. Hearst Trust, No. 1:01CV02119, 2001 WL 1478814 (D.D.C. Oct. 15, 2001).

[9] Also as in the *ADP* case, the FTC challenged the transaction on the merits and obtained a consent settlement requiring Hearst to divest the former Medi-Span business and to pay $19 million as disgorgement of unlawful profits. *See* FTC v. Hearst Trust, No.1:01CV00734 (TPJ) (D.D.C. Dec. 18, 2001) (consent decree).

[10] United States v. Iconix Brand Group, Inc., Civ. A. No. 1:07-cv-01852-ESH, 2007-2 Trade Cas. (CCH) ¶ 75,900 (D.D.C. 2007).

Failure to File

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Monday, April 4, 2016

Justice Department Sues ValueAct for Violating Premerger Notification Requirements

ValueAct Invested Over $2.5 Billion in Halliburton and Baker Hughes, Failed to Notify Antitrust Authorities, Wrongly Claiming No Intent to Influence Companies' Business Decisions

The Department of Justice today filed a civil antitrust lawsuit in the U.S. District Court for the Northern District of California against certain ValueAct Capital entities for violating the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The Antitrust Division's lawsuit seeks civil penalties and an injunction against further HSR Act violations.

On Nov. 17, 2014, Baker Hughes and Halliburton – two of the three largest providers of oilfield products and services in the world – announced their plan to merge in a deal valued at $35 billion. Thereafter, ValueAct, an activist investment firm, purchased over $2.5 billion of Halliburton and Baker Hughes voting shares without complying with the HSR Act's notification requirements. According to the complaint, ValueAct purchased these shares with the intent to influence the companies' business decisions as the merger unfolded and therefore could not rely on the limited "investment-only" exemption to HSR notification requirements. The complaint details how ValueAct used its access to senior executives of both Halliburton and Baker Hughes to formulate merger and other business strategies with the companies.

"ValueAct's substantial stock purchases made it one of the largest shareholders of two competitors in the midst of our antitrust review of the companies' proposed merger, and ValueAct used its position to influence decision-making at both companies," said Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division. "ValueAct was not entitled to avoid HSR requirements by claiming to be a passive investor. Given the seriousness of the violation and ValueAct's prior HSR violations, we will be seeking significant civil penalties and an injunction against further violations."

The HSR Act imposes notification and waiting period requirements for transactions meeting certain size thresholds so that such transactions can undergo premerger antitrust review by the department and the Federal Trade Commission. The HSR Act has a narrow exemption for acquisitions of less than 10 percent of a company's outstanding voting securities if that acquisition is made "solely for the purposes of investment" with no intention of participating in the company's business decisions.

Federal courts can assess civil penalties for premerger notification violations under the HSR Act in lawsuits brought by the department. The maximum civil penalty for an HSR violation is $16,000 per day.

ValueAct is an investment firm headquartered in San Francisco that advertises a strategy of "active, constructive involvement" in the management of the companies in which it invests. According to ValueAct's website, ValueAct's business model focuses on "acquiring significant ownership stakes in a limited number of companies," and "[t]he goal in each investment is to work constructively with management and/or the company's board to implement a strategy or strategies that maximize returns for all shareholders." ValueAct manages over $16 billion on behalf of

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. VA PARTNERS I, LLC VALUEACT CAPITAL MASTER FUND, L.P. VALUEACT CO-INVEST INTERNATIONAL, L.P., Defendants.	Civil Action No.:

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain civil penalties and equitable relief against the Defendants (collectively, "ValueAct") for failing to comply with the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), and alleges as follows:

I. INTRODUCTION

1. The Hart-Scott-Rodino Act, 15 U.S.C. §18a, is an essential part of modern antitrust enforcement. It requires purchasers of voting securities in excess of a certain value to notify the Department of Justice and the Federal Trade Commission and to observe a waiting period before consummating the transaction. These obligations extend to acquisitions of minority interests. One limited exemption to these obligations applies if the purchaser's holdings constitute less than ten percent of the stock of the company and the acquisition is "solely for the purpose of investment" – that is, the purchaser has no intention of participating in the company's business decisions.

2. ValueAct promotes itself as having a strategy of "active, constructive involvement" in the management of the companies in which it invests. This case concerns recent acquisitions by two ValueAct investment funds of over $2.5 billion of voting securities of Halliburton Company and Baker Hughes Incorporated. Halliburton and Baker Hughes are head-to-head competitors and two of the largest providers of oilfield products and services in the world. On November 17, 2014, Halliburton and Baker Hughes announced their intent to merge. Their proposed merger is the subject of an ongoing antitrust review in the United States and several other countries.

3. ValueAct began acquiring significant holdings of the two companies on the heels of the Halliburton/Baker Hughes merger announcement. From the beginning, ValueAct anticipated influencing the business decisions of the companies as the merger process unfolded. ValueAct sent memoranda to its investors outlining this strategy and explaining that purchasing a stake in each of these firms would allow it to "be a strong advocate for the deal to close," which would in turn "[i]ncrease probability of deal happening." If the deal encountered "regulatory issues," ValueAct "would be well positioned as an owner of both companies to help develop the new terms." ValueAct executives also discussed internally a back-up plan to "sell at least some of Baker's pieces" if the deal were blocked or abandoned.

4. ValueAct's purchases of Halliburton and Baker Hughes shares did not qualify for the narrow exemption from the requirements of the HSR Act for acquisitions made solely for the

purpose of investment. ValueAct planned from the outset to take steps to influence the business decisions of both companies, and met frequently with executives of both companies to execute those plans.

5. These HSR Act violations allowed ValueAct to become one of the largest shareholders of both Halliburton and Baker Hughes, without providing the government its statutory right to notice and prior review of the stock purchases. ValueAct established these positions as Halliburton and Baker Hughes were being investigated for agreeing to a merger that threatens to substantially lessen competition in numerous markets. ValueAct intended to use its position as a major shareholder of these companies to obtain access to management, to learn information about the merger and the companies' strategies in private conversations with senior executives, to influence those executives to improve the chances that the merger would be completed, and to influence other business decisions whether or not the merger went forward.

6. The Court should assess a civil penalty of at least $19 million to address ValueAct's violations of the HSR Act, and should restrain ValueAct from further violations.

II. JURISDICTION AND VENUE

7. This Complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a, added by Title II of the HSR Act, to recover civil penalties and equitable relief for violations of that section.

8. This Court has jurisdiction over the Defendants and over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355. Each of the Defendants is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

9. Venue is properly based in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391(b)(2), (c)(2). Each of the Defendants transacts or has transacted business in this district and has its principal place of business here.

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III. INTRADISTRICT ASSIGNMENT

10. Assignment to the San Francisco Division is proper because this action arose primarily in San Francisco County. Many of the events that gave rise to the claims occurred in San Francisco, and Defendants' headquarters and principal places of business were during the relevant events, and continue to be, located in San Francisco.

IV. THE DEFENDANTS

11. This case arises from acquisitions of stock over several months by two investment funds – ValueAct Master Capital Fund, L.P. ("Master Fund") and ValueAct Co-Invest International, L.P. ("Co-Invest Fund"). Though separate entities for purposes of the HSR Act, both funds have the same general partner – VA Partners I, LLC ("VA Partners"). Master Fund and Co-Invest Fund are organized under the laws of the British Virgin Islands, and VA Partners is organized under the laws of Delaware. Master Fund, Co-Invest Fund, and VA Partners (collectively, "ValueAct" or "Defendants") all have the same principal office and place of business in San Francisco, California.

12. ValueAct is well known as an activist investor. In contrast to other large funds that focus on passive investment strategies to generate returns, ValueAct's website explains that it pursues a strategy of "active, constructive involvement" in the management of the companies in which it invests. The website further states, "The goal in each investment is to work constructively with management and/or the company's board to implement a strategy or strategies that maximize returns for all shareholders."

13. ValueAct tracks its "activism" in these investments by various metrics, such as success in changing executive compensation, and touts these statistics in its presentations to potential investors as illustrated by the following slide from ValueAct's June 2015 presentation:

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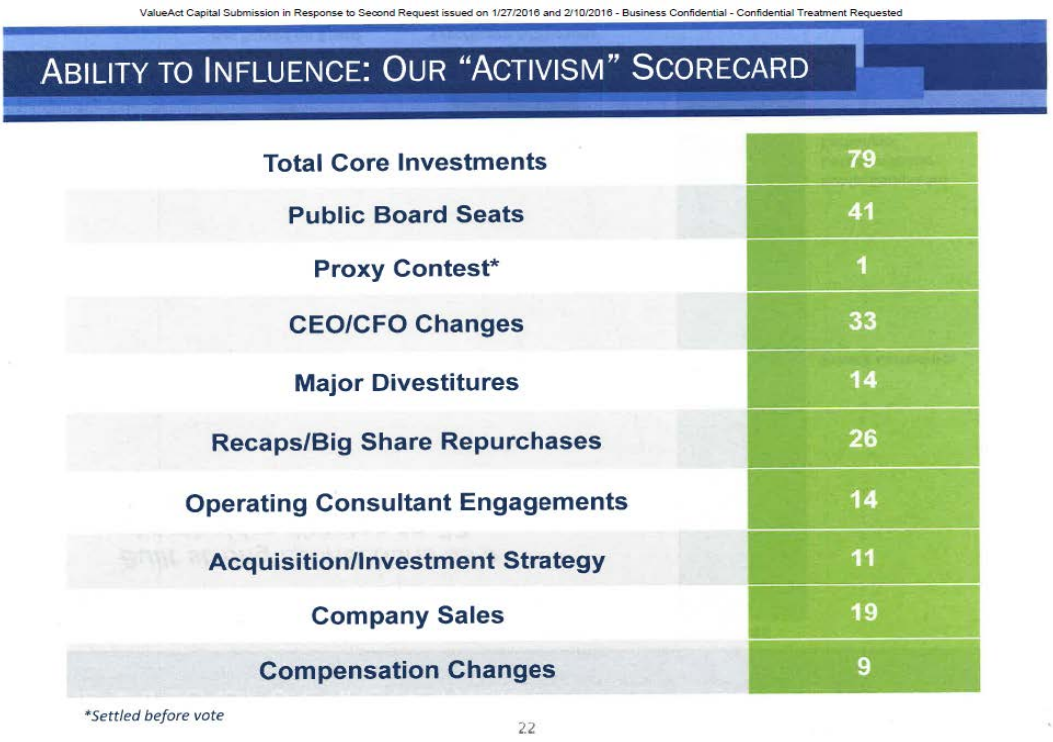

14. In presentations, ValueAct has explained that it likes "disciplined oligopolies" and looks to invest in businesses in "[o]ligopolistic markets, high barriers-to-entry."

15. ValueAct funds have previously violated the HSR Act by acquiring voting securities without making the required notifications. In 2003, ValueAct Capital Partners, L.P. filed corrective notifications for three prior acquisitions of voting securities. ValueAct outlined steps it would take to ensure future compliance with the HSR Act. No enforcement action was taken at that time. Master Fund then failed to make required filings with respect to three acquisitions that it made in 2005. ValueAct agreed to pay a $1.1 million civil penalty to settle an HSR Act enforcement action based on these violations.

V. BACKGROUND

A. The Hart-Scott-Rodino Antitrust Improvements Act

16. The HSR Act requires parties to file a notification with the Federal Trade Commission and the Department of Justice and to observe a waiting period before consummating acquisitions of voting securities or assets that exceed certain value thresholds.

These requirements give the antitrust enforcement agencies prior notice of, and information about, proposed transactions. The waiting period also provides the antitrust enforcement agencies with an opportunity to investigate and to seek an injunction to prevent the consummation of anticompetitive transactions.

17. The HSR Act contains certain limited exemptions to the notification and waiting period requirements. The acquirer of voting securities has the burden of showing eligibility for an exemption. One such exemption applies narrowly to acquisitions made "solely for the purpose of investment" if the voting securities held do not exceed ten percent of the outstanding voting securities of the issuer. 15 U.S.C. § 18a(c)(9). The regulations implementing the Act explain that, to qualify for this exemption, the acquiring party must have "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1).

B. ValueAct's Initial Investment Decision and Strategy

18. After Halliburton and Baker Hughes announced their intent to merge on November 17, 2014, ValueAct began purchasing stock in each company through its Master Fund and Co-Invest Fund. ValueAct continued to make purchases in both companies for several months, eventually acquiring over $2.5 billion in securities of the two companies combined.

19. As ValueAct was acquiring stock in these two companies in December 2014 and early January 2015, its executives were developing strategies to use ValueAct's ownership position to influence management of each firm as necessary to increase the probability of the deal being completed. ValueAct's Master Fund crossed the applicable HSR Act reporting thresholds for Baker Hughes and Halliburton on December 1 and December 5, 2014, respectively, and Master Fund continued to build up its position as its executives discussed strategy. These discussions culminated in the drafting of memoranda that ValueAct sent to its investors on January 16, 2015. These memoranda – one about Baker Hughes and one about Halliburton – explained ValueAct's decision to acquire stakes in these competitors through its Master Fund, and offered investors the opportunity to increase their stakes in these firms through additional share purchases by ValueAct's Co-Invest Fund.

20. These memoranda and other contemporaneous documents show that ValueAct's most senior executives planned from the outset to play an active role at Halliburton and Baker Hughes. The lead ValueAct partner responsible for the Baker Hughes investment internally circulated a draft of an investor memorandum explaining that "our activist approach limits our downside in the unlikely case that the merger does not close." The draft further noted that if the merger were not completed, ValueAct "would likely seek to take a more active role in overseeing the company." ValueAct's CEO then requested an insertion into the memorandum highlighting that ValueAct's "[a]ctive role" is an additional reason to invest in both companies.

21. Although the memoranda ultimately shared with investors watered down the words used to describe ValueAct's activist strategy, they still emphasized that purchasing a stake in Halliburton and Baker Hughes would "increase probability of deal happening" and would allow ValueAct to be "a strong advocate for the deal to close." ValueAct identified this as one of three "key considerations" supporting its investment decision. A contemporaneous email among ValueAct partners remarked that if Halliburton's shareholders threatened to vote against the deal, ValueAct's "position in HAL should be meaningful enough to have a substantial role in those conversations."

22. ValueAct also intended to help restructure the merger if it hit roadblocks. On December 16, 2014, ValueAct's CEO emailed his partners: "if we own both we can drive new terms to get the deal done if weird [expletive] is happening." ValueAct also expressed this view in its memos to investors: "In the event of further fundamental dislocation or regulatory issues, it is possible the deal would need to be restructured and we believe ValueAct Capital would be well positioned as an owner of both companies to help develop the new terms."

23. In a December 2014 internal email, a ValueAct partner observed that "[i]f the deal failed, the back-up plan would seem to be to sell at least some of Baker's pieces, and we think that we could get up to 12x EBITDA for just 2 of BHI's businesses – artificial lift and chemicals." ValueAct's memoranda to investors noted, "Recent transactions in each of those industries [specialty chemicals and artificial lift] suggest that these businesses are worth north of 10 times EBITDA." Moreover, the Baker Hughes memorandum explained that there are

"numerous levers for the company to pull to drive margin expansion," and identified Baker Hughes's pressure pumping business as a good candidate for margin improvement.

24. Regardless of how the merger process unfolded, ValueAct intended to influence the business decisions of both companies. For example, on December 5, 2014, the day Master Fund's holdings in Halliburton crossed the HSR Act threshold, a ValueAct partner wrote an email to ValueAct's CEO about Halliburton: "Wonder if it would be possible to get the VRX [Valeant Pharmaceuticals] comp plan in from outside the board room?" The CEO responded "Yes. Good idea." (ValueAct had recently convinced management to change the executive compensation plan at another of its investments, Valeant Pharmaceuticals.)

25. ValueAct also intended to play a role in Halliburton's efforts to integrate the two firms. ValueAct told its investors that its stake in Halliburton "helps to further enhance our relationship with management and the board of directors as they work to complete the merger and integrate the business into Halliburton's existing operations."

C. ValueAct's Efforts to Influence the Management of Both Companies

26. Consistent with its investment strategy of "active, constructive involvement," ValueAct established a direct line to senior management at both Halliburton and Baker Hughes and met with them frequently from the time it started acquiring stock. From December 2014 through January 2016, ValueAct met in person or had teleconferences more than fifteen times with senior management of Halliburton or Baker Hughes, including meeting multiple times with the CEOs of both companies. ValueAct partners also exchanged a number of emails with management at both firms about the merger and the companies' respective operations.

27. ValueAct reached out to Baker Hughes immediately after it began purchasing shares. On December 1, 2014, the day Master Fund's holdings crossed the HSR Act threshold for Baker Hughes, a ValueAct partner told a Baker Hughes executive that ValueAct was positive on the merger but also liked "that 20% of [Baker Hughes's] revenue comes from non-capital intensive business lines which could command a big multiple if sold." A few days later, ValueAct's CEO met in person with the CFO of Baker Hughes. According to Baker Hughes's notes of the meeting, ValueAct's CEO "highlighted that it was critical that BHI continued

focused [*sic*] on many of these improvement opportunities despite the acquisition. He specifically emphasized with graphs the largest gap/opportunities he saw." With respect to the gap in Baker Hughes's North American margins, ValueAct's CEO stated, "Looking to learn with BHI on how to close that GAP [*sic*]." ValueAct's CEO also discussed other areas "that he thought BHI should continue to focus on as there was a lot of improvement opportunity." According to the notes, the meeting ended with ValueAct's CEO "stating that they would remain in contact and sharing that they plan to be large shareholders of BHI."

28. On January 16, 2015, ValueAct filed a Beneficial Ownership Report (Schedule 13D) with the Securities and Exchange Commission publicly disclosing its substantial stake in Baker Hughes and reporting that it might discuss "competitive and strategic matters" with Baker Hughes management, and might "propos[e] changes in [Baker Hughes's] operations." Before submitting the Schedule 13D, ValueAct's CEO notified Halliburton's CEO of the impending filing on Baker Hughes, explaining that the filing "gives us the flexibility to engage with the company [Baker Hughes] on all issues." Later the same day, ValueAct's CEO emailed Halliburton's CEO a copy of its investment memoranda for both Halliburton and Baker Hughes.

29. By February, after ValueAct had completed its outreach to investors seeking capital for additional share purchases, ValueAct began acquiring stock in Halliburton and Baker Hughes through Co-Invest Fund. On March 10, 2015, Co-Invest Fund's holdings in Halliburton crossed the applicable HSR Act reporting threshold.

30. Also in early March, ValueAct contacted Halliburton to offer assistance in advance of the shareholder vote on the merger. ValueAct offered Halliburton "to speak with any of [Halliburton's] top shareholders about [ValueAct's] view of the merger prior to the vote." Halliburton responded that it would let ValueAct know if ValueAct's help became necessary.

