MERGER ANTITRUST LAW

Unit 4: The DOJ/FTC Merger Review Process

Class 4

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[1] For the published Notice of Proposed Rulemaking, see Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (to be codified at 16 C.F.R. Pts. 801-803).

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.

Previous:
Frequently Asked Questions About Merger Consent Order Provisions

Up

HART-SCOTT-RODINO ACT

Clayton Act § 7A. Premerger notification and waiting period

(a) *Filing*. Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person—

(A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19 (a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

(B)

(i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published); and

(ii)

(I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;

(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or (III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

(III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

(b) Waiting period; publication; voting securities

(1) The waiting period required under subsection (a) of this section shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a) of this section, or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

(c) *Exempt transactions*. The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 1467a(e) of title 12, section 1828 (c) of title 12, or section 1842 of title 12, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 1843 (k) of title 12; and (B) does not require agency approval under section 1842 of title 12;

(8) transactions which require agency approval under section 1843 of title 12 or section 1464 of title 12, if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction

    (A) is subject to section 1843 (k) of title 12; and

    (B) does not require agency approval under section 1843 of title 12;

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of

    (A) voting securities pursuant to a plan of reorganization or dissolution; or

    (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

(d) *Commission rules*. The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, consistent with the purposes of this section—

(1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e) Additional information; waiting period extensions

(1)

(A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(B)

(i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person to determine—

(I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or

(II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person.

(ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with investigative staff, in order to avoid undue delay of the merger review process.

(iii) Not later than 90 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.

(iv) Not later than 120 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.

(v) Not later than 180 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress— (I) which reforms each agency has adopted under this subparagraph; (II) which steps each has taken to implement such internal reforms; and (III) the effects of such reforms.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person,

(A) all the information and documentary material required to be submitted pursuant to such a request, or

(B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.

(f) *Preliminary injunctions; hearings*. If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 18 of this title, or section 45 of this title, or an action is filed by the United States, alleging that a proposed acquisition violates such section 18 of this title, or section 1 or 2 of this title, and the Federal Trade Commission or the Assistant Attorney General

(1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and

(2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.

(g) Civil penalty; compliance; power of court.

(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

(h) *Disclosure exemption*. Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

(i) Construction with other laws

(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or

the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act [15 U.S.C. 1311 et

(j) Omitted[1]

(k) *Extensions of time*. If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103 (a) of title 5), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

[1 Omitted in original.]

good-paying jobs. EPA received $41.5 billion in appropriations to develop and support 24 new and existing programs that monitor and reduce greenhouse gas emissions and air pollution, protect health and advance environmental justice.

These new programs funded by the IRA Sections 60112 and 60116 will provide grants, technical assistance, and tools, including a carbon label, to advance the President's bold agenda to combat the climate crisis, protect public health and advance environmental justice. The new programs will help manufacturers, institutional buyers, real estate developers, builders and others measure, report and substantially lower the levels of embodied carbon and other greenhouse gas emissions associated with the production, use and disposal of construction materials and products including steel, concrete, asphalt and glass. Additionally, this work will support President Biden's Buy Clean Task Force which is developing recommendations for Federal procurement and federally funded projects that would expand consideration of greenhouse gas emissions and other pollutants associated with construction materials.

Authority: 42 U.S.C. 1310.

Dated: January 18, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–01501 Filed 1–25–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of section 7A of the Clayton Act.

DATES: February 27, 2023.

FOR FURTHER INFORMATION CONTACT: Nora Whitehead (202–326–3100), Bureau of Competition, Premerger Notification Office, 400 7th Street SW, Room 5301, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: This document announces updates to (1) the thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as required by the 2000 amendment of section 7A of the Clayton Act; and (2) the filing fee schedule for the same Act, as required by Division GG of the 2023 Consolidated Appropriations Act. Both updates are discussed in more detail below.

(1) The Jurisdictional Thresholds

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390 (''the Act''), requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with section 8(a)(5).

The new jurisdictional thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

Subsection of 7A	Original jurisdictional threshold (million)	Adjusted jurisdictional threshold (million)
7A(a)(2)(A)	$200	$445.5
7A(a)(2)(B)(i)	50	111.4
7A(a)(2)(B)(i)	200	445.5
7A(a)(2)(B)(ii)(i)	10	22.3
7A(a)(2)(B)(ii)(i)	100	222.7
7A(a)(2)(B)(ii)(II)	10	22.3
7A(a)(2)(B)(ii)(II)	100	222.7
7A(a)(2)(B)(ii)(III)	100	222.7
7A(a)(2)(B)(ii)(III)	10	22.3

Any reference to the jurisdictional thresholds and related thresholds and limitation values in the HSR rules (16 CFR parts 801–803) and the Antitrust Improvements Act Notification and Report Form (''the HSR Form'') and its Instructions will also be adjusted, where indicated by the term ''(as adjusted)'', as follows:

Original threshold	Adjusted threshold
$10 million.	$22.3 million.
$50 million.	$111.4 million.
$100 million.	$222.7 million.
$110 million.	$245 million.
$200 million.	$445.5 million.
$500 million.	$1.1137 billion.
$1 billion.	$2.2274 billion.