31. In May 2015, ValueAct further engaged with Halliburton on the company's plans for post-merger integration. On May 13, ValueAct met with Halliburton's CEO to discuss actions that Halliburton could take in an attempt to achieve its target merger synergies. On May 27, a ValueAct partner called Halliburton's Chief Integration Officer to recommend a firm

for real estate integration services. In a subsequent email exchange, another ValueAct partner emphasized the need to engage on these issues at the executive level, and stated that Halliburton's plan was "a traditional approach likely to leave value on the table." Instead, the partner identified alternative ways the real estate firm could work with Halliburton to help achieve the synergy goals.

32. ValueAct also followed through on its idea for changing Halliburton's executive compensation plan. On July 14, 2015, ValueAct contacted Halliburton's CEO to schedule a meeting to discuss executive compensation. At the meeting, which ultimately occurred in September, ValueAct delivered a thirty-five-page presentation detailing ValueAct's preferred approach, commenting on Halliburton's current plan, and proposing specific changes.

D. Consistent with Its Initial Plans, ValueAct Worked to Restructure the Merger or to Sell Parts of Baker Hughes

33. ValueAct carefully monitored the status of the antitrust review process and intended to intervene with the management of each firm as necessary to increase the probability of the deal being completed. ValueAct met with Baker Hughes's CEO in May 2015 and according to ValueAct's notes of that meeting, Baker Hughes's CEO "seemed pretty worried about anti-trust, and implied odds deal goes through 70% or lower in his mind." ValueAct then continued to push management of both companies to preserve the deal or, if these efforts failed, to sell off pieces of Baker Hughes.

34. On August 31, 2015, ValueAct met with Baker Hughes's CEO "to plant the seed to seek alternative options with other buyers if the deal falls through." In its initial investment analysis, the ValueAct partners had discussed selling individual Baker Hughes businesses as a back-up plan if the merger failed. ValueAct presented an updated analysis to argue this case to Baker Hughes. ValueAct also proposed restructuring the deal with Halliburton, suggesting that Baker Hughes should sell its pressure pumping, artificial lift, and specialty chemical businesses to Halliburton at a premium in lieu of receiving the merger termination fee.

35. According to ValueAct notes from the meeting, Baker Hughes's CEO was "very committed to running BHI stand-alone if the deal fails and did not seem to entertain the idea of

shopping the business piecemeal to other buyers." The notes explain that ValueAct agreed that the Baker Hughes CEO's plan to "focus on technology-based product lines, and grow the business organically in these areas seems like the right areas to focus for the stand-alone company." But this plan was not what the ValueAct executives hoped for: "the problem is that this story seems like a 4-5 year period with the stock not generating a great return over that period." According to Baker Hughes's notes of the meeting, the ValueAct executives registered disappointment with Baker Hughes's CEO, and informed him that Halliburton and Baker Hughes were "the only investment ValueAct had where they did not have board seats."

36. On September 18, 2015, ValueAct pitched its restructuring plan to Halliburton's CEO, advocating that Halliburton pursue selective acquisitions of Baker Hughes's production chemicals and artificial lift businesses. According to Halliburton's notes of the call, ValueAct suggested that Halliburton should offer a substantial sum to acquire these businesses and settle the $3.5 billion merger break-up fee at the same time.

37. During this conversation with the CEO of Halliburton, ValueAct shared Baker Hughes's plans if the merger could not close. According to Halliburton's notes of the call, ValueAct stated that if the merger could not be consummated, Baker Hughes's CEO intended to "run the company like he did before." Halliburton's CEO then asked whether Baker Hughes's CEO was "listening to VA." A ValueAct partner replied that Baker Hughes's CEO "realize [*sic*] can go to his board directly." ValueAct also asked Halliburton's CEO if there was "anything we [ValueAct] can do to be helpful," and explicitly offered to "apply pressure to BHI CEO regarding unhappiness if he continues to run co. if deal does not go through." In short, ValueAct offered to use its position as a shareholder to pressure Baker Hughes's management to change its business strategy in ways that could affect Baker Hughes's competitive future.

38. ValueAct and Halliburton's willingness to discuss the competitive future of Baker Hughes in the absence of a merger is further confirmed by notes contained in ValueAct's files. These notes list "3 options that Lazard [presumably Halliburton's CEO, David Lesar] discussed" with respect to Baker Hughes. One of those options was "Cripple a competitor."

39. On November 5, 2015, ValueAct made a detailed fifty-five page presentation to Baker Hughes's CEO proposing operational and strategic changes to the company. The same day, ValueAct lobbied Halliburton's senior management to pursue alternative ways to get the deal done.

VI. VIOLATIONS ALLEGED

40. Plaintiff alleges and incorporates paragraphs 1 through 39 as if set forth fully herein.

41. The HSR Act provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. Master Fund and Co-Invest Fund are each considered a separate person under the Act and are each obligated to comply with its requirements.

A. Count 1: Master Fund's Acquisition of Halliburton

42. The HSR Act and applicable implementing regulations required that Master Fund file a notification and report form with the antitrust enforcement agencies and observe a waiting period before acquiring any voting securities in Halliburton that would result in Master Fund holding an aggregate total amount of voting securities in excess of the $50 million threshold, as adjusted ($75.9 million in December 2015, and $76.3 million beginning in February 2016).

43. On or about December 4, 2014, Master Fund began purchasing Halliburton voting securities. On or about December 5, 2014, Master Fund's aggregate value of Halliburton voting securities exceeded the $75.9 million threshold. Master Fund continued to purchase Halliburton voting securities until June 30, 2015, by which time Master Fund's aggregate value of Halliburton voting securities exceeded $1.4 billion.

44. Master Fund failed to file the required notification or to observe the required waiting period.

45. On or about January 27, 2016, Master Fund had sold a sufficient quantity of voting securities of Halliburton such that its holdings were no longer in excess of $76.3 million.

46. Master Fund was in violation of the requirements of the HSR Act related to its purchase of Halliburton voting securities each day beginning December 5, 2014, and ending on or about January 27, 2016.

B. Count 2: Co-Invest Fund's Acquisition of Halliburton

47. The HSR Act and applicable implementing regulations required that Co-Invest Fund file a notification and report form with the antitrust enforcement agencies and observe a waiting period before acquiring any voting securities in Halliburton that would result in Co-Invest Fund holding an aggregate total amount of voting securities in excess of the $50 million threshold, as adjusted ($76.3 million beginning in February 2016).

48. On or about February 24, 2015, Co-Invest Fund began purchasing Halliburton voting securities. On or about March 10, 2015, Co-Invest Fund's aggregate value of Halliburton voting securities exceeded the $76.3 million threshold. Co-Invest Fund continued to purchase Halliburton voting securities until March 12, 2015, by which time Co-Invest Fund's aggregate value of Halliburton voting securities exceeded $138 million.

49. Co-Invest Fund failed to file the required notification or observe the required waiting period.

50. On or about January 22, 2016, Co-Invest Fund had sold a sufficient quantity of voting securities of Halliburton such that its holdings were no longer in excess of $76.3 million.

51. Co-Invest Fund was in violation of the requirements of the HSR Act related to its purchase of Halliburton voting securities each day beginning March 10, 2015, and ending on or about January 22, 2016.

C. Count 3: Master Fund's Acquisition of Baker Hughes

52. The HSR Act and applicable implementing regulations required that Master Fund file a notification and report form with the antitrust enforcement agencies and observe a waiting period before acquiring any voting securities in Baker Hughes that would result in Master Fund holding an aggregate total amount of voting securities in excess of the $50 million threshold, as adjusted ($75.9 million in December 2015, and $76.3 million beginning in February 2016).

53. On or about November 28, 2014, Master Fund began purchasing Baker Hughes voting securities. On or about December 1, 2014, Master Fund's aggregate value of Baker Hughes voting securities exceeded the $75.9 million threshold. Master Fund continued to purchase Baker Hughes voting securities until January 15, 2015, by which time Master Fund's aggregate value of Baker Hughes voting securities exceeded $1.2 billion.

54. Master Fund failed to file the required notification or to observe the required waiting period.

55. Master Fund was in violation of the requirements of the HSR Act related to its purchase of Baker Hughes voting securities each day beginning on December 1, 2014, and remains in violation of the HSR Act to the present.

VII. REQUEST FOR RELIEF

Wherefore, Plaintiff requests:

(a) That the Court adjudge and decree that Defendant Master Fund's acquisitions of voting securities of Halliburton, without having filed a notification and report form and observing a waiting period, violated the HSR Act;

(b) That the Court adjudge and decree that Defendant Co-Invest Fund's acquisitions of voting securities of Halliburton, without having filed a notification and report form and observing a waiting period, violated the HSR Act;

(c) That the Court adjudge and decree that Defendant Master Fund's acquisitions of voting securities of Baker Hughes, without having filed a notification and report form and observing a waiting period, violated the HSR Act;

(d) That the Court order Defendants to pay to the United States an appropriate civil penalty as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 74 Fed. Reg. 858 (Jan. 9, 2009);

(e) That the Court enjoin Defendants from any future violations of the HSR Act;

(f) That the Court order such other and further relief as the Court may deem just and proper; and,

(g) That the Court award the Plaintiff its costs of this suit.

Dated:

Respectfully submitted,

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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, July 12, 2016

Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements

ValueAct to Pay $11 Million for Investing in Halliburton and Baker Hughes without Notifying Antitrust Authorities

The Department of Justice announced today that ValueAct has agreed to pay $11 million to settle allegations that certain ValueAct entities violated the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). As part of the settlement, ValueAct has also agreed to injunctive relief designed to prevent future violations.

On Nov. 17, 2014, Baker Hughes and Halliburton – two of the three largest providers of oilfield products and services in the world – announced their plan to merge in a deal valued at $35 billion. Thereafter, ValueAct, an activist investment firm, purchased over $2.5 billion of Halliburton and Baker Hughes voting shares without complying with the HSR Act's notification requirements. According to a complaint filed on April 4, 2016 in the U.S. District Court for the Northern District of California, ValueAct purchased these shares with the intent to influence the companies' business decisions – including decisions related to the merger – and therefore could not rely on the limited "investment-only" exemption to the HSR Act's notification requirements. The complaint details how ValueAct used its access to senior executives of both Halliburton and Baker Hughes to attempt to influence the companies' proposed merger and other aspects of their businesses. Halliburton and Baker Hughes abandoned their proposed merger on May 2, 2016 after the Antitrust Division sued to block it in U.S. District Court for the District of Delaware.

"ValueAct acquired substantial stakes in Halliburton and Baker Hughes in the midst of our antitrust review of the companies' proposed merger, and used its position to try to influence the outcome of that process and certain other business decisions," said Principal Deputy Assistant Attorney General Renata Hesse, head of the Justice Department's Antitrust Division. "ValueAct was not entitled to avoid the HSR requirements by claiming to be a passive investor, while at the same time injecting itself in this manner. The HSR notification requirements are the backbone of the government's merger review process, and crucial to our ability to prevent anticompetitive mergers and acquisitions. Today's record penalty and important injunctive relief demonstrate our continued commitment to vigorous enforcement of these important notification and waiting period requirements."

The HSR Act imposes notification and waiting period requirements for transactions meeting certain size thresholds to ensure that such transactions undergo premerger antitrust review by the department and the Federal Trade Commission. The HSR Act has a narrow exemption for acquisitions of less than 10 percent of a company's outstanding voting securities if the acquisition is made "solely for the purposes of investment" and the purchaser has no intention of participating in the company's business decisions.

Federal courts can assess civil penalties for premerger notification violations under the HSR Act in lawsuits brought by the department. The current maximum civil penalty for an HSR violation is $16,000 per day; however, the maximum penalty will increase to $40,000 per day effective Aug. 1, 2016.

As part of the settlement, ValueAct agreed to pay a record $11 million. The highest fine previously paid for an HSR violation was $5.67 million. ValueAct is also enjoined from relying on the "investment-only" exemption when it intends to influence, or is considering influencing, certain basic business decisions, including those relating to merger and acquisition strategy, corporate restructuring, and the company's pricing, production capacity, or production output.

ValueAct is an investment firm headquartered in San Francisco that manages over $16 billion on behalf of investors.

As required by the Tunney Act, the proposed settlement, along with the department's competitive impact statement, will be published in The Federal Register. Any person may submit written comments concerning the proposed settlement within 60 days of its publication to Kathleen S. O'Neill, Chief, Transportation, Energy & Agriculture Section, U.S. Department of Justice, 450 Fifth Street, N.W., Suite 8000, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the Northern District of California may enter the final judgment upon finding that it serves the public interest.

ValueAct Explanation

ValueAct CIS

ValueAct PFJ

ValueAct Stipulation with Proposed Order

16-800

Topic:
Antitrust

Antitrust Division

Updated July 12, 2016

Gun Jumping

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 1, 2014
WWW.JUSTICE.GOV

AT
(202) 514-2007
TTY (866) 544-5309

FLAKEBOARD ABANDONS ITS PROPOSED ACQUISITION OF SIERRAPINE

Decision to Abandon Deal Preserves Competition in the MDF Industry

WASHINGTON, D.C. — Flakeboard America Ltd. abandoned its plan to acquire one medium-density fiberboard (MDF) and two particleboard mills from SierraPine, after the Department of Justice expressed concerns about the transaction's likely anticompetitive effects in MDF. The department said that the transaction likely would have substantially lessened competition in the market for the production of MDF sold to customers in the West Coast states of California, Oregon, and Washington.

MDF is a manufactured wood product widely used in furniture, kitchen cabinets, and decorative mouldings. An increase in the price of MDF would likely result in significant harm to MDF consumers on the West Coast, the department said.

"This deal threatened to weaken competition and raise MDF prices for customers on the West Coast," said Bill Baer, Assistant Attorney General of the Department of Justice's Antitrust Division. "The companies' decision to abandon the deal is a victory for consumers, who will continue to enjoy the benefits of MDF competition between Flakeboard and SierraPine."

Flakeboard and SierraPine are two of only four significant suppliers of MDF to the West Coast. Both companies operate MDF mills in Oregon—Flakeboard in Eugene; SierraPine in Medford—and the nearest competing mill is several hundred miles away. For many customers, Flakeboard and SierraPine are the two closest sellers of MDF. The proposed merger would have given the combined firm a 58 percent market share for the thicker and denser grades of MDF that Flakeboard and SierraPine sell on the West Coast.

According to the department, the acquisition would have eliminated significant head-to-head competition between Flakeboard and SierraPine. In addition, by gaining control over SierraPine's MDF mill, the department said that Flakeboard would have been in a better position to raise prices by restricting the amount of MDF available to the West Coast. The acquisition also would have enhanced the risk of coordination between Flakeboard and its few remaining rivals on output and prices, the department said.

Flakeboard is a Delaware corporation headquartered in Ontario, Canada. Flakeboard's parent company is Celulosa Arauco y Constitución (Arauco), which is held by Inversiones

Angelini y Compañia Limitada, a Chilean corporation headquartered in Santiago, Chile. In 2013, Flakeboard's annual revenues from its MDF business were approximately $380 million. SierraPine is a California limited partnership headquartered in Roseville, California. In 2013, SierraPine's annual revenues from its MDF business were approximately $70 million.

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14-1071

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 7, 2014
WWW.JUSTICE.GOV TTY (866) 544-5309

AT
(202) 514-2007

JUSTICE DEPARTMENT REACHES $5 MILLION SETTLEMENT WITH FLAKEBOARD, ARAUCO, INVERSIONES ANGELINI AND SIERRAPINE FOR ILLEGAL PREMERGER COORDINATION

Department Obtains Civil Penalties of $3.8 Million and Disgorgement of $1.15 Million

WASHINGTON —The department today announced a settlement with Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución S.A. and Inversiones Angelini y Compañía Limitada; and SierraPine. The settlement requires the companies to pay a combined $3.8 million in civil penalties for violating the Hart–Scott–Rodino (HSR) Act of 1976. In addition, for violating Section 1 of the Sherman Act, Flakeboard must disgorge $1.15 million in illegally obtained profits and both Flakeboard and SierraPine must establish antitrust compliance programs and agree to certain restrictions.

The settlement resolves the department's allegations that Flakeboard, Arauco and SierraPine engaged in illegal premerger coordination while Flakeboard's proposed acquisition of three SierraPine mills was under antitrust review by the Department of Justice.

Flakeboard and SierraPine abandoned the proposed acquisition on Sept. 30, 2014, after the department expressed concerns about the transaction's likely anticompetitive effects in the production of medium-density fiberboard (MDF). MDF is a manufactured wood product widely used in furniture, kitchen cabinets, and decorative mouldings.

The department today filed, in U.S. District Court for the Northern District of California, a civil antitrust complaint alleging violations of the HSR Act (Section 7A of the Clayton Act) and Section 1 of the Sherman Act. At the same time, the department filed an agreement that, if approved by the court, would resolve the lawsuit.

"Companies proposing to merge must remain separate and independent during the government's investigation," said Bill Baer, Assistant Attorney General of the Department of Justice's Antitrust Division. "These two competitors did not. Instead they closed a plant and allocated customers when they should have been competing vigorously. As a result both companies are paying substantial civil penalties and Flakeboard is being forced to surrender the ill-gotten profit it gained from violating the antitrust laws."

According to the complaint, before the proposed acquisition, SierraPine operated particleboard mills in Springfield, Oregon, and Martell, California, that competed directly with Flakeboard's particleboard mill in Albany, Oregon. Particleboard is an unfinished wood product that is widely used in countertops, shelving, low-end furniture, and other finished products. The Springfield and Martell mills were included in the proposed acquisition along with a third SierraPine mill that produced MDF. The

complaint alleges that after announcing the proposed acquisition on Jan. 14, 2014, and before the expiration of the HSR Act's mandatory premerger waiting period, Flakeboard, Arauco, and SierraPine illegally coordinated to close SierraPine's particleboard mill in Springfield, Oregon, and move the mill's customers to Flakeboard. This unlawful coordination led to the permanent shutdown of the Springfield mill on March 13, 2014, and enabled Flakeboard to secure a significant number of Springfield's customers for its Albany mill. The defendants' conduct constituted an illegal agreement to restrain trade in violation of Section 1 of the Sherman Act, and prematurely transferred operational control, and therefore beneficial ownership, of SierraPine's business to Flakeboard in violation of the HSR Act.

The HSR Act requires companies planning acquisitions or mergers that meet certain thresholds to file premerger notification documents with the department and the Federal Trade Commission. The HSR Act also requires that the merging parties observe a mandatory waiting period before proceeding with the transaction. If the government determines that a transaction violates the antitrust laws, it may seek to block that transaction before the waiting period expires. Each party is subject to a maximum civil penalty of $16,000 per day for each day they violate the HSR Act.

The complaint alleges that the defendants' HSR Act violation occurred from January 17, 2014, when Flakeboard and SierraPine began coordinating on the closure of the Springfield mill, until the expiration of the waiting period on Aug. 27, 2014. The companies cooperated with the investigation by voluntarily providing the department with evidence of their unlawful premerger conduct, which was a significant factor in the department's decision to reduce the maximum HSR penalty. The $1.15 million in disgorgement under the Sherman Act represents a reasonable approximation of the ill-gotten profit Flakeboard received as a result of the parties' coordination to close Springfield and move the mill's customers to Flakeboard.

Flakeboard is a Delaware corporation with its U.S. headquarters in Fort Mill, South Carolina. Flakeboard's parent company is Celulosa Arauco y Constitución (Arauco), which is held by Inversiones Angelini y Compañía Limitada, a Chilean corporation headquartered in Santiago, Chile, and the ultimate parent entity named on the HSR filing.

SierraPine is a California limited partnership headquartered in Roseville, California.

As required by the Tunney Act, the proposed settlement, along with the department's competitive impact statement, will be published in the Federal Register. Any person may submit written comments concerning the proposed settlement during a 60-day comment period to Peter Mucchetti, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, N.W., Suite 4100, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the District of Columbia may enter the proposed final judgment upon finding that it is in the public interest.

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14-1246

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FLAKEBOARD AMERICA LIMITED,

CELULOSA ARAUCO Y CONSTITUCIÓN, S.A.,

INVERSIONES ANGELINI Y COMPAÑÍA LIMITADA,

and

SIERRAPINE,

Defendants.

Case No. 3:14-cv-4949

COMPLAINT

The United States of America brings this civil antitrust action to challenge unlawful conduct by Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución, S.A., and Inversiones Angelini y Compañía Limitada; and SierraPine that occurred while the U.S. Department of Justice was reviewing Flakeboard's proposed acquisition of certain assets from SierraPine.

I. NATURE OF THE ACTION

1. On January 13, 2014, Flakeboard and SierraPine executed an asset purchase agreement in which Flakeboard agreed to acquire SierraPine's particleboard mills in Springfield, Oregon, and Martell, California, and a medium-density fiberboard (MDF) mill in Medford, Oregon. The total value of the proposed transaction was approximately $107 million, plus a variable amount for inventory.

2. SierraPine's Springfield and Martell particleboard mills competed directly with Flakeboard's particleboard mill in Albany, Oregon. Particleboard is an unfinished wood product that is widely used in countertops, shelving, low-end furniture, and other finished products. Both companies also compete in the sale of MDF, a higher-end wood product that is widely used in furniture, kitchen cabinets, and decorative mouldings.

3. The transaction exceeded thresholds established by Section 7A of the Clayton Act, 15 U.S.C. § 18a, also commonly known as the Hart–Scott–Rodino Antitrust Improvements Act of 1976, as amended ("Section 7A" or "HSR Act"). Consequently, the HSR Act required that the defendants make premerger notification filings with the Federal Trade Commission and Department of Justice and observe a waiting period before Flakeboard obtained beneficial ownership of SierraPine's business. The waiting period seeks to ensure that the parties to a proposed transaction are preserved as independent entities while the reviewing agency—here, the Department of Justice—investigates the transaction and determines whether to challenge it.

4. Instead of preserving SierraPine as an independent business, however, Flakeboard, Arauco, and SierraPine coordinated during the HSR waiting period to close SierraPine's Springfield mill and move the mill's customers to Flakeboard. The mill was permanently shut down on March 13, 2014, months before the HSR waiting period expired. On September 30, 2014, Flakeboard and SierraPine abandoned their proposed transaction in response to concerns expressed by the Department of Justice about the transaction's likely anticompetitive effects in the sale of MDF.

5. The defendants' coordination to close Springfield and move the mill's customers to Flakeboard constituted a per se unlawful agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and prematurely transferred operational control of SierraPine's business to Flakeboard during the HSR waiting period in violation of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

6. The United States brings this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, seeking relief for the violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and under Section 7A of the Clayton Act, 15 U.S.C. § 18a, to recover civil penalties for the violation of the HSR Act. This Court has jurisdiction over this action and the defendants under Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

7. The defendants are engaged in, and their activities substantially affect, interstate commerce.

8. The defendants have stipulated to venue and personal jurisdiction in this District.

III. THE DEFENDANTS

9. Flakeboard America Limited is a Delaware corporation with its U.S. headquarters in Fort Mill, South Carolina. Flakeboard and its related entities own numerous mills in North America that produce particleboard and MDF, including a particleboard mill in Albany, Oregon.

10. Flakeboard's parent company is Celulosa Arauco y Constitución, S.A., a Chilean company headquartered in Santiago, Chile, that also produces particleboard and other products. Arauco oversees Flakeboard's operations in North America.

11. Inversiones Angelini y Compañía Limitada is a Chilean corporation headquartered in Santiago, Chile. Inversiones Angelini is a holding company and Flakeboard's ultimate parent entity, as defined by the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.* Inversiones Angelini is also the ultimate parent entity of Arauco.

12. SierraPine is a California limited partnership with its headquarters in Roseville, California. SierraPine owns an operating particleboard mill in Martell, California; the closed particleboard mill in Springfield, Oregon; a closed particleboard mill in Adel, Georgia; and an operating MDF mill in Medford, Oregon.

IV. THE HSR ACT AND THE ASSET PURCHASE AGREEMENT

13. The HSR Act imposes notification and waiting-period requirements on certain transactions that result in an acquiring person holding assets or voting securities valued above certain thresholds. Section 801(c)(1) of the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.*, defines "hold" to mean to have "beneficial ownership." One way that an acquiring person may prematurely obtain beneficial ownership of assets or voting securities it plans to acquire is by obtaining operational control of the acquired person's business before the end of the HSR waiting period. This conduct, sometimes referred to as "gun jumping," violates Section 7A.

14. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), states that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which the person is in violation. For the period relevant to the Complaint, the maximum civil penalty was $16,000 per defendant, per day, according to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.

§ 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996).

15. Flakeboard's proposed acquisition of SierraPine's mills was subject to the HSR Act. On January 22, 2014, Flakeboard's ultimate parent entity, Inversiones Angelini, and SierraPine submitted premerger notification filings to the antitrust agencies as required by Section 7A. The HSR waiting period expired on August 27, 2014, 30 days after Flakeboard and SierraPine certified compliance with the Antitrust Division's requests for additional information.

16. Before negotiating the proposed acquisition, SierraPine had no plans to shut down the Springfield mill. But during negotiations, Flakeboard made clear that it did not intend to operate Springfield after the transaction closed. Flakeboard insisted that SierraPine close the mill because Flakeboard did not want to manage the shutdown, and its parent company, Arauco, was concerned that its reputation might be harmed if it announced the closure.

17. Accordingly, SierraPine agreed in the asset purchase agreement (APA) to "take such actions as are reasonably necessary to shut down and close all business operations at its Springfield, Oregon facility five (5) days prior to the Closing." The APA further provided that "in no event shall [SierraPine] be required to shut down or close its business operations at its Springfield, Oregon facility" until "[a]ny required waiting periods and approvals…under applicable Antitrust Law shall have expired or been terminated." Consistent with these provisions, when Flakeboard and SierraPine executed the APA, they anticipated that SierraPine would announce and implement the Springfield closure immediately after the HSR waiting period expired, but before the transaction was consummated.

V. THE DEFENDANTS' UNLAWFUL CONDUCT

18. Despite the defendants' intentions under the APA, they subsequently entered into a series of agreements and took other actions during the HSR waiting period to close SierraPine's Springfield mill and move the mill's customers to Flakeboard—conduct that together constituted

an unlawful agreement between competitors and prematurely transferred operational control of SierraPine's business to Flakeboard.

19. On January 14, 2014, the day after executing the APA, the defendants announced Flakeboard's proposed acquisition of SierraPine's mills. SierraPine did not announce the Springfield closure at that time because it intended to continue operating Springfield if the acquisition was not consummated and knew that employees and customers would start leaving the mill as soon as news of the planned closure became public.

20. Within two days of the transaction's announcement, however, a labor issue arose that SierraPine believed would likely require it to publicly disclose the Springfield closure earlier than planned, while the transaction was still being reviewed by the Department of Justice. SierraPine immediately informed Flakeboard that the labor issue would require them to "share the pending news on Springfield…before we have early determination on [the] HSR." The following week, SierraPine and Flakeboard discussed the Springfield closure announcement, its timing, and its ramifications. During these discussions, the companies considered the possibility that Flakeboard might waive the provision requiring SierraPine to close the mill, which they expected would avert the need to announce the Springfield closure during the HSR waiting period.

21. After consulting with Arauco, however, Flakeboard informed SierraPine that it would not waive the Springfield closure provision. As a result, the companies understood that SierraPine would announce the Springfield closure during the HSR waiting period and that the mill would close within weeks of that announcement, without regard to whether the HSR waiting period had expired and regardless of whether the underlying transaction was ultimately consummated. Consistent with this understanding, at the end of January, Flakeboard and SierraPine agreed on the content and timing of a press release announcing that Springfield would "cease operations in an orderly manner over the next few weeks" and that the mill would be "permanent[ly] clos[ed]." SierraPine issued the press release on February 4, 2014, and ceased production at Springfield on March 13, 2014, months before the HSR waiting period expired.

22. Flakeboard and SierraPine also agreed to transition Springfield's customers to Flakeboard's competing mill in Albany, Oregon. In the period leading up to the Springfield closure announcement, SierraPine gave Flakeboard competitively sensitive information about Springfield's customers—including the name, contact information, and types and volume of products purchased by each Springfield customer—and Flakeboard distributed this information to its sales employees. SierraPine also agreed to Flakeboard's request to delay the issuance of the press release from February 3 to February 4 so that Flakeboard could better position its sales personnel to contact Springfield's customers.

23. In addition, at Flakeboard's request, SierraPine instructed its own sales employees to inform Springfield customers following the Springfield closure announcement that Flakeboard wanted to serve their business and would match SierraPine's prices. Also at Flakeboard's request, SierraPine relayed assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct SierraPine's Springfield customers to Flakeboard. A top Flakeboard sales manager underscored the purpose of these employment assurances: "Once that [Springfield closure] announcement is made the 74 [million square feet of particleboard] from Springfield becomes fair game. I…want to make sure that the SierraPine sales group will be trying to direct the business to their new employer and to [Flakeboard's Albany mill]."

24. After the Springfield closure announcement, SierraPine did not compete for most of Springfield's customers from its remaining particleboard mill in Martell, California, but instead directed these customers to Flakeboard, telling them that Flakeboard could meet their needs and would honor SierraPine's prices. As SierraPine informed one Springfield customer, "We will try and transition all business to [Flakeboard's] Albany [mill]."

25. With SierraPine's assistance, Flakeboard successfully secured a substantial amount of Springfield's business, including a significant number of new customers that Flakeboard had not previously served and additional business from customers that Springfield and Flakeboard's Albany mill both previously served. The increased sales volumes from SierraPine's Springfield customers significantly increased Flakeboard's profits.

26. Although Flakeboard and SierraPine subsequently abandoned their transaction on September 30, 2014, SierraPine's Springfield mill remains closed. Virtually all of its employees have voluntarily left or been terminated. Reopening the Springfield mill would be costly and time-consuming, and SierraPine has no plans to do so.

VI. VIOLATIONS ALLEGED

FIRST CAUSE OF ACTION
(Violation of Section 1 of the Sherman Act)

27. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of this Complaint.

28. Flakeboard and SierraPine are horizontal competitors in the sale of particleboard.

29. Flakeboard, Arauco, and SierraPine's coordination to close SierraPine's particleboard mill in Springfield, Oregon, and to move the mill's customers to Flakeboard constituted a contract, combination, or conspiracy in restraint of trade that was unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. Their unlawful agreement was not reasonably necessary to achieve the procompetitive benefits of any legitimate business collaboration.

30. Flakeboard, Arauco, and SierraPine's actions to close the Springfield mill and move its customers to Flakeboard were undertaken without any assurance that their transaction would be consummated and constituted an agreement between competitors to reduce output and allocate customers that is per se unlawful under Section 1 of the Sherman Act.

SECOND CAUSE OF ACTION
(Violation of Section 7A of the Clayton Act)

31. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of this Complaint.

32. Flakeboard's acquisition of SierraPine's mills was subject to Section 7A's premerger notification and waiting-period requirements.

33. Flakeboard, after contracting to acquire SierraPine's assets under the APA, exercised operational control, and therefore obtained beneficial ownership, over SierraPine's business in violation of the HSR Act by:

(a) Coordinating with SierraPine to close the Springfield mill without regard to the HSR waiting period;

(b) Coordinating with SierraPine to move Springfield's customers to Flakeboard during the HSR waiting period, by, among other things:

(i) obtaining competitively sensitive information from SierraPine, including a customer list with the name, contact information, and types and volume of products purchased by each Springfield customer, and distributing this confidential information to Flakeboard sales employees;

(ii) delaying the Springfield closure announcement so that Flakeboard could better position its sales team to contact Springfield's customers;

(iii) directing SierraPine sales employees to inform Springfield customers that Flakeboard sought their business and would match SierraPine's prices; and

(iv) coordinating with SierraPine to offer assurances of future employment with Flakeboard to key SierraPine sales employees so that they would direct Springfield's customers to Flakeboard.

34. Through these actions, Flakeboard exercised operational control, and therefore obtained beneficial ownership, of SierraPine's business before the HSR waiting period expired.

35. The defendants were continuously in violation of Section 7A from on or about January 17, 2014, until the HSR waiting period expired on August 27, 2014. Thus, Inversiones Angelini, as Flakeboard's ultimate parent entity (together with Arauco and Flakeboard) and SierraPine are each liable to the United States for a maximum civil penalty of $16,000 per day.

VII. REQUEST FOR RELIEF

36. The United States requests that this Court:

(a) adjudge and decree that Flakeboard, Arauco, and SierraPine engaged in an agreement, combination, or conspiracy that was unlawful under Section 1 of the Sherman Act;

(b) award the United States such other relief, including equitable monetary relief, as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation of Section 1 of the Sherman Act and to dissipate the anticompetitive effects of the violation;

(c) adjudge and decree that the defendants violated the HSR Act and were in violation of the HSR Act during the period beginning on or about January 17, 2014, and ending on August 27, 2014;

(d) order that Inversiones Angelini (together with Arauco and Flakeboard) and SierraPine each pay to the United States an appropriate civil penalty as provided under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18(a)(g)(1), and 16 C.F.R. § 1.98(a); and

(e) award the United States the costs of this action.

Dated: November 7, 2014

Respectfully Submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

/s/ William J. Baer
WILLIAM J. BAER
Assistant Attorney General for Antitrust

LESLIE C. OVERTON
Deputy Assistant Attorney General

DAVID I. GELFAND
Deputy Assistant Attorney General

PATRICIA A. BRINK
Director of Civil Enforcement

MARK W. RYAN
Director of Litigation

PETER J. MUCCHETTI
Chief, Litigation I

RYAN M. KANTOR
Assistant Chief, Litigation I

/s/ Amy R. Fitzpatrick
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SCOTT I. FITZGERALD
KARA KURITZ
JOHN LOHRER
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Antitrust Division
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Phone: (202) 532-4558
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Attorneys for the United States

* Attorney of Record

CERTIFICATE OF SERVICE

I certify that on November 7, 2014, I electronically filed this Complaint with the Clerk of Court using the CM/ECF system. A copy has also been sent via e-mail to:

Counsel for Flakeboard America Limited,
Celulosa Arauco y Constitución, S.A., and
Inversiones Angelini y Compañía Limitada:

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/s/ Amy R. Fitzpatrick
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Falsification of documents

CRIMINAL CODE

18 U.S.C. § 1521. Tampering with a witness, victim, or an informant

. . .

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

. . .

Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, AUGUST 15, 2011
WWW.JUSTICE.GOV

AT
(202) 514-2007
TTY (866) 544-5309

NAUTILUS HYOSUNG HOLDINGS AGREES TO PLEAD GUILTY TO OBSTRUCTION OF JUSTICE FOR SUBMITTING FALSE DOCUMENTS IN A MERGER INVESTIGATION

WASHINGTON – Nautilus Hyosung Holdings Inc. has agreed to plead guilty and pay a $200,000 criminal fine for obstruction of justice in connection with a premerger filing and investigation by the Antitrust Division, the Department of Justice announced today. Nautilus Hyosung Holdings, an automated teller machine (ATM) manufacturer, is a wholly-owned subsidiary of Korea-based Nautilus Hyosung Inc. (NHI). The false documents were submitted to the government by NHI on behalf of Nautilus Hyosung Holdings in contemplation of the acquisition of Triton Systems of Delaware Inc., a competing manufacturer of ATM systems. The department said that the parties abandoned the proposed acquisition of Triton before the Antitrust Division reached a decision whether to challenge the transaction.

According to a two-count felony charge filed today in U.S. District Court in Washington, D.C., in or about July and August 2008, NHI, as the parent company of Nautilus Hyosung Holdings, submitted false documents to the Department of Justice and the Federal Trade Commission (FTC) in conjunction with mandatory premerger filings made under the Hart-Scott-Rodino Antitrust Improvement Act. After receiving the premerger filings, the Antitrust Division opened a civil merger investigation of the proposed acquisition. The department said that in September 2008, NHI submitted additional false documents in response to a document request from the Antitrust Division.

According to court documents, an executive of a company affiliated with, and acting on behalf of, Nautilus Hyosung Holdings and NHI altered and directed other corporate employees to alter existing corporate documents with the intent to impair their integrity and availability for use in an official proceeding. The department said that, among other things, the alterations misrepresented and minimized the competitive impact of the proposed acquisition on the market for ATMs in the United States.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, requires companies contemplating mergers and acquisitions valued above certain thresholds to make filings with the Department of Justice and the FTC. The federal antitrust agencies have authority to investigate and challenge such proposed transactions under Section 7 of the Clayton Act and Section 1 of the Sherman Act, if the transactions may substantially lessen competition or create a monopoly.

According to court documents, subsequent to these false submissions to the Antitrust Division in connection with its merger investigation, NHI and Nautilus Hyosung Holdings voluntarily disclosed that numerous documents had been altered before being submitted to the government. Since the time of that admission, NHI and Nautilus Hyosung Holdings have cooperated in the department's criminal investigation of the full nature and scope of the alleged obstructive conduct, and have committed to continue their cooperation in the department's ongoing investigation.