(2) The Filing Fee Thresholds

Section 605 of Public Law 101–162 (15 U.S.C. 18a note) requires the Federal Trade Commission to assess and collect filing fees from persons acquiring voting securities or assets under the Act. The current filing fee thresholds are set forth in section 605. Division GG of the 2023 Consolidated Appropriations Act, Public Law 117–328, 136 Stat. 4459, requires the Federal Trade Commission to revise these filing fee thresholds. The new filing fee thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

Filing fee	Size of transaction as determined under section 7A(a)(2) of the Act
$30,000	less than $161.5 million.
$100,000	not less than $161.5 million but less than $500 million.
$250,000	not less than $500 million but less than $1 billion.
$400,000	not less than $1 billion but less than $2 billion.
$800,000	not less than $2 billion but less than $5 billion.
$2.25 million	$5 billion or more.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–01533 Filed 1–25–23; 8:45 am]

BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0310; Docket No. 2022–0001; Sequence No. 17]

Submission for OMB Review; Nondiscrimination in Federal Financial Assistance Programs, GSA Form 3702

AGENCY: Office of Civil Rights, General Services Administration (GSA).

ACTION: Notice of request for comments regarding an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an existing information collection requirement regarding OMB Control No: 3090–0310; Nondiscrimination in Federal Financial Assistance Programs, GSA 3702. This information is needed to facilitate nondiscrimination in GSA's Federal Financial Assistance Programs, consistent with Federal civil rights laws and regulations that apply to recipients of Federal financial assistance.

DATES: Submit comments on or before: February 27, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments''; or by using the search function.

FOR FURTHER INFORMATION CONTACT: Stephanie Stoltzfus Treier, Deputy Associate Administrator, Office of Civil Rights, at telephone 202–501–0767 or via email to *civilrights@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

GSA has mission responsibilities related to monitoring and enforcing compliance with Federal civil rights laws and regulations that apply to Federal financial assistance programs administered by GSA. Specifically, those laws provide that no person on the ground of race, color, national origin, disability, sex or age shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program in connection with which Federal financial assistance is extended under laws administered in whole, or in part, by GSA.

These mission responsibilities generate the requirement to request and obtain certain data from recipients of Federal surplus property for the purpose of determining compliance, such as the number of individuals that speak non-English languages encountered by the recipient's program(s) and how the recipient is addressing meaningful access for individuals that are Limited English Proficient; whether the recipients provide disability access in compliance with applicable laws and standards; whether there has been complaints or lawsuits filed against the recipient based on prohibited discrimination; whether there has been any findings of discrimination; and whether the recipient's facilities are accessible to qualified individuals with disabilities.

B. Annual Reporting Burden

Respondents: 1,200.
Responses per Respondent: 1.
Total Responses: 1,200.
Hours per Response: 2.
Total Burden Hours: 2,400.

C. Public Comments

A 60-day notice was published in the **Federal Register** at 87 FR 70818 on November 21, 2022. No comments were received.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 3090–0310, Nondiscrimination in Federal Financial Assistance Programs, GSA 3702, in all correspondence.

Beth Anne Killoran,

Deputy Chief Information Officer.

[FR Doc. 2023–01550 Filed 1–25–23; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0155]

Agency Information Collection Activities; Proposed Collection; Comment Request; Quantitative Research on Front of Package Labeling on Packaged Foods

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing an opportunity for public comment on a proposed collection of information. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice invites comments on an information collection associated with a study entitled ''Quantitative Research on Front of Package Labeling on Packaged Foods.''

DATES: Either electronic or written comments on the collection of information must be submitted by March 27, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 27, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

BEING REVISED--NEW VERSION WITH MAJOR CHANGES LIKELY TO BE RELEASED IN LATE 2023

NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

☐☐☐☐☐☐☐☐ TRANSACTION NUMBER ASSIGNED

FEE INFORMATION *(For Payer Only)*

AMOUNT PAID

- ◯ $0.00
- ◯ $400,000.00
- ◯ $30,000.00
- ◯ $800,000.00
- ◯ $100,000.00
- ◯ $2,250,000.00
- ◯ $250,000.00
- ◯ Specific Amount ______

TAXPAYER IDENTIFICATION NUMBER ______
OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

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

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ☐

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) $

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

ACQUIRING UPE(S)

NAME
ADDRESS
ADDRESS LINE 2
CITY, STATE
ZIP CODE, COUNTRY

ACQUIRED UPE(S)

NAME
ADDRESS
ADDRESS LINE 2
CITY, STATE
ZIP CODE, COUNTRY

ACQUIRING ENTITY(S)

NAME
ADDRESS
ADDRESS LINE 2
CITY, STATE
ZIP CODE, COUNTRY

ACQUIRED ENTITY(S)

NAME
ADDRESS
ADDRESS LINE 2
CITY, STATE
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

NAME OF PERSON FILING NOTIFICATION	DATE

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

NAME OF PERSON FILING NOTIFICATION	DATE

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 ________________________________

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.

NAME OF PERSON FILING NOTIFICATION	DATE

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 profiles, 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.

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[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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ValueAct Capital Submission in Response to Second Request issued on 1/27/2016 and 2/10/2016 - Business Confidential - Confidential Treatment Requested

ABILITY TO INFLUENCE: OUR "ACTIVISM" SCORECARD

Total Core Investments	79
Public Board Seats	41
Proxy Contest*	1
CEO/CFO Changes	33
Major Divestitures	14
Recaps/Big Share Repurchases	26
Operating Consultant Engagements	14
Acquisition/Investment Strategy	11
Company Sales	19
Compensation Changes	9

**Settled before vote*

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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. <u>BACKGROUND</u>

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,

FOR THE PLAINTIFF UNITED STATES OF AMERICA:

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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 | AT
WEDNESDAY, OCTOBER 1, 2014 | (202) 514-2007
WWW.JUSTICE.GOV | 