Nautilus Hyosung Holdings is charged with obstruction of justice, which carries a maximum criminal fine of $500,000 per count. Nautilus Hyosung Holding's agreed-upon criminal fine of $100,000 per count is subject to court approval and takes into consideration the nature and extent of the company's disclosure of wrongdoing and its cooperation in the department's investigation.

The ongoing investigation is being conducted by the Antitrust Division's National Criminal Enforcement Section. Anyone with information concerning anticompetitive conduct or obstruction of justice in antitrust matters is urged to call the Antitrust Division's National Criminal Enforcement Section at 202-307-6694 or visit www.justice.gov/atr/contact/newcase.htm.

# # #

11-1047

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.
	)	
	)	Filed:
v.	)	
	)	Violation: 18 U.S.C. § 1512(c)(1)
NAUTILUS HYOSUNG HOLDINGS, INC.,	)	(Counts 1-2)
	)	
Defendant.	)	

INFORMATION

COUNT I

The United States of America, acting through its attorneys, charges:

THE DEFENDANT

1. NAUTILUS HYOSUNG HOLDINGS, INC. ("Defendant") is a corporation organized and existing under the laws of the State of Delaware, and is a wholly-owned subsidiary of NAUTILUS HYOSUNG INC. ("NHI"), a corporation organized and existing under the laws of the Republic of Korea.

2. Whenever in this Information reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, employees, agents or other representatives while they were actively engaged in the management, direction, control, or transaction of business or affairs.

BACKGROUND OF THE OFFENSE

3. Automated teller machines ("ATMs") are used by financial institutions and other business entities to dispense cash, accept deposits, and conduct other financial transactions with customers at various locations, including but not limited to retail establishments and other non-bank locations. During the period covered by this Information, NHI was a producer of ATMs and, directly or through its subsidiaries, was engaged in the sale of ATMs in the United States and elsewhere.

4. During the period covered by this Information, NHI negotiated for and entered into an agreement for the defendant to acquire Triton Systems of Delaware, Inc. ("Triton"), a corporation organized and existing under the laws of the State of Delaware. Defendant, as a wholly-owned subsidiary of NHI, was to directly acquire Triton and conduct various of NHI's business operations in the United States following the acquisition.

5. In conjunction with the proposed acquisition of Triton, NHI, as the ultimate parent entity of Defendant, was required to make premerger notification filings with the United States Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ") in the District of Columbia pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18(a), and the implementing regulations promulgated thereunder at 16 C.F.R. Part 801, *et seq*. ("HSR filings").

6. Employees of NHI and other corporations affiliated with and acting on behalf of Defendant, directed and participated in the identification, review, and collection of documents required to be submitted as part of the HSR filings pursuant to 16 C.F.R. § 803.1, *et. seq*.,

including "studies, surveys, analyses and reports . . . evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." 16 C.F.R. Part 803 Appendix, at Item 4(c) (the "4(c) documents").

7. On or about August 7, 2008 and August 29, 2008, NHI made HSR filings with the FTC and DOJ in the District of Columbia for the benefit of Defendant in conjunction with the proposed acquisition of Triton.

8. Subsequent to receipt of the HSR filings, DOJ reviewed the HSR filings and subsequently commenced a preliminary inquiry into whether the proposed acquisition of Triton violated Section 7 of the Clayton Act, 15 U.S.C. § 18, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The HSR filings, review and preliminary inquiry constituted an official proceeding within the meaning of 18 U.S.C. §§ 1512(c), 1515(a)(1)(C).

DESCRIPTION OF THE OFFENSE

9. In or about July and August 2008, the exact dates being unknown to the United States, Executive A of a corporation affiliated with and acting on behalf of NHI and the defendant did, and did direct others to, corruptly alter, destroy, mutilate and conceal records, documents, and other objects, to wit, the 4(c) documents submitted to the FTC and DOJ as part of the HSR filings, and attempted to do so, with the intent to impair the objects' integrity and availability for use in an official proceeding. In doing so, Executive A misrepresented the market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets relating to the proposed acquisition in the United States and other statements

relevant and material to analyses of the proposed acquisition of Triton by the FTC and DOJ.

JURISDICTION AND VENUE

10. The offense charged in this Information was carried out in the District of Columbia within five years preceding the filing of this Information.

ALL IN VIOLATION OF TITLE 18 UNITED STATES CODE, SECTION 1512(c)(1).

COUNT II

The United States of America, acting through its attorneys, further charges that:

11. Each and every allegation contained in Paragraphs 1-10 of Count I of this Information is here realleged as if fully set forth in this Count.

BACKGROUND

12. In conjunction with its review and preliminary inquiry, on or about August 19, 2008, DOJ requested that NHI produce copies of additional documents, to wit, pre-existing business and strategic plans for the years 2006, 2007, and 2008 relating to the sale of ATMs.

13. On or about September 4, 2008, NHI produced such business plans to DOJ in the District of Columbia.

DESCRIPTION OF THE OFFENSE

14. In or about August and September 2008, the exact dates being unknown to the United States, Executive A of a corporation affiliated with and acting on behalf of NHI and the defendant did, and did direct others to, corruptly alter, destroy, mutilate and conceal records, documents, and other objects, to wit, pre-existing business and strategic plans for the years 2006, 2007, and 2008, and attempted to do so, with the intent to impair the objects' integrity and

availability for use in an official proceeding. In doing so, Executive A misrepresented statements concerning NHI's business and competition among vendors of ATMs that were relevant and material to DOJ's analysis of the proposed acquisition of Triton.

JURISDICTION AND VENUE

15. The offense charged in this Information was carried out in the District of Columbia within five years preceding the filing of this Information.

ALL IN VIOLATION OF TITLE 18 UNITED STATES CODE, SECTION 1512(c)(1).

DATED:

CHRISTINE A. VARNEY
Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOHN TERZAKEN
Director of Criminal Enforcement

LISA M. PHELAN
Chief
National Criminal Enforcement Section
Antitrust Division
U.S. Department of Justice

Kenneth W. Gaul
Attorney
U.S. Department of Justice
Antitrust Division
450 5th Street, N.W.
Washington, D.C. 20530
Tel: 202-307-6147

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
V.
NAUTILUS HYOSUNG HOLDINGS, INC.

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

CASE NUMBER: 11-cr-00255-RLW

Carey R. Dunne ;Arthur J. Burke
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☑ pleaded guilty to count(s) Counts 1 & 2

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1512(c)(1)	corruptly altering, destroying, mutlilating or concealing	8/31/2008	1
18 USC 1512(c)(1)	corruptly altering, destroying, mutlilating or concealing	9/30/2008	2

The defendant organization is sentenced as provided in pages 2 through 6 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's
Federal Employer I D. No.. _____

Defendant Organization's Principal Business Address:

Nautilus Hyosung America
6641 N. Belt Line Road Suite 100
Irving, TX 75063

10/20/2011
Date of Imposition of Judgment

Robert L. Wilkins
Signature of Judge

Robert L. Wilkins — U.S. District Judge
Name of Judge — Title of Judge

10/26/2011
Date

Defendant Organization's Mailing Address

DEFENDANT ORGANIZATION: NAUTILUS HYOSUNG HOLDINGS, INC.
CASE NUMBER: 11-cr-00255-RLW

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	Assessment	Fine	Restitution
TOTALS	$ 800.00	$ 200,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☑ The defendant organization shall pay interest on restitution or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT ORGANIZATION: NAUTILUS HYOSUNG HOLDINGS, INC.
CASE NUMBER: 11-cr-00255-RLW

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

Immediately upon filing of the plea agreement with the Court, the defendant corporation will post a letter of credit or standby letter of credit issued by a United States bank or a United States branch of a foreign bank to the benefit of the United States or its designee to guarantee the entire balance of the fine.

AO 245E (Rev 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 4 — Schedule of Payments

DEFENDANT ORGANIZATION: NAUTILUS HYOSUNG HOLDINGS, INC.
CASE NUMBER: 11-cr-00255-RLW

SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☑ Lump sum payment of $ 800.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C or ☐ D below; or

B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☑ Special instructions regarding the payment of criminal monetary penalties:

It is further ordered that Nautilus Hyosung Holdings, Inc. pay a special assessment of $400 on each of Counts One and Two, for a total of $800.00. The special assessment is due within 30 days of sentence imposition.

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Investigations

U.S. Department of Justice

Antitrust Division

[Counsel for the Antitrust Division]
450 5th St., NW, Suite [X]
Washington, DC 20530
[Counsel's e-mail]

****This Model Voluntary Request Letter is provided as a resource to parties preparing for the review of a proposed transaction by the Antitrust Division. The model is intended to give parties a head start in identifying the kinds of information they should be gathering for the Division, so that parties can be proactive and submit the information as early as possible during the initial waiting period. Parties anticipating a potential investigation by the Division should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing. The model specifications below are examples. The circumstances of a particular investigation will dictate whether any or some of these model specifications may be appropriate for a particular investigation. Based on the unique facts and circumstances of a transaction, the Antitrust Division may seek different or additional information on a voluntary basis.*

[DATE]

Via e-mail
[COUNSEL]

Re: Proposed Merger of [PARTY A] and [PARTY B]
DOJ File No. [XX]

Dear [COUNSEL]:

The Antitrust Division is requesting voluntary information from [Party] ("the company") regarding the proposed merger between [Party A] and [Party B] (the "transaction"). This request is not to be construed as a "request for additional information or documentary materials" under the Hart–Scott–Rodino Antitrust Improvements Act ("HSR").

You should be prepared to submit this key information within a few days of receipt of this letter. The earlier the Division receives this information, the sooner and more effectively the Division can determine whether a competitive concern exists, whether the Division can narrow the areas of inquiry, or whether the investigation can be closed.

Unless specifically noted otherwise, this letter seeks information relating only to products or services sold, purchased, or used in the United States. Where the specification

calls for data, please provide the data in an electronic form that is both searchable and sortable, such as an Excel spreadsheet.

1. Identify as narrowly as practical (for example, with the names used by the company and others in the industry to describe the products or services, such as brand names) each product or service, or category of products or services, manufactured, offered, or sold by the company for which there is a competing product or service manufactured, offered, or sold by [Party] ("overlap products").

2. For each overlap product:

   (a) identify each area (e.g., U.S., region, county, metropolitan statistical area (MSA)) in which the company and [Party] offer each overlap product;

   (b) provide lists of the company's 20 largest U.S. customers (in dollars and by units/volume) during the last [X] year(s) and the company's 20 most recent customers during the last [X] year(s), and, for each customer, identify a contact person, physical address, e-mail address, phone number, and the units/volume and dollar value of the customer's purchases during the last [X] year(s);

   (c) provide the company's actual and estimated [world, U.S., MSA, other area] sales by [units, dollars, and revenues] for the current and past [X] year(s), any projections of future sales, and any estimated market shares for the company and other significant competitors;

   (d) identify all other significant competitors (including entrants or potential entrants) and competing products; and

   (e) [*Where applicable*] identify each facility that produces an overlap product, and state the capacity utilization for each facility for the current year and past [X] years(s).

3. Submit all surveys, win-loss reports, and other documents or data showing the competitors from or to which the company won or lost sales/customers of overlap products for the past [X] year(s).

4. Submit a copy of all presentations and accompanying materials relating to the transaction that were provided to industry analysts, investors, or government or regulatory agencies, including transcripts of any investor calls.

5. Submit documents analyzing, describing, or quantifying the efficiencies or synergies that the company believes will be generated by the transaction.

6. Submit a copy of the company's current organization chart and personnel directory for the company as a whole and for each of the company's facilities or divisions that manufactures, offers, or sells an overlap product.

7. Provide a list of all the company's agents and representatives, including investment bankers and third-party consultants, retained in relation to the transaction, and produce all draft or final Confidential Information Memoranda (or documents meant to serve the function of a Confidential Offering Memoranda), bankers' books, and other third-party consultants' materials relating to the transaction. This includes any ordinary course of business documents and financial data shared in the course of due diligence that describe or reflect competition or the competitive position of the company in the business relating to the overlap products.

8. *[For Non-Reportable Transactions]* Submit all agreements, including any side agreements, between the company and [Party] relating to the transaction.

9. *[For Non-Reportable Transactions]* Submit all studies, surveys, forecasts, analyses, business plans, and reports which were prepared by or for any officer or director of the company for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, cost reductions, potential for sales growth or expansion, synergies and efficiencies, and indicate (if not contained in the document itself) the date prepared, and the name and title of each individual who prepared each document.

Please provide a rolling production of the requested information, prioritizing your responses to Specifications [##]. Please also send all information to us in electronic form either by e-mail to [email address] or by overnight delivery to [address, using 20001 zip code, not 20530].

Documents and information submitted in response to this request are subject to 28 C.F.R. §16. As appropriate, please designate any "confidential commercial information" under 28 C.F.R. §16.7.

Please do not hesitate to call me at [number] with any questions or to discuss this matter further. Thank you for your cooperation with this request.

Sincerely,

[NAME]
Attorney
[X] Section

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Guidance for Voluntary Submission of Documents During the Initial Waiting Period

Providing information early in the initial 30-day waiting period increases the likelihood that staff will be able to focus its investigation and resolve outstanding questions about the transaction during its preliminary investigation. In order that parties may effectively use the initial waiting period, counsel should be prepared to discuss staff's most likely concerns and voluntarily provide documents and information that may assist staff in quickly and efficiently evaluating whether the proposed transaction raises competitive concerns.

The list below is provided to help parties understand the type of documents and information that are useful to Bureau of Competition staff analyzing proposed transactions filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Staff generally has requested these documents and information in a "voluntary request letter" or "access letter" during the initial waiting period and prior to any issuance by the Commission of a Request for Additional Information ("Second Request"). Our experience has been that it takes time to obtain these documents and information, which delays staff's investigation. Parties may expedite the review process by compiling these documents and information in anticipation of staff's request. Although it is not required, the parties to the transaction are encouraged to submit some or all of these documents and information with their HSR Act filing or soon thereafter. The parties are also encouraged to submit any other information not contained on the list below that they believe could assist staff in assessing the proposed merger and the markets involved.

This list is not exhaustive and, prior to the end of the initial waiting period, staff may request that the parties voluntarily submit additional documents and information. The following list does not supercede or replace the requirements of the HSR Act and rules or the HSR Act form. It is possible that some of the documents requested in this list are the same documents required under the HSR Act form, e.g., documents responsive to Item 4(c) of the form.

1. Organization Chart
2. Strategic Plans for the past three years
3. Marketing Plans for the past three years
4. List of products manufactured and sold
5. List of products in development
6. List of top 10 customers with contact information (for overlap products)
7. List of competitors with contact information (for overlap products)
8. Market share information (for overlap products)

ftc.gov

INTRODUCTORY GUIDE III

MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL

(SECOND REQUEST)

REVISED OCTOBER 2021

AN OVERVIEW

Guide III is one in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office "PNO"). *Guide III* provides background information on the process for a Request for Additional Information and Documentary Materials "Second Request") and contains a sample model of a Second Request. Also, the Antitrust Division of the Department of Justice Second Request Internal Appeal Procedure has been provided as reference.

The Guides are intended to provide a general overview and do not address specific proposed transactions. Because the premerger notification program applies to many different types of reporting persons and to many different types of transactions, the rules implementing the program are necessarily technical and complex. In order to assist those unfamiliar with the program, the PNO has published a variety of helpful information, including guides, procedures, announcements, speeches, rules and regulations, and interpretations of the rules. This information is available at the Federal Trade Commission web site www.ftc.gov) and from the PNO, 400 Seventh Street N.W., Room 5301, Washington, D.C. 20024.

If you have a specific question on a proposed transaction and your question is not addressed by these reference resources, call the PNO between the hours of 8:30AM and 5:00PM, Eastern Standard Time, Monday through Friday, except holidays, at (202) 326-3100.

Introduction

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 7A of the Clayton Act or (the Act), established the Federal Premerger Notification Program (the Program). The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission ("FTC") and the Department of Justice "DOJ") (the enforcement agencies) before consummating the proposed acquisition. The parties must wait a specific period of time, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale)[1], while the enforcement agencies complete their review. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period. The Program became effective September 5, 1978, after final promulgation of the Premerger Notification Rules (the Rules)[2].

Second Request Process

If either the FTC or the DOJ determines during the waiting period that further inquiry is necessary, the determining agency is authorized by Section 7A(e) of the Clayton Act to request additional information and documentary materials from any person required to file notification. A second request extends the waiting period for a specified period, usually 30 days (10 days in the case of a cash tender offer or a bankruptcy sale) [3], after all parties have complied with the request (or, in the case of a tender offer or bankruptcy, after the acquiring person has complied)[4]. This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action, if necessary, before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

[1] 16 CFR Section 803.10(a).
[2] 43 FR 33537, effective July 31, 1978.
[3] 16 CFR Section 803.20(c).
[4] 16 CFR Section 803.20(c).

FTC Review Process

The FTC has set forth guidance to make merger investigations more effective and more efficient.[5]

Second Requests are prepared by the Bureau of Competition ("BC") staff attorneys in consultation with economists from the Bureau of Economics. BC management reviews all second requests before issuance to ensure that specifications are as precisely and narrowly framed as possible and consistent with the needs of the investigation.

After the issuance of a second request, the parties may request a second request conference. At the conference, the BC staff will discuss with the parties the competitive issues raised by the proposed transaction, if known, and consider which information and documents may be obtained relating to the competitive issues raised.

FTC Second Request Appeals Process

All Requests for Additional Information issued by the FTC invite recipients to discuss possible modifications with staff.[6] If the recipient of a Request from the FTC believes that compliance with portions of the Request should not be required and the recipient has exhausted reasonable efforts to obtain modification of the Request from the lead staff attorney and the BC Assistant Director supervising the investigation, the recipient may petition the General Counsel of the FTC to hear an appeal on unresolved issues.

The petition for an appeal shall be made by letter to the General Counsel, with a copy to the lead staff attorney. The petition shall be no longer than 2 pages and shall address petitioner's efforts to obtain modification from BC staff.

1. Within 2 business days of receipt of such a petition, the General Counsel shall set a date for a conference with the petitioner and investigating staff.
2. Such conference shall take place within 7 business days of receipt of the petition, unless petitioner agrees to a longer time period before the conference or waives his right to a conference.
3. No later than 3 business days before the date of the conference, the petitioner and investigating staff may each submit to the General Counsel written briefs regarding the issues presented in the appeal petition. The briefs shall be no longer than 5 pages double spaced, shall be exchanged with opposing counsel on the same day they are submitted to the General Counsel, and shall include:
   a) a concise explanation of the reasons why the petitioner believes compliance should not be required or of the reasons why investigating staff believe compliance is necessary; and
   b) modifications that the petitioner proposes.
4. The General Counsel shall render a decision on the appeal within 3 business days following the conference.

A petition for an appeal made pursuant to this procedure must be made before the petitioner asserts substantial compliance with the Request for Additional Information, and the petitioner must agree to defer asserting substantial compliance until after this appeal process is completed or the petitioner withdraws its appeal.

5 Bureau of Competition Best Practices for Merger Investigations (August 2015), available at https://www.ftc.gov/enforcement/merger-review.

6 66 FR 8721, effective February 1, 2001.

DOJ Second Request Appeals Process[7]

A. Appeals Regarding Modifications

If the recipient of a second request from the Department of Justice believes that the request is unreasonably cumulative, unduly burdensome, or duplicative and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding a modification, the recipient may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue the "Reviewer" . The appeal shall be in writing, no longer than ten 10) pages double spaced, and shall include:

1. A concise explanation of the reasons why the recipient believes that compliance would be unduly burdensome, including a summary of compliance discussions at the staff and section chief level; and
2. the modifications that the recipient proposes.

All appeals should be sent to the Office of Operations Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within seven (7) days after the recipient has provided all necessary information.

An appeal must be made prior to assertion of compliance by the recipient, and the recipient must agree to defer asserting compliance until after the appeal process has been completed or the recipient has withdrawn its appeal.

B. Appeals Regarding Substantial Compliance

If the recipient of a second request has certified that it is in substantial compliance with the request and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding compliance, the recipient, after receiving the deficiencies believed to exist from the section chief, may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue the "Reviewer" . The appeal shall be in writing, no longer than ten 10) pages double spaced, and shall include a concise explanation of the reasons why the recipient believes that it is in compliance, including a summary of compliance discussions at the staff and section chief level.

All appeals should be sent to the Office of Operations Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within three 3) business days after the recipient has provided all necessary information.

If the Reviewer determines that the recipient is in substantial compliance, the date of certification of substantial compliance will be the date on which the waiting period is determined to have begun. If the Reviewer determines that the recipient is not in substantial compliance, the Reviewer will recommend that a formal deficiency letter be issued.

[7] http://www.usdoj.gov/atr/public/8430.htm

REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [COMPANY]

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Request for Additional Information and Documentary Material (the "Request") requires a complete search of "the Company" as defined in Definition D1 of the Definitions, which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss any questions and possible modifications with the Commission representatives identified in Instruction I(11) of this Request. All modifications to this Request must be agreed to in writing by a Commission representative. Submit the information requested in Specifications 1 and 10(a) of this Request promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search or interrogatory response obligations.

SPECIFICATIONS

1. Submit:

   (a) one copy of each organization chart and personnel directory in effect since January 1, **[Yr-2]** for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product [Service];

   (b) a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other Persons retained by the Company in any capacity relating to the Proposed Transaction or any Relevant Product [Service] (excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);

   (c) for each Person identified in response to Specification 1(b), the agent's or representative's title, business address, and telephone number, as well as a description of that Person's responsibilities in any capacity relating to the Proposed Transaction or any Relevant Product [Service] provided in any Relevant Area; and

   (d) a Data Map for the Company.

2. List each Relevant Product manufactured or sold [Service provided] by the Company in the Relevant Area, and for each:

   (a) provide a detailed description of the product [service] [including its end uses]; and

(b) state [the brand name and] the division, subsidiary, or affiliate of the Company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each Relevant Product [Service] listed in response to Specification 2 above, state or provide:

(a) the Company's Sales to all customers in each Relevant Area, stated separately in units and dollars;

(b) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured in the U.S.;]

(c) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured outside the U.S.;]

(d) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products purchased from sources outside the Company and resold by the Company rather than of products manufactured by the Company;

(e) the names and addresses of the [XX] Persons who purchased the greatest unit and dollar amounts of the Relevant Product [Service] from the Company in each Relevant Area;

(f) [a sample contract for each customer type]; and

(g) the name, address, estimated Sales, and estimated market share of the Company and each of the Company's competitors in each Relevant Area in the manufacture or sale of the Relevant Product [provision of the Relevant Service].

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any Relevant Product [provides or has provided any Relevant Service] in the Relevant Area for the Company, and for each such facility state: the current nameplate and practical capacity and the [annual, monthly] capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity; the number of shifts normally used at the facility; and the feasibility of increasing capacity [by X% or more], including the costs and time required.

5. For each Relevant Product manufactured or sold [Service provided] in the Relevant Area, submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising [and marketing] Plans and strategies.

6. Submit all documents relating to the Company's or any other Person's Plans relating to any Relevant Product [Service] [in the Relevant Area], including, but not limited to, business plans; short-term and long-range strategies and objectives; expansion or retrenchment plans; research and development efforts; presentations to management committees, executive committees, and boards of directors; and budgets and financial projections. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents for prior years, and cumulative year-to-date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:

   (a) the Sales, market share, or competitive position of the Company or any of its competitors;

   (b) the relative strength or weakness of Persons producing or selling each Relevant Product [providing each Relevant Service];

   (c) supply and demand conditions;

   (d) attempts to win customers from other Persons and losses of customers to other Persons, [including, but not limited to, all sales personnel call reports and win/loss reports];

   (e) allegations by any Person that any Person that manufactures or sells any Relevant Product [provides any Relevant Service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints; and threatened, pending, or completed lawsuits; and

   (f) any actual or potential effect on the supply, demand, cost, or price of any Relevant Product [Service] as a result of competition from any other possible substitute product [service].

8. Submit:

   (a) all documents relating to the Company's or any other Person's price lists, pricing Plans, pricing policies, pricing forecasts, pricing strategies, price structures, pricing analyses, price zones, and pricing decisions relating to any Relevant Product [Service] in the Relevant Area; and

   (b) all studies, analyses, or assessments of the pricing or profitability of any Relevant Product [Service] sold or provided by the Company, [by third-party distributors/lessee dealers/etc.], or through other channels of trade in any Relevant Area.

9. Identify the Person(s) at the Company responsible for creating or monitoring price strategy, [price zones,] pricing practices, and pricing policies for the Relevant Product [Service] in the Relevant Area. Describe in detail the Company's pricing strategy, pricing practices, and pricing policies, including, but not limited to:

   (a) a description regarding how, and how often, the prices for each Relevant Product [Service] in each Relevant Area are determined;

   (b) whether, and how, pricing based on customer characteristics, presence of other competitors, or other factors are used by the Company in determining the prices for each Relevant Product [Service] in each Relevant Area; and

   (c) **[**whether, and how, price zones and/or pricing based on geographic areas, the presence of local competitors, or other factors are used by the Company for each Relevant Product [Service] in each Relevant Area.]

10. Identify each electronic database used or maintained by the Company in connection with any Relevant Product [Service] at any time after January 1, **[Yr-3]**, that contains information concerning the Company's (i) products [services] and product codes; (ii) facilities; (iii) production; (iv) shipments; (v) bids or sales proposals; (vi) sales; (vii) prices; (viii) margins; (ix) costs, including but not limited to production costs, distribution costs, standard costs, expected costs, and opportunity costs; (x) patents or other intellectual property; (xi) research or development projects; or (xii) customers. For each such database:

   (a) describe the (i) database type, i.e., flat, relational, or enterprise; (ii) fields, query forms, and reports available or maintained; (iii) software product(s) or platform(s) required to access the database;

   (b) for each Relevant Product [Service] in each Relevant Area, compile and submit one or more Data Sets from the database comprising data used or maintained by the Company at any time after January 1, **[Yr-3]** that constitutes, records, or discusses:

      (i) discount requests or approvals (including rebates and other promotions);

      (ii) sales personnel call reports;

      (iii) meeting competition requests or approvals;

      (iv) win/loss reports;

      (v) prices, quotes, estimates, or bids submitted to any customer;

      (vi) the results of any bid or quote submitted to any customer or prospective customer;

(vii) customer relationships; and

(viii) transaction-level Sales data for all [top 20, 50, 100**]** customers by revenue and unit volume [and a X percent random sample of the remaining customers**]**, including, but not limited to, customer name, customer address, product code, product description, and transaction date; and

(c) for each Data Set provided in response to Specification 10(b), provide a data dictionary that includes:

(i) a list of field names and a definition for each field contained in the Data Set;

(ii) the meaning of each code that appears as a field value in the Data Set; and

(iii) the primary key in the Data Set or table that defines a unique observation.

The Company should consult Instruction I(3) regarding the inclusion of Sensitive Personally Identifiable Information or Sensitive Health Information in a Data Set(s) responsive to Specification 10.

11. Provide each financial statement, budget, profit and loss statement, cost center report, profitability report, and any other financial report regularly prepared by or for the Company on any periodic basis, since January 1, **[Yr-3]**, including, but not limited to, such statements and reports for the Company as a whole; for each of the Company's manufacturing facilities, sales offices, and distribution facilities relating to the research, development, manufacture, license, sale, or provision of any Relevant Product [Service] in each Relevant Area; and for any product line or customer for any Relevant Product [Service] in each Relevant Area. For each such statement, budget, or report, state how often it is prepared, and identify the Person responsible for its preparation; provide all such statements and reports on both a quarterly basis and a yearly basis. For each Relevant Product [Service], provide all regularly prepared customer profitability reports and product line profitability reports.

12. State the name and address of each Person that has entered or attempted to enter into, or exited from, the manufacture or sale of each Relevant Product [the provision of each Relevant Service] in any Relevant Area from **[Yr-10]** to the present. For each such Person, state:

(a) the product(s) or service(s) it sells or provides, sold or provided, or attempted to sell or provide in each Relevant Area;

(b) the date of its entry into, attempted entry into, or exit from the market; and

(c) whether such Person constructed a new facility, converted assets previously used for another purpose, or began using facilities that were already being used for the same purpose.

13. For each Relevant Product [Service], identify or describe (including the bases for your response) and submit all documents relating to:

(a) requirements for entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area including, but not limited to, research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;

(b) the total costs required for entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the Relevant Product [provision of the Relevant Service]; the methods and amount of time necessary to recover such costs; and the total Sunk Costs entailed in satisfying the requirements for entry;

(c) [barriers to entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area, including but not limited to network and customer lock-in effects;]

(d) possible new entrants into the manufacture or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area; and

(e) the Minimum Viable Scale; the minimum and optimum plant size, production line size, capacity utilization rate, and production volume; requirements for multi-area, multi-plant, multi-product, or vertically integrated operations; and other factors required to attain any available cost savings, economies of scale or scope, or other efficiencies necessary to compete profitably in the manufacture or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area.

14. State whether the Company has entered into the manufacture or sale of any Relevant Product [provision of any Relevant Service] in any Relevant Area from **[Yr-5]** to the present and provide date(s) of entry. For each Relevant Product [Service] in each Relevant Area, describe in detail the steps taken by the Company to enter, including but not limited to steps related to research and development, planning and design, production, distribution, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time required to complete each step. For each entry event provide the costs associated with each step taken by the Company to enter.

15. Submit all documents relating to any Plans of the Company or any other Person for the construction of new facilities, the closing of any existing facilities, or the expansion, conversion, or modification (if such modification has a planned or actual cost of more than $[xxxxxxxx]) of current facilities for the manufacture or sale of any Relevant Product [provision of any Relevant Service] [in the Relevant Area].

16. [Submit all documents relating to actual and potential imports into, or exports from, each Relevant Area of any Relevant Product, including, but not limited to, documents showing: the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any Person; and any costs or barriers to imports or exports. Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each Relevant Area of any Relevant Product.]

17. [Identify, and state whether the Company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the production or sale of any Relevant Product [provision of any Relevant Service]. Submit one copy of all documents submitted to or received from each identified organization (or its agents) by any Person that discuss or describe production, Sales, prices, competition, or entry conditions relating to the Relevant Product [Service].]

18. [Identify each non-U.S. competition or antitrust authority that the Company has notified (or intends to notify) of the Proposed Transaction, and for each authority:

    (a) state the date (or expected date) the authority was (or is expected to be) notified;

    (b) provide copies of all documents (including draft filings) submitted to the authority, including but not limited to, notifications and appendices, remedies submitted to a reviewing authority or authorities for market testing, white papers, responses to requests for information, and competitive impact submissions;

    (c) state the date (or expected date) the authority completed (or will complete) its review; and

    (d) submit a copy of any draft or final order, decision to enter a new stage of investigation (e.g., a 6(1)(c) decision by the European Commission), Statement of Objections, or request for additional information, issued by the authority in connection with its review.]

19. Submit all documents relating to the Company's or any other Person's Plans for, interest in, or efforts undertaken to bring about any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the manufacture or sale of any Relevant Product [provision of any Relevant Service] other than the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to or in connection with any prior transaction involving the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area other than the Proposed Transaction.

20. Submit all documents (except documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues) relating to the Proposed Transaction and provide:

    (a) a timetable for the Proposed Transaction, a description of all actions that must be taken prior to consummation of the Proposed Transaction, and any harm that will result if the Proposed Transaction is not consummated [or is delayed];

    (b) a detailed description of (including the rationale for) all Plans for changes in the Company's and **[A/B-Side's]** operations, structure, policies, strategies, corporate goals, financing, business, officers, employees, or any other area of corporate activity as a result of the Proposed Transaction. Identify all documents directly or indirectly used to prepare the Company's response to this subpart;

    (c) a detailed description of the reasons for the Proposed Transaction and the benefits, costs, and risks anticipated as a result of the Proposed Transaction; and

    (d) a detailed description of all statements or actions by any Person (identifying the Person by name, title, and business address) in support of, in opposition to, or otherwise expressing opinions about the Proposed Transaction or its effects.

21. Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including, but not limited to, all cost savings, economies, or other efficiencies of any kind anticipated as a result of the Proposed Transaction, including:

    (a) a description of the steps the Company will take to achieve each benefit, cost saving, economy, or other efficiency;

    (b) the estimated time and cost required to achieve each benefit, cost saving, economy, or other efficiency and an explanation for how the cost was derived;

    (c) the estimated dollar value of each benefit, cost saving, economy, or other efficiency, stating separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings in dollars per unit and dollars per year, and an explanation of how that value was derived;

    (d) an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction; and

    (e) the identity of each Person (including the Person's title and business address) employed or retained by the Company with any responsibility for achieving, analyzing, or quantifying each benefit, cost saving, economy, or other efficiency described.

22. Describe and submit all documents related to any Relevant Product [Service] that discuss the Company's Plans or attempts to:

    (a) reduce its costs;

    (b) improve its products or services;

    (c) expand its sales or distribution efforts;

    (d) introduce new products or services;

    (e) integrate the Relevant Products [Services] sold by the Company with any products [services] sold by **[A/B-Side]**;

    (f) improve its operating performance, financial condition, or competitive viability;

    (g) close, consolidate or rationalize any facility;

    (h) discontinue the research, development, manufacture, license, or sale of any Relevant Product or product line [Service]; and

    (i) achieve any benefits as a result of any multi-plant, multi-product, or vertically integrated operation of the Company.

23. Describe in detail (including the time and cost required to achieve), quantify (if possible), and submit all documents related to projected and actual cost savings, economies, or other efficiencies resulting or predicted to result from each previous merger, acquisition, or joint venture by the Company that is being relied upon by the Company to support any claim of predicted cost savings, economies, or other efficiencies expected to result from the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to expected efficiencies with respect to any prior transaction.

24. [Identify, and provide all documents relating to, each occasion that the Company (i) submitted a bid or negotiated to provide or sell any Relevant Product [Service] in or from any Relevant Area; or (ii) declined to submit a bid or negotiate to provide or sell any Relevant Product [Service] in or from any Relevant Area. For each such occasion, state or provide:

    (a) the date the request for proposal, inquiry, or other solicitation for bids or offers was received;

    (b) the identity of the Person that requested or received the bid;

    (c) the identity of the incumbent provider(s), if any, of the Relevant Product [Service] to the Person that requested or received the bid at the time of the request for proposal, inquiry, or other solicitation for bids or offers;

(d) the request for proposal, inquiry, or other solicitation for the bid, including any proposed specifications, request for information, or request for quotation;

(e) if applicable, the terms of the Company's final bid, including, but not limited to, any aspects relating to price or quantity (e.g., incentives not to switch; rebates, pre-bates, cash awards, etc.; the product/services covered; the geography covered); the terms of any other Company bid; and the date each Company bid was submitted;

(f) if applicable, the pricing methodology or calculations the Company used for its bid(s), and all factors considered in determining the bid price and other terms;

(g) an itemized breakdown of the Company's estimated total, fixed, and variable costs, and the Company's gross margin, relating to each bid;

(h) the reason the Company declined to bid, if applicable;

(i) the identity of each Person that submitted a competing bid and the terms of each competing bid, including any proposal by the prospective customer to provide any part of the Relevant Product [Service] in-house;

(j) the date that the contract was awarded or that the Company expects it to be awarded;

(k) if applicable, the identity of the Person(s) to whom the contract or order was awarded, the price and terms of the winning bid(s), and the products or services included in the winning bid(s);

(l) whether the Company won the contract or order, and if so, state the Company's actual Sales by Relevant Product [Service]; the total, fixed, and variable costs incurred by the Company; and the margin earned by the Company, pursuant to the contract;

(m) the costs associated with preparing the bid; and

(n) all documents relating to each bid or negotiation identified in this Specification.]

25. Submit, without regard to custodian:

(a) all documents provided to the Company's Board of Directors relating to any Relevant Product [Service] in any Relevant Area; and

(b) all minutes or other recordings of meetings of the Company's Board of Directors relating to any Relevant Product [Service] in any Relevant Area.

26. Identify each prior or ongoing investigation from **[Yr-5]** to the present by any state, federal, or international authority related to whether the Company has violated the antitrust or competition laws of any jurisdiction. The Company need not disclose (i) an investigation that has been reported to the federal agencies under the Hart-Scott-Rodino Act, (ii) that an investigation is currently being conducted by a grand jury, or (iii) that an investigation involves a pending leniency application made by the Company to the United States Department of Justice. For each applicable investigation, identify the authority that conducted or is conducting the investigation and describe the conduct being investigated and the status of the investigation (or outcome of the investigation if closed). For each identified investigation, submit:

    (a) all communications between the Company and the authority relating to the investigation (excluding those to/from a grand jury);

    (b) all trial transcripts, deposition transcripts, declarations, and other sworn testimony related to the investigation (excluding grand jury testimony); and

    (c) all documents and information related to the investigation produced by the Company, employees of the Company, and former employees of the Company to the authority.

27. Submit documents sufficient to show and, to the extent not reflected in such documents, describe in detail the Company's policies and procedures relating to the retention and destruction of documents.

28. List (a) each federal judicial district (e.g., District of Columbia, Southern District of New York) within the United States in which the Company has an agent to receive service of process, and provide each such agent's name, current business and home addresses, and telephone numbers; (b) each federal judicial district within the United States in which the Company is incorporated or licensed to do business or currently is doing business; and (c) each federal judicial district within the United States in which the Company has an office or a facility, and, for each such office or facility, list the address and the individual in charge (with his or her title).

    Alternatively, the Company may respond to this Specification by providing a written stipulation that it agrees to accept service of process, and to subject itself to personal jurisdiction, in all federal judicial districts within the United States.

29. Identify the Person(s) responsible for preparing the response to this Request and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the Person who gave the instructions, describe the content of the instructions, and identify the Person(s) to whom the instructions were given. For each Specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the Persons (identified by name and corporate title or job description) whose files were searched by each.

30. Identify any electronic production tools or software packages utilized by the Company in responding to this Request for: keyword searching, Technology Assisted Review, email threading, de-duplication, and global de-duplication or near-de-duplication (please note that the use of all forms of de-duplication requires advance approval from Commission staff per Instruction I(4)(e)), and:

    (a) if the Company utilized keyword search terms to identify documents and information responsive to this Request, provide a list of the search terms used for each custodian;

    (b) if the Company utilized Technology Assisted Review software:

        (i) describe the collection methodology, including: (a) how the software was utilized to identify responsive documents; (b) the process the Company utilized to identify and validate the seed set documents subject to manual review; (c) the total number of documents reviewed manually; (d) the total number of documents determined nonresponsive without manual review; (e) the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; (f) how the Company handled exceptions ("uncategorized documents"); and (g) if the Company's documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and

        (ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this Request; and

    (c) identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the organization, relating to its response to this Specification.

DEFINITIONS

For the purposes of this Request, the following Definitions apply:

D 1. The term "the Company" or "**[A-Side]**" means **[A-Side]** [Ltd., plc]; its domestic and foreign parents, predecessors, successors, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any Person in which there is partial (25% or more) or total ownership or control between the Company and any other Person.

D 2. The term "**[B-Side]**" means **[B-Side]** [Corporation, Inc.]; its domestic and foreign parents, predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any Person in which there is partial (25% or more) or total ownership or control between **[B-Side]** and any other Person.

D 3. The term "Proposed Transaction" means the proposed acquisition of **[B-Side]** by **[A-Side]** pursuant to the [Merger/Stock Purchase/Transaction/etc.] Agreement dated [date], or any other proposed, contemplated, discussed, or related transaction between **[A-Side]** and **[B-Side]**.

D 4. The term "Data Map" means an organized list, schematic, diagram, or other representation sufficient to show where and how the Company stores all physical and electronic information in its possession, custody, or control, including, but not limited to, information systems (e.g., email messages, voice-mail messages, communications logs, enterprise content management, instant messaging, database applications), locations where information is stored, including servers and backup systems (e.g., physical Company facility, third-party vendor location, cloud), and the physical and logical network topology of the Company's computer systems.

D 5. The term "Data Set" means all or a subset of data held by, or accessible to, the Company in the normal course of business provided by the Company to respond to any Specification in this Request.

D 6. The term "documents" means any information, on paper or in electronic format, including written, recorded, and graphic materials of every kind, in the possession, custody, or control of the Company. The term "documents" includes, without limitation: computer files; email messages; audio files; instant messages; drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that Person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

(a) Unless otherwise specified, the term "documents" excludes:

(i) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature;

(ii) architectural plans and engineering blueprints;

(iii) documents solely relating to environmental, tax, OSHA, or ERISA issues; and

(iv) relational and enterprise databases, except as required to comply with an individual Specification.

(b) The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mobile devices, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this Definition with the Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this Definition to:

(i) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;

(ii) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain Specifications identified by Commission representatives; or

(iii) include other proposals consistent with Commission policy and the facts of the case.

D 7. The term "Person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

D 8. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D 9. The terms "and" and "or" have both conjunctive and disjunctive meanings.

D 10. The term "Plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

D 11. The term "Sales" means net sales (i.e., total sales after deducting discounts, returns, allowances and excise taxes). "Sales" includes Sales of the Relevant Product [Service] whether manufactured [provided] by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.

D 12. The term "Relevant Product [Service]" as used herein means, and information shall be provided separately for, each [name or list of product(s) or service(s) at issue].

D 13. The term "Relevant Area" means, and information shall be provided separately for, (a) the United States and (b) worldwide [or regional or local market(s)].

D 14. The term "Minimum Viable Scale" means the smallest amount of production [smallest service volume] at which average costs equal the price currently charged for the Relevant Product [Service]. It should be noted that Minimum Viable Scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.

D 15. The term "Sunk Costs" means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the Relevant Product [provide the Relevant Service] that cannot be recovered through the redeployment of these assets for other uses.

D 16. The term "Technology Assisted Review" means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.

INSTRUCTIONS

For the purposes of this Request, the following Instructions apply:

I 1. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for: (1) documents for each of the years from **[January 1, Yr-2]** to the present; and (2) information for each of the years from January 1, **[Yr-3]** to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company's fiscal year data indicating the 12-month period covered, and provide the Company's best estimate of calendar year data.

I 2. This Request shall be deemed continuing in nature so as to require production of all documents responsive to any Specification included in this Request produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this Request. [except for documents responsive to Specification 7, Specification 20, and Specification 26, for which the date is 21 calendar days prior to the date of the Company's full compliance with this Request.]

I 3. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following:

- date of birth
- driver's license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

I 4. Form of Production: The Company shall submit documents as instructed below absent written consent.

(a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

(i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and metadata.

(ii) Submit emails in TIFF (Group IV) format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the email.
Bates End	Bates number of the last page of the email.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the person from whom the email was obtained.
Email BCC	Names of person(s) blind copied on the email.
Email CC	Names of person(s) copied on the email.
Email Date Received	Date the email was received. [MM/DD/YYYY]
Email Date Sent	Date the email was sent. [MM/DD/YYYY]
Email From	Names of the person who authored the email.
Email Message ID	Microsoft Outlook Message ID or similar value in other message systems.
Email Subject	Subject line of the email.

Metadata/Document Information	Description
Email Time Received	Time email was received. [HH:MM:SS AM/PM]
Email To	Recipients(s) of the email.
Email Time Sent	Time email was sent. [HH:MM:SS AM/PM]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Folder	File path/folder location of email.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt

(iii) Submit email attachments other than those described in subpart (a)(i) in TIFF (Group IV) format. For all email attachments, provide extracted text and the following metadata and information as applicable:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of person from whom the file was obtained.
Date Created	Date the file was created. [MM/DD/YYY]

Metadata/Document Information	Description
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Native Link	Relative file path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Parent ID	Document ID or beginning Bates number of the parent email.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

(iv) Submit all other electronic documents, other than those described in subpart (a)(i), in TIFF (Group IV) format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.

Metadata/Document Information	Description
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the original custodian of the file.
Date Created	Date the file was created. [MM/DD/YYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY HH:MM:SS AM/PM]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (e.g., docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC-0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

(v) Submit documents stored in hard copy in TIFF (Group IV) format accomplished by OCR with the following information:

Metadata/Document Information	Description
Bates Begin	Beginning Bates number of the document.
Bates End	Bates number of the last page of the document.
Custodian	Name of person from whom the file was obtained.

(vi) Submit redacted documents in TIFF (Group IV) format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction I(7).

(b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact. Submit data separately from document productions.

(c) Produce electronic file and TIFF submissions as follows:

(i) For productions over 10 gigabytes, use hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in USB 2.0 or 3.0 external enclosure.

(ii) For productions under 10 gigabytes, CD-ROM (CD-R, CD-RW) optical disks and DVD-ROM (DVD+R, DVD+RW) optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats.

(iii) All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this Request.

(iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.

(d) Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.

(e) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this Request.

I 5. Before using software or technology (including search terms, email threading, Technology Assisted Review, deduplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Company must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and company terminology. For any process that relies on a form of Technology Assisted Review to identify or eliminate documents, the Company must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows Commission representatives to review statistically-significant samples of documents categorized as non-responsive documents by the algorithm.

I 6. All documents responsive to this Request:

(a) shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;

(b) shall be marked on each page with corporate identification and consecutive document control numbers when produced in TIFF format (e.g., ABC-00000001);

(c) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

(d) shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document

unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format TIFF);

(e) shall be accompanied by an index that identifies: (i) the name of each Person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that Person's documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that, Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request; and

(f) shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents.

I 7. If any documents or parts of documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes, in separate fields, a privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; all custodians; date of the document; the title or subject line; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the Person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document or part of a document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this Instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third party, such as internal law firm memoranda, may be omitted from the log. Provide the log in Microsoft Excel readable format.

I 8. If the Company is unable to answer any question fully, supply such information and data as are available. Explain why the answer is incomplete, the efforts made by the Company to obtain the information and data, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not

available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

I 9. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy as disclosed or described in response to Specification 27 of this Request, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify the Persons having knowledge of the content of such documents.

I 10. In order for the Company's response to this Request to be complete, the attached certification form must be executed by the Company official supervising compliance with this Request, notarized, and submitted along with the responsive materials.

I 11. Any questions you have relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to **[Staff Contact Name]** at **[Telephone Number]**. The response to the Request shall be addressed to the attention of **[Staff Contact Name]** and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission, 400 7th Street, SW, Washington, DC 20024. If you wish to submit your response by United States mail, please call the staff listed above for mailing instructions.

CERTIFICATION

As required by §803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object based on the Commission not offering the original document.

_____ (Signature)

_____
(Type or Print Name and Title)

Subscribed and sworn to before me at the City of _____,

State of _____, this _____day of _____, 20___.

_____
(Notary Public)

_____
(Date Commission Expires)

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Timing is everything: The Model Timing Agreement

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Bruce Hoffman, Bureau of Competition
Aug 7, 2018

TAGS: Hart-Scott-Rodino Act (HSR) | Bureau of Competition | Competition | Merger

The Bureau of Competition has undertaken several initiatives to streamline our merger review process in order to reach swifter resolutions—whether that be clearance, a negotiated settlement, or a lawsuit. As part of these efforts, we are announcing a new Model Timing Agreement for the Bureau's merger reviews.

New FTC Model Timing Agreement

Merger investigations commonly involve timing agreements, which—among other things—provide an agreed-upon framework for the timing of certain steps in the investigation. Timing agreements also ensure that FTC staff has notice of parties' plans to consummate the transaction. Both parties and staff benefit from having such a framework established shortly after issuance of the Request for Additional Information and Documentary Material, also known as a Second Request, as it allows staff and the parties to engage efficiently in a substantive exchange without undue uncertainty during the Second Request review period.

The Bureau began using a version of the Model Timing Agreement earlier this year, and we have been refining provisions of the agreement based on feedback and experiences in recent merger investigations. The version of the Model Timing Agreement announced today supersedes any versions that parties may have seen previously. The Bureau may continue to update the Model and any such updates will be publicly available.

It is worth noting that a timing agreement does not affect the statutory expiration of the Hart-Scott-Rodino waiting period. Regardless of the commitments made in the timing agreement, the HSR waiting period expires 30 days after the parties certify substantial compliance with the Second Request. (These periods may differ in a cash tender or bankruptcy filing.) Additional time provided by the parties beyond this 30-day waiting period is by agreement, and does not alter this statutory provision. (For more information, see the prior blog post, Getting in Sync with HSR Timing Considerations.)

Key Provisions of the Model Timing Agreement

Many of the provisions in the Model Timing Agreement will be familiar to those who regularly engage with the Bureau, but here are a few highlights.

The Model requires parties to agree not to close the proposed transaction until 60 to 90 calendar days following certification of substantial compliance with the Second Request depending on the complexity of the competition issues raised by the deal. This timeframe, which is consistent with prior practice, is intended to serve as a benchmark and not an upper limit. The post-compliance timing will depend on the circumstances of each case. For instance, in matters involving particularly complicated industries, staff may need more than 90 days to analyze data or information before making a recommendation to the Commission.

In addition, the Model requires that the parties provide 30 calendar days' notice before certifying substantial compliance with the Second Request, and 30 calendar days' notice before consummating the proposed transaction. These notice requirements help staff structure the timing of preparing a recommendation on the matter. More importantly, they allow staff to plan an appropriate timeline for any meetings that the parties would like to have with division management, the Bureau's Front Office, and individual Commissioners so that parties have opportunities to present their arguments and evidence prior to expiration of the agreed-upon review period.

Parties that seek to limit staff's time to review Second Request materials may foreclose the parties' opportunity to meet with the Bureau or Commissioners, who may have to devote their energies to preparing or reviewing recommendations to the Commission. Further, parties are advised not to file their notice of intent to consummate the transaction if they know that they cannot close within 30 days. Rather, they should file the notice when they actually expect to be able to close. An early notice would force the Bureau to assume that closing was imminent and take any necessary steps based on that assumption. Such a misunderstanding could negatively alter on-going negotiations with the parties.

With respect to communication and exchange of information, the Model Timing Agreement commits Bureau staff to engage in a good-faith continuing dialogue regarding facts and relevant legal and economic issues related to the case. We encourage parties to raise arguments and present white papers early in the review process. Waiting until the meeting with the Bureau Front Office, or even until meeting with the Commissioners, to submit white papers and advance arguments for clearance does not serve the parties well. The Bureau Front Office is not able to engage fully on arguments not raised with or vetted by Bureau staff and division management. Note that, even though the Model anticipates continuing dialogue with Bureau staff, the Bureau Front Office will continue to adhere to the practice that it will meet only once with the parties during the Bureau's review of the matter. Parties are free to take that meeting whenever they like, but an early meeting on a discrete issue, rather than a later meeting on the Bureau's broader recommendation to the Commission, may not be the parties' best use of this opportunity.

The Model contains timing and logistics provisions regarding document productions and investigational hearings. These timelines ensure that Bureau staff has adequate time to review information submitted by the parties, and provides parties with sufficient notice of the identity of potential IH witnesses.

Finally, the Model includes a stipulated Temporary Restraining Order that prevents the parties from consummating the proposed transaction until after the fifth business day following a court ruling on a motion for a preliminary injunction. This provision is designed to avoid time-consuming and distracting negotiations between the parties and staff related to a TRO. That time could otherwise be spent on substantive discussions or potential settlement negotiations. Multiple parties have agreed to such stipulated TROs in the past year and this has functioned as a significant benefit to both sides by allowing the Bureau staff, the Commission, and the parties to focus on the issues in the matter, rather preparing for a TRO hearing.

Expectations Going Forward

The new Model Timing Agreement represents the culmination of extensive input from each of the divisions and regional offices within the Bureau, as well as the Bureau's Front Office. The Bureau expects that future timing agreements will conform, or substantially conform, to this Model. Deviations from the Model may be necessary in certain cases. The Bureau's Front Office reviews all timing agreements before execution and will consider the justification for any changes.

As always, parties are encouraged to reach out to staff early on in a Second Request investigation to negotiate a timing agreement. Part of the goal of an effective timing agreement is to facilitate constructive feedback between Bureau staff and the parties by creating more certainty about the timing of an investigation. Our hope is that the new Model will allow parties to better anticipate the Bureau's expectations, which should in turn help promote smoother, more efficient investigations.

DATE

BY E-MAIL

[COUNSEL for acquiring company A]

[COUNSEL for acquired company B]

Re: [Transaction]

Dear [COUNSEL]:

This letter ("the Agreement") sets forth the understanding between the staff of the Bureau of Competition of the Federal Trade Commission ("FTC Staff") and [Company A] and [Company B] (collectively the "Parties") in connection with the proposed acquisition by [A] of [B] (the "Proposed Transaction"), which is the subject of Requests for Additional Information and Documentary Material issued by the Federal Trade Commission on [DATE] ("Second Requests") [or commensurate request for non-reportable mergers].

This Agreement does not alter the Parties' obligations to certify substantial compliance with the Second Requests, as modified in writing by FTC Staff.

This Agreement does not bind the Federal Trade Commission ("FTC"), any individual Commissioner, or any other federal or state Government entity, but rather is an agreement with FTC Staff. This Agreement does not alter the FTC's legal ability to challenge the Proposed Transaction, including, but not limited to, after expiration of the timing set out below.

It is agreed as follows:

I. Timing and Communication

The Parties agree not to close the Proposed Transaction before 11:59 PM Eastern Time on the [60th–90th] calendar day following the date on which both Parties substantially comply with the Second Requests, as modified in writing by FTC Staff, unless the FTC earlier (i) terminates the Hart-Scott-Rodino Act waiting period without issuance of a complaint or following issuance of a complaint and consent order, and/or (ii) provides written notice that the FTC has closed its investigation.

Commented [A1]: Note for Public Version: The proposed date range shall not be interpreted as either a cap or a limit on the number of days the Parties must wait until closing. Some investigations may require in excess of 90 days for the review contemplated by this agreement.

A. Notices

1. The Parties agree to provide FTC Staff with thirty (30) calendar days advanced notice before certifying that they have substantially complied with the Second Requests. Such notice shall be provided no earlier than ten (10) calendar days following the execution of this Agreement.

2. The parties agree to provide thirty (30) calendar days advanced notice before consummating the Proposed Transaction. The date identified for consummation of the Proposed Transaction shall be deemed the Closing Date for purposes of this Agreement. The Parties may not provide this advanced notice more than forty (40) calendar days prior to the Closing Date and must have a good faith basis for believing that they can consummate the proposed transaction on that Closing Date.

All notices required in Sections I.A. are to be made in writing in the form of the letters provided as Attachments A and B to this letter, as appropriate.

B. Computing Time and Extension of Deadlines

In computing any period specified in this Agreement, the day of the act, event, or default that triggers the period shall be excluded. The first day of the period shall be the first business day after the act, event, or default that triggers the period. The last day of the period of time shall be included unless it is a Saturday, Sunday, or federal holiday, in which case the period runs until 11:59 PM Eastern Time of the next business day on which the federal government is open. Any material received by the Bureau of Competition or the FTC after 5:00 PM Eastern Time shall be deemed received on the next business day.

In the event that the Federal Trade Commission is closed pursuant to a lapse in appropriations from Congress, all dates specified herein shall be extended day-for-day, for each calendar day the Federal Trade Commission closure is in place. This day-for-day extension shall include but is not limited to any date(s) between notice and certification of substantial compliance and any date(s) between certification of substantial compliance and close. Notices and certifications of substantial compliance may not be given if the Commission is closed pursuant to the first sentence of this paragraph. Any portion of a calendar day affected by a federal government closure shall be considered an entire day for the purposes of extending, day-for-day, the date(s) specified herein. For example, if the federal government is reopened at noon on a given calendar day, the date(s) specified herein shall be extended as if the federal government closure lasted that entire day.

Except as specifically provided herein, the failure of a Party to comply with any deadline in this Agreement shall cause any subsequent deadlines specified herein to be extended, day-for-day, for each calendar day the deadline is not met.

C. Communication / Exchange of Information

During the course of the investigation, FTC Staff and staff from the FTC's Bureau of Economics ("BE") will make a good faith effort to meet with the Parties, either in person or by

phone, as reasonably requested by either FTC Staff or either Party, to promote a continuing dialogue regarding the facts and the relevant legal and economic issues and to discuss progress in meeting the agreed-upon schedule discussed in this Agreement. FTC Staff and the Parties intend that the ongoing dialogue include a good faith exchange of information regarding any substantive issues, theories, or questions that FTC Staff may have regarding the Proposed Acquisition.

The Parties are encouraged to provide to FTC Staff the results of their own economic and econometric analyses, and any underlying data. FTC Staff will make good faith and reasonable efforts to provide feedback on the Parties' submissions. Also, as soon as practicable upon discovery of any deficiencies relating to a Party's certification, FTC Staff will notify the Party in writing of the deficiencies.

D. Investigational Hearings and Document Productions

To the extent investigational hearings ("IHs") are conducted in this matter, FTC Staff will use reasonable best efforts to identify IH witnesses no later than the fifteenth (15th) business day after both Parties certify substantial compliance with the Second Requests ("Compliance Date"). The Parties agree to make such witnesses available such that their IHs may be completed within ten (10) business days after FTC Staff identifies each witness, or ten (10) business days after receipt of documents belonging to each witness, or a later date if agreed to by staff. The Parties also agree to produce an up-to-date resume for each IH witness at least five (5) business days prior to the date of that witness's IH.

For each IH witness identified prior to a Party certifying substantial compliance, the Party will produce a substantially complete document production, including relevant non-custodial Specifications identified by FTC Staff, to the FTC at least fifteen (15) business days prior to the agreed-upon date of the witness's IH (the "IH Document Production Date"). Contemporaneous with the substantial completion of the document production for each custodian or at the earliest practicable date, the Parties shall identify in writing the cut-off date for the collection of documents for each custodian. If additional responsive, non-duplicative, and non-privileged documents or information from a witness's files or in response to relevant non-custodial productions are produced after this deadline, FTC Staff reserves the right to hold open, re-open, continue, or reschedule that witness's IH. If FTC Staff decides to hold open or re-open an IH for this reason, FTC Staff will use the additional hearing time to question the witness on only the documents and information produced after the IH Document Production Date and any additional topics related to those documents and that information.

II. Second Request Production and Post-Compliance Period

A. Rolling Production and Priority Custodians/Specifications

The Parties shall use good faith efforts to produce responsive materials on a rolling basis (i.e., the responsive documents from each individual's files will be produced as soon as practicable after such documents are reviewed, processed, and copied, and the Parties' documents will be produced in multiple, sequential batches). Each production shall be accompanied by a data overlay updating metadata for the entire production (e.g., updating the

alternative custodian field for all documents in the current production and all documents previously produced).

Within five (5) business days of execution of this Agreement, the Bureau shall identify no more than [X] Priority Custodians from each Party. The Priority Custodians shall be listed and attached as an appendix to this Agreement following identification by FTC Staff. The Parties agree to produce substantially complete document productions from the Priority Custodians at least thirty (30) business days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Custodian materials.

Commented [A2]: Note for Public Version: The proposed priority custodian range shall vary based on the unique facts and timing of the second request investigation.

The Parties will substantially comply with Specifications [X-Y] in the Second Requests ("Priority Data") at least thirty (30) business days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Data.

B. Second Request Modifications

Staff agrees to work in good faith with the Parties to consider reasonable requests for modification to the Second Request.

III. Preliminary Injunction Proceeding

The Parties shall not initiate a declaratory judgment action against the FTC relating to the Proposed Transaction. In the event that the FTC files an enforcement action pursuant to Section 13(b) of the Federal Trade Commission Act, on or before the Closing Date, seeking to enjoin the Proposed Transaction, the Parties agree to file a joint stipulation with the court as follows:

A. The Parties and the FTC hereby stipulate to a Temporary Restraining Order (an executed version is attached hereto as Attachment C) preventing the Parties from consummating the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after a court rules on a motion for a preliminary injunction or the date set by the District Court, whichever is later; and

B. The Parties shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, the Proposed Transaction until the timing identified in the paragraph immediately above.

This agreement shall not be construed to limit in any way the FTC's right to seek additional discovery in the context of any federal court hearing.

IV. Construction

Nothing in this Agreement affects FTC Staff's ability to reject a submission that it determines is not in substantial compliance with the Second Requests, or in the case of an HSR filing, is deficient. This Agreement may only be amended or modified through a written instrument signed by the parties.

February 2019

If you agree to the terms set forth in this Agreement, please indicate your agreement by countersigning below and returning to us.

_____	_____
Counsel for [Company A]	Date
_____	_____
Counsel for [Company B]	Date

February 2019

Attachment A: Pre-Certification Notice Template

[FTC Staff and Address]

Re: Notice of Intent to Certify Substantial Compliance; FTC File No. [XX]

Dear [FTC Staff],

We write on behalf of [Company A] and [Company B] (collectively, "the Parties") in connection with the Requests for Additional Information and Documentary Material ("Second Requests") issued by the FTC to [Company A] and [Company B] on [Date].

We hereby provide notice to FTC Staff that the Parties intend to certify substantial compliance with the Second Request and CID on or after [today's date + 30 calendar days].

_____ _____

Counsel for [Company A] Date

_____ _____

Counsel for [Company B] Date

February 2019

Attachment B: Pre-Consummation Notice Template

[FTC Staff and Address]

Re: Notice of Intent to Consummate the Proposed Transaction; FTC File No. [XX]

Dear [FTC Staff],

We write on behalf of [Company A] and [Company B] (collectively, "the Parties") in connection with the proposed merger of [Company A] and [Company B] (the "Proposed Transaction").

We hereby provide notice to FTC Staff that the Parties intend to consummate the Proposed Transaction on or after [today's date + 30 calendar days] as limited by Section I.A.2 of this Agreement, which shall be deemed the Closing Date for purposes of the timing agreement executed by the Parties and Commission staff on [Date].

We also hereby confirm that on or after [today's date + 30 calendar days], the Parties' good faith belief is that they will be able to close the Proposed Transaction because all conditions precedent to the closing of the Proposed Transaction (including any described in the Parties' Letter of Intent dated [Date]) will have been satisfied or waived if the FTC does not sue to block the Proposed Transaction.

_____ _____

Counsel for [Company A] Date

_____ _____

Counsel for [Company B] Date

February 2019

Attachment C: Temporary Restraining Order

In the event that the Federal Trade Commission ("FTC") files an enforcement action seeking to enjoin the proposed merger of [Company A] and [Company B] (the "Proposed Transaction") on or before the date that [Company A] and [Company B] have identified for consummating the Proposed Transaction, [Company A], [Company B], and the FTC hereby stipulate to a Temporary Restraining Order in federal district court stating that:

a. [Company A] and [Company B] shall not consummate the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after the court rules on the FTC's motion for a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act or until after the date set by the District Court, whichever is later; and

b. In connection with paragraph immediately above, [Company A] and [Company B] shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such transaction; and

c. In computing any period of time specified in this attachment, the day of the act, event, or default that triggers the period shall be excluded. The term "business day" as used in this attachment refers to any day that is not a Saturday, Sunday, or federal holiday.

_____ _____
Counsel for [FTC Staff] Date

_____ _____
Counsel for [Company A] Date

_____ _____
Counsel for [Company B] Date

February 2019

U.S. Department of Justice

Antitrust Division

[Counsel for the Antitrust Division]
450 5th St., NW, Suite [X]
Washington, DC 20530
[Counsel's e-mail]

[Date]

[Counsel for Company A
Law Firm
Address
City, State ZIP]

[Counsel for Company B
Law Firm
Address
City, State ZIP]

Re: Proposed Acquisition [Merger] of [Company B] by [and] [Company A]

Dear [Counsel]:

This letter sets forth the understandings between the U.S. Department of Justice Antitrust Division ("Division"), [Company A], and [Company B] ([Company A] and [Company B] are hereinafter referred to separately as "Party" and collectively as the "Parties), in connection with the proposed acquisition [merger] of [Company B] by [and] [Company A] ("Proposed Acquisition"), which is the subject of the Requests for Additional Information and Documents issued to the Parties on [Date] ("Second Requests"). This letter contains the entire agreement of the Division and the Parties with respect to the subject matter of this letter, and supersedes any prior agreements, understandings, or negotiations, whether written or oral. This letter may only be amended in writing by agreement of the Division and the Parties. The Division and the Parties further agree as follows:

I. Timing

Each Party will certify compliance with its Second Request no earlier than [Date]. The date of the last received certification of compliance will be the "Compliance Date." The Parties will not consummate the Proposed Acquisition before 12:01 a.m. Eastern Time ninety (90) days following the Compliance Date (the "Closing Date"), unless they have received from the Division prior written notice that the Division has closed its investigation. It may become appropriate to revisit this agreement, and to amend, shorten, extend, or cancel it, in light of developments in the unfolding COVID-19 situation. The Parties and the Division agree to

engage with one another in good faith to that end. The Parties agree to provide the Division with ten (10) days written notice before closing the Proposed Acquisition, unless they have the Division's written concurrence to close within a shorter period.

Rule 6(a) of the Federal Rules of Civil Procedure will apply to computing any period of time specified in this letter. The Closing Date, however, may occur on a Saturday, Sunday, or legal holiday. Any material received by the Division after 5:00 p.m. Eastern Time will be deemed received on the next business day.

II. Second Request Compliance

A. Limited Document Custodians

In order to comply with the Second Requests, each Party must, inter alia, produce to the Division all documents that are responsive to its Second Request and that are in that Party's possession, custody, or control. It is agreed, however, that each Party may limit its search to twenty (20) individuals for documents and electronically stored information that may be responsive to the Second Requests. Those individuals are identified in Attachment A ("Custodian List").

In addition to the individuals on the Custodian List, each Party must also search (1) the files of any predecessors or successors of the individuals identified on the Custodian List to the extent that such files may include documents or electronically stored information that fall within the relevant date range specified in the Second Requests; (2) the files of secretaries and other administrative personnel who support any of the individuals identified on the Custodian List; and (3) any centralized hard-copy or electronic files, databases, data sets, or other shared repositories of potentially responsive information.

In addition, the Division reserves the right to add up to a total of five (5) custodians ("Additional Custodians") to the Custodian List of each Party at any time prior to the filing of a complaint. The Parties agree that they will submit responsive documents found in the files of any Additional Custodians within fifteen (15) days of receipt from the Division of the names of the Additional Custodians. The addition of custodians will not delay a Party's certification of compliance with the Second Request. Failure by any Party to meet the fifteen (15) day production schedule, however, will cause all subsequent deadlines or dates specified in this letter to be extended day-for-day, until that Party has submitted all requested materials.

These custodian limitations apply only to the Parties' production of documents in response to the Second Requests. Except to the extent the Division and the Parties agree to the contrary in writing, each Party must produce data and other non-custodial documents and information responsive to the Second Requests regardless of where such data, documents, and information are located.

B. Rolling Production of Documents

The Parties must make rolling productions of documents responsive to the Second Requests according to the following schedule:

[For Parties using a technology assisted review ("TAR") process]

With the exception of non-privileged documents pulled in good faith due to a preliminary determination of privilege and documents to be redacted for privilege, the Parties must produce all responsive, non-privileged documents no later than thirty (30) days before the Compliance Date.

Documents withheld in good faith for privilege review but determined not to be privileged and documents redacted for privilege must be produced no later than ten (10) days before the Compliance Date. If any such production of documents initially withheld for privilege review or redaction includes more than a *de minimis*[1] volume of documents *for any single custodian*, the producing Party may not certify compliance until thirty (30) days after completion of this production.

A complete privilege log must be produced no later than five (5) days before the Compliance Date. If a Party must produce documents from Additional Custodians, a privilege log covering documents withheld from the production of documents for those Additional Custodians must be produced no later than five (5) days after production from the Additional Custodians.

[For Parties not using a TAR process]

With the exception of non-privileged documents pulled in good faith due to a preliminary determination of privilege and documents to be redacted for privilege, the Parties must produce all responsive, non-privileged documents from the files of Group A Custodians no later than forty-five (45) days before the Compliance Date. The Parties must produce all responsive, non-privileged documents from the files of Group B Custodians no later than thirty (30) days before the Compliance Date.

Documents withheld in good faith for privilege review but determined not to be privileged and documents redacted for privilege must be produced no later than twenty (20) days after the relevant document production deadline for each custodian group. If any such production of documents initially withheld for privilege review or redaction includes more than a *de minimis*[2] volume of documents *for any single custodian*, the producing Party may not certify compliance until, for Group A Custodians, forty-five (45) days after completion of this production, and for Group B Custodians, thirty (30) days after completion of this production.

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[1] A production will be deemed *de minimis* if it constitutes less than five percent (5%) of the number of records in that Party's total production for that custodian.

[2] A production will be deemed *de minimis* if it constitutes less than five percent (5%) of the number of records in that Party's total production for that custodian.

A complete privilege log must be provided to the Division no later than five (5) days before the Compliance Date. If a Party must produce documents from Additional Custodians, a privilege log covering documents withheld from the production of documents for those Additional Custodians must be produced no later than five (5) days after production from the Additional Custodians.

C. Data Production

In order to comply with the Second Requests, each Party must, inter alia, produce to the Division all data that are responsive to its Second Request and that are in that Party's possession, custody, or control on or before the Compliance Date. It is agreed, however, that certain data will be produced on a rolling basis before the Compliance Date according to the schedule set forth below.

As early as practicable, but in no event less than [number (X)] days prior to the Compliance Date, each Party will produce a complete response to Specification [1(f) or the subpart that references "a description of each database or data set responsive to Specification 2"]. The Parties acknowledge that the Division must be in receipt of the Specification [1(f)] response before negotiating the scope of the remainder of the Parties' data productions, and that a Party's delay in responding to Specification [1(f)] may delay a Party's entire data production and the timing of its certification of compliance with the Second Request as set forth in this Timing Agreement.

No Party will certify compliance until forty-five (45) days after producing a copy, at the most granular[3] level available, of all profit-and-loss reports generated in the normal course of business since January 1, [Yr-3], including any line items for revenues, costs, and profit margins.

No Party will certify compliance until thirty (30) days after the Party has produced, for any database or data set used by the Party from January 1, [Yr-3] to the present:

(1) transaction-level data (e.g., sales, invoices) for each Relevant Product,[4] including the dates, customer, customer location, products, revenues, and quantities relevant to each transaction;

(2) any data maintained in the normal course of business that describe the customers (e.g., customer types), products (e.g., product characteristics), or geographies (e.g., sales territories) referenced in the transaction-level data;

(3) any data maintained in the normal course of business that identifies particular competitors and associates those competitors with specific

[3] "Granular" refers to the narrowest product, geography, and time frame available.
[4] The definition of Relevant Product will be as defined in each Party's Second Request.

business decisions made or market outcomes experienced by the company (e.g., wins, losses, bids, price discounts); and

(4) a definition for each variable provided in response to parts (1)-(3) above, including text descriptions of any codes used in any tables.

Data must be produced as ASCII delimited text files with variable names in the first row, using a delimiter that preserves the column alignment of the table.

All remaining responsive data must be produced on or before the Compliance Date.

D. Reliance on Documents, Information, or Data Not Produced

If in discussions with the Division, including in oral or written presentations, economic analyses, and white papers, any Party cites or relies upon information that was not produced to the Division, the Division will have fifteen (15) days to request production of that information from the Party. The Party must make a supplemental production of the responsive documents and information within seven (7) days of receipt of such a request from the Division. If the information cited by or relied upon by the Party was found (1) in a central file or database that was not searched in response to the Second Request or (2) in the files of an individual who is neither among those identified on the Custodian List nor among those identified as an Additional Custodian, the Party must also conduct a thorough search of the central file, database, or individual's files for other responsive documents and information and include those in the supplemental production. If this supplemental production is not completed within seven (7) days of receipt of the request by the Division, all subsequent deadlines or dates specified in this letter will be extended day-for-day from the date that the supplemental production was due until the ultimate date of production of such responsive documents and information.

E. Form of Production

Unless otherwise agreed to in writing by the Division, all documents and data produced in response to the Second Requests must be produced in a format that conforms to the instructions contained in the letter regarding Form of Production of ESI Documents in Response to the Second Request and the letter's attachments ("ESI Letter"). If electronic media is produced that does not conform to the specifications, or is otherwise infected or corrupted, the Division will promptly notify the relevant Party, and the Party must produce a replacement as expeditiously as possible.

If a replacement production is necessary, all subsequent deadlines or dates specified in this letter will be extended day-for-day for the amount of time between the date of the original production and the receipt by the Division of a replacement production that is not infected or corrupted and conforms to the instructions contained in the ESI Letter.

F. Deficiencies

As soon as practicable upon discovery of any deficiencies in a Party's response to the

Second Request, but in any event no later than twenty (20) days after the Party has certified compliance with the Second Request, Division staff will notify the Party in writing of any deficiency. The Party, within five (5) days of receiving any such notice, either will (a) remedy the alleged deficiency or (b) inform Division staff in writing that it believes there is no deficiency. The Division will then have seven (7) days in which to issue a formal deficiency letter ("Non-Compliance Notice"). Failure by the Division formally to issue a Non-Compliance Notice within that time period will constitute a waiver of the claimed deficiency such that the deficiency will not prevent the Party from having complied with the Second Request. A Party may appeal a Non-Compliance Notice in accord with DOJ's standard appeals procedure for Second Request compliance matters, set forth at <http://www.justice.gov/atr/public/8430.htm>.

If a Party must make a supplemental production after it has been notified in a Non-Compliance Notice of an alleged deficiency, all subsequent deadlines or dates specified in this letter will be extended day-for-day until the date of completion of the supplemental production. In particular, if a Party makes a supplemental production after the Party has certified compliance, the Compliance Date will be reset to the date of the supplemental production, including for purposes of establishing the Closing Date.

If the Division notifies a Party in writing of a deficiency later than twenty (20) days after the Party has certified compliance, the Party must remedy the deficiency within fifteen (15) days of receiving such notice. Under these circumstances, however, no other deadlines or dates specified in this letter, including the Compliance Date, will be extended.

III. Conduct of Investigation

A. Depositions

The Parties agree to make executives and employees available to the Division for up to twelve (12) Civil Investigative Demand ("CID") depositions per Party. No later than fourteen (14) days after the Compliance Date, the Division will: (1) provide a tentative list of Party executives or employees to be deposed; and (2) tentatively identify in writing the topic(s) that the Division proposes to cover in any 30(b)(6)-style deposition. Nothing precludes the Division, however, from taking depositions of Party executives or employees prior to the Compliance Date.

Within five (5) days of receiving a 30(b)(6)-style deposition CID, and for each topic that is identified, the Party receiving such a CID must designate one or more officers, directors, managing agents, or other persons to testify on behalf of the Party regarding the topic(s) identified in the CID. Testimony from all deponents taken pursuant to a single 30(b)(6)-style deposition CID will count as only one (1) CID deposition against the Division's limit of twelve (12) CID depositions per Party, and the Division will issue no more than [number (X)] 30(b)(6)-style deposition CIDs to each Party.

The Parties will make each witness available for seven (7) testifying hours, except that: (1) upon request by the Division, the Parties must make up to [number (X)] witnesses available for fourteen (14) testifying hours; and (2) any individual made available for a 30(b)(6)-style

deposition may be noticed for an additional non-30(b)(6)-style deposition, in which case the Parties will make such witnesses available for an additional day of testimony.

Deposition dates will comport, to the extent practicable, to the order in which the Division wishes to take the depositions. Depositions will take place at the Division's offices located at 450 Fifth Street NW, Washington, DC, or, if necessary in light of developments in the unfolding COVID-19 situation, at another location or by video conference as determined by the Division in its sole discretion. Depositions may proceed simultaneously, in the Division's discretion. The Parties agree to make witnesses available such that depositions may be completed no later than fourteen (14) days before the Closing Date or ten (10) days after the deposition CID is served, whichever is later. In the event one or more of the depositions cannot be scheduled within the time frame noted in this paragraph, the Closing Date will be extended on a day-for-day basis until all depositions have been completed.

B. Knowledgeable Personnel

Upon reasonable request of Division staff, the Parties will use reasonable efforts to make available, within five (5) days of any Division request, representatives who can explain each Party's data and representatives who can explain each Party's interrogatory responses to the Second Request. This will enable Division staff to make reasonable use of this material in its evaluation of the Proposed Acquisition.

C. Communication/Exchange of Information

During the course of the investigation, Division staff, including representatives of the Economic Analysis Group, will meet with the Parties, either in person or by phone, as reasonably requested by the Division or either Party, to promote a continuing dialogue regarding the facts and the relevant legal and economic issues and to discuss progress in meeting the agreed-upon schedule discussed in this letter. The Division and the Parties intend that the ongoing dialogue include an exchange of information regarding any substantive issues, theories, or questions that the Division may have regarding the Proposed Acquisition. The Parties are encouraged to provide the results of their own economic and econometric analyses, and any underlying documents, data, or workpapers, to Division staff. Division staff will make reasonable efforts to reciprocate within applicable confidentiality constraints.

D. White Papers and Economic Studies

If the Parties submit any white papers or economic or econometric studies, they simultaneously will identify all data and documents upon which those papers or studies are based and provide all related work papers and underlying raw data not previously produced.

E. Front Office Meetings

If the Division has continuing concerns about the Proposed Acquisition, the Parties will be given an opportunity to meet with the appropriate Division Front Office personnel, including the relevant Deputy Assistant Attorney General and/or the Assistant Attorney General. In the

event the Parties intend to produce white papers or economic data or analyses in any presentation to Division Front Office personnel, the Parties must submit to Division staff the written presentation or economic analysis at least five (5) days prior to the Front Office meeting.

IV. Court Proceedings

A. No Declaratory Judgment

The Parties will not initiate a declaratory judgment action against the Division relating to the Proposed Acquisition.

B. Completion of Proposed Acquisition

If the Division files a complaint seeking to enjoin the Proposed Acquisition that is not filed at the same time as a proposed final judgment, the Parties agree that they will not close, consummate, or otherwise complete the Proposed Acquisition until 12:01 a.m. on the tenth (10th) day following the entry of a judgment by a court, and will close only if a court enters an appealable order that does not prohibit consummation of the transaction. The Parties agree that the Division need not seek a temporary restraining order or a preliminary injunction.

C. Post-Complaint Discovery

In consideration of the limitations imposed on the Division by this letter and to ensure that the Division has adequate time to prepare a full presentation of its case for a court in the event of the need for a litigated challenge to the Proposed Acquisition, the Parties agree to seek from the Court a post-complaint fact and expert discovery period of not less than one hundred and fifty (150) days prior to any trial on the merits. The Parties further agree not to argue to a court that the amount of discovery obtained by the Division prior to filing a complaint, or the length of the Division's investigation, should diminish, expedite, forestall, or otherwise limit post-complaint discovery or the post-complaint discovery period. In particular, the Parties acknowledge that compliance with the Second Requests—with the substantial limitations on numbers of Second Request document custodians and numbers of CID depositions agreed to by the Division pursuant to this letter—is not sufficient to prepare the Division for a trial on the merits and does not constitute the production of all documents that are responsive or relevant to the Division's claims under the Federal Rules of Civil Procedure.

D. Expert Disclosures

The Division and the Parties agree that expert disclosures, including the Division's or each Party's expert reports, in any litigation will be conducted in accordance with Federal Rule of Civil Procedure 26(a)(2) and 26(b)(4) except that neither the Division nor the Parties must preserve or disclose, including in expert deposition testimony, the following documents or information:

(1) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her

final report shared (a) between the Division or any Party's counsel and the Division's or the Party's own testifying or non-testifying expert(s), (b) between any agent or employee of the Division or Party's counsel and the Division or the Party's own testifying or non-testifying expert(s), (c) between testifying and non-testifying experts, (d) between non-testifying experts, or (e) between testifying experts;

(2) any form of oral or written communications, correspondence, or work product not relied upon by the expert in forming any opinions in his or her final report shared between experts and any persons assisting the expert;

(3) the expert's notes, except for notes of interviews participated in or conducted by the expert, if the expert relied upon such notes in forming any opinions in his or her final report;

(4) drafts of expert reports, affidavits, or declarations; and

(5) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in forming any opinions in his or her final report.

The Division and the Parties agree that the following materials will be disclosed:

(1) all final reports;

(2) a list by bates number of all documents relied upon by the testifying expert(s) in forming any opinions in his or her final reports;

(3) copies of any materials relied upon by the expert not previously produced that are not readily available publicly;

(4) a list of all publications authored by the expert in the previous ten (10) years and copies of all publications authored by the expert in the previous ten (10) years that are not readily available publicly;

(5) a list of all other cases in which, during the previous four (4) years, the expert testified at trial or by deposition, including tribunal and case number; and

(6) for all calculations appearing in the final reports, all data and programs underlying the calculations (including all programs and codes necessary to replicate the calculations from the initial ("raw") data files and the intermediate working-data files that are generated from the raw data files and used in performing the calculations appearing in the final report) and a written explanation of why any observations in the raw data were either excluded from the calculations or modified when used in the calculations.

E. Retention of Attorney Communications

The Division and the Parties agree that neither the Parties nor the Division must preserve or produce in discovery the following categories of documents:

(1) documents sent solely between outside counsel for the Parties (or persons employed by or acting on behalf of such counsel) or solely between counsel of the United States (or persons employed by the United States Department of Justice); and

(2) documents that were not directly or indirectly furnished to any non-Party, such as internal memoranda, authored by the Parties' outside counsel (or persons employed by or acting on behalf of such counsel) or by counsel for the United States (or persons employed by the United States Department of Justice).

F. Retention of Electronic Information

The Division and the Parties agree that neither the Parties nor the Division must preserve or produce in discovery the following categories of electronically stored information for this matter:

(1) voicemail messages, except in the case where they are contained within the Parties' or Division's e-mail systems;

(2) e-mail or other electronic messages sent to or from a personal digital assistant or smartphone (e.g., Blackberry handheld), provided that a copy of such e-mail or message is routinely saved and preserved elsewhere for potential production in discovery;

(3) other electronic data stored on a personal digital assistant or smartphone, such as calendar or contact data or notes, provided that a copy of such information is routinely saved and preserved elsewhere for potential production in discovery;

(4) temporary or cache files, including Internet history, web browser cache, and cookie files, wherever located; and

(5) server, system, or network logs.

V. Term of Agreement

Unless otherwise amended in writing by agreement of the Division and the Parties, this agreement and all of its terms will remain in effect until the Division has closed its investigation or the Parties have closed or abandoned the Proposed Acquisition.

* * * * * * *

Please indicate your agreement with the above terms by signing and returning a copy of this letter.

Sincerely,

_____
[Name]
Trial Attorney
U.S. Department of Justice
Antitrust Division

SO AGREED:

_____
[Name]
Counsel for [Company B]

_____
[Name]
Counsel for [Company A]

Frequently Asked Questions
Voluntary Requests and Timing Agreements

Model Voluntary Request Letter

1. Why is the Division publishing a model voluntary request letter?

The Division sends a voluntary request letter to the parties to a transaction during the initial HSR waiting period in most investigations it opens. The letter requests information to allow the Division to quickly assess the likelihood of anticompetitive harm from the transaction.

Publishing the model voluntary request letter is intended to give parties a head start in identifying the kind of information they should be gathering for the Division, so that parties can be proactive and submit the information as early as possible during the initial waiting period.

The earlier the Division receives this information, the sooner and more effectively the Division can determine whether a competitive concern exists that may require a longer, more in-depth investigation, whether the Division can narrow the areas of inquiry, or whether the investigation can be closed following analysis of the voluntarily produced information.

2. When should parties have voluntary productions ready to submit to the Division?

Parties should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing. The sooner the Division receives this information, the sooner investigations that do not raise competitive issues can be closed. Even when a more in-depth investigation is required, the Division may be able to use the information produced voluntarily to narrow the scope of the investigation as much as possible.

3. Should parties negotiate custodians before producing responsive material?

No. Parties should produce responsive documents as soon as possible, without regard to custodian.

4. Must parties certify that they have provided a complete response?

Parties are not required to certify that they have provided a complete response to a voluntary request letter. If a more in-depth investigation is required, the Division will issue Requests for Additional Information and Documents ("Second Requests") or Civil Investigative Demands (CIDs"). Parties are required to certify that they have provided complete responses to Second Requests and CIDs.

5. If a party does not receive a voluntary request letter, does that mean the Division will not issue a Second Request?

No, not necessarily. The Division may issue Second Requests even if it has not made voluntary requests.

6. What production format requirements apply to documents submitted in response to a voluntary request letter?

We encourage parties to consult with staff regarding production format in advance of any production.

7. Are materials submitted in response to a voluntary request letter protected from disclosure?

It is in the Division's interest to protect the confidentiality of sensitive information provided to the Division and to prevent competitively sensitive information from being shared among competitors. Accordingly, sensitive information will only be used by the Division for a legitimate law enforcement purpose, and it is the Division's policy not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose.

Sensitive information includes "confidential commercial information" which means "commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4)." *See* 28 C.F.R. 16.7(a). Exemption 4 of the Freedom of Information Act ("FOIA") protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See* 5 U.S.C. § 552(b)(4) and 28 C.F.R. § 16.7. *See also* Department of Justice, *Guide to the Freedom of Information Act, Exemption 4* (2009), available at https://www.justice.gov/oip/doj-guide-freedom-information-act-0. Parties submitting information in response to a voluntary request letter should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

In the event of a request by a third party for disclosure of confidential commercial information under the FOIA, the Department will act in accordance with its regulation at 28 C.F.R. § 16.7. In the event of a request by a third party for disclosure of any appropriately designated confidential commercial information under any provision of law other than the FOIA, it is the Department's policy to assert all applicable exemptions from disclosure permitted by law.

Model Timing Agreement

1. What is a timing agreement?

Timing agreements are a mechanism to encourage an orderly process by which the parties comply with a Second Request and the Division analyzes the transaction and decides whether to clear it, seek remedies, or seek to block it.

Timing agreements are a negotiated deviation from the process that Congress outlined in the HSR Act, which sets a deadline of 30 days for the Division to reach a decision once the parties certify compliance with a Second Request. As a result, timing agreements should be mutually beneficial. The Division gets certainty on timing — which is in the parties' control — and the parties get certainty, among other things, on the number of custodians, the number of depositions, treatment of deficiencies, and the availability of meetings with the Front Office.

2. Why has the Division published a model timing agreement?

The Division has previously used a model as the basis for its timing agreements, but had not made that model public.[1] The Division has now published its model timing agreement in order to increase transparency and facilitate reaching timing agreement with parties to a transaction more quickly and efficiently. Streamlining negotiations over timing agreements will allow Division staff to spend more of its time focusing on the substance of the investigation.

3. How does this model differ from previous timing agreements used by the Division?

The Division has made several changes to the new model timing agreement. These changes are intended to narrow potential areas of disagreement and facilitate more efficient reviews. Assistant Attorney General Makan Delrahim recently announced several of these changes:[2]

Fewer Custodians. The Division intends to seek documents from fewer custodians than it generally has in the past. As a general matter there will be an assumption that 20 custodians per party will be sufficient. Every investigation is different, however, and the Deputy AAG in charge of an investigation may authorize a larger number of custodians if necessary.

Fewer Depositions. The Division also intends to require fewer depositions than in the past. Again, while every investigation is different, the Division generally will not seek more than 12 depositions per party unless the Deputy AAG in charge of an investigation authorizes a greater number.

Reducing the number of custodians and taking fewer depositions will tangibly reduce the burden on parties from complying with a Second Request.

Shorter Time from Compliance to a Decision. The Division will strive to make a decision as quickly as possible after the parties certify compliance. The Division has set a

[1] The Division published a model timing agreement for use only as part of the 2006 Merger Review Process Initiative ("MRPI"). Although that model timing agreement remains on the public website, *see* https://www.justice.gov/atr/merger-review-process-initiative-model-pta-letter, it remains there for historical purposes. That timing agreement was only for use with other provisions of the MRPI.

[2] Makan Delrahim, "It Takes Two: Modernizing the Merger Review Process" (Sept. 25, 2018), *available at* https://www.justice.gov/opa/speech/file/1096326/download.

goal of making a decision in no longer than 60 days — sooner, if possible — again with the proviso that a Deputy AAG can authorize more time if necessary.

In exchange for these benefits, to the Division has also modified what is expected from the parties:

Faster and Earlier Production of Documents. The Division expects to receive documents and other information earlier in the compliance period than has been common in the past. If the parties employ traditional document review, this will mean a more robust rolling production, with the parties producing tranches of documents in roughly evenly spaced increments early in the compliance period, with certain documents due well in advance of certifying compliance. For parties employing technology assisted review, it will mean completing the bulk of the production a certain number of days in advance of certifying compliance.

Earlier Production of Data. Data is increasingly important. In the view of the Division, there is no reason that data called for in a Second Request cannot be produced substantially earlier than parties have produced it in the past. The Division will expect to receive early cooperation on identifying relevant data for Division economists to analyze. The Division will further expect production of useable data substantially before the Second Request compliance date.

No More Privilege Log Gamesmanship. The Division is committed to eliminating gamesmanship on privilege issues. The Division respects the attorney-client privilege and the work product doctrine, but too often parties game the process, withholding large numbers of documents as privileged, only to de-privilege and produce many of these documents much later in the process, often on the eve of a particular deposition. In the Division's experience, while some of the de-privileged documents might be close calls, most never should have been withheld in the first place. The new model timing agreement endeavors to protect the Division from this practice of over-withholding. This will require parties to be pro-active, organized, and diligent in their review of potentially privileged materials.

Longer Post-Complaint Discovery Period. The Division will be doing its part to streamline and shorten the merger review process by agreeing to significant limitations on documents custodians and depositions and by committing to try to resolve most investigations within sixty (60) days after compliance with Second Requests. Because of these limitations on the scope and length of the Division's investigations, parties must acknowledge that the Division will require a reasonable period to conduct post-complaint discovery in the event of contested litigation.

4. Do the timing milestones outlined in the model timing agreement allow the Division to complete an investigation within six months?

Yes, if the parties do their part. The timing milestones allow for completion of an investigation within six-months if the parties also work to produce responsive data, documents, and information quickly. A party that does not comply with its Second Request within six months cannot expect the Division to complete its investigation in six months. The timing of an investigation often is driven by the parties, because they control when documents and information are produced to the Division. In some cases, the parties may prefer a longer investigation rather than a quick decision by the Division, and other parties may wish to extend the timing for various reasons. If the parties seek a resolution within six months, however, the Division shares that goal and is committed to working towards it.

5. Are provisions in the model timing agreement negotiable?

The Division considers the provisions in the model to be standard provisions, and does not intend to deviate from them under most circumstances. Extended negotiations over deviations also would run counter to the Division's goal of streamlining and shortening the negotiations over timing agreements. The Division recognizes, however, that the individual circumstances of a transaction may warrant deviation in some cases. Parties should be aware, however, that substantial deviation will require approval from the Deputy AAG in charge of the investigation.

6. What are the benefits of entering into a timing agreement?

Both the Division and the parties benefit from timing agreements. Some of these benefits include:

Time to complete the investigation. It is in both the Division's and the parties' interest to allow the Division sufficient time to complete its investigation. In many investigations, the Division is able to resolve potential competitive concerns and close its investigation, allowing parties to proceed with their transaction. When time is short and competitive concerns remain, however, the Division must devote its resources to preparing for litigation.

Narrowed discovery. Timing agreements provide the parties with an agreement by the Division to narrow document discovery during the Division's investigation phase to a certain number of custodians and to take only a limited number of CID depositions. Timing agreements can also provide the Division with time to engage in the investigation necessary to further modify or narrow a Second Request, leading to decreased burdens and costs to parties. Timing agreements ensure that the Division will have the time and resources to fully engage with the parties in these discussions. Parties should be prepared to provide company executives, managers, or other specialized employees to answer staff's questions during discussions regarding Second Request modifications.

Increased certainty. The valuable certainty provided by timing agreements applies to the overall length of the Division's review as well as the timing of significant interim steps, including meetings with staff, section management, and the Front Office. Knowing the timing of each of these events enables parties to better plan for the preparation of their own legal and economic analyses, presentations, and white papers. Timing agreements also provide parties with valuable certainty with respect to the number and timing of depositions. With this information, parties can better prepare their deponents and ensure their availability during the agreed-upon time period.

Prompt identification of deficiencies. An important benefit to parties with a timing agreement is that the Division will agree to identify deficiencies in a party's Second Request response within a specified time period. The model timing agreement provides parties the additional certainty that if the Division fails to formally assert a deficiency within the agreed-upon time period, the claimed deficiency is waived and will not be a basis to challenge its certification of compliance at a later date. Parties will be required to produce the information that should have been produced, but the timing will not be extended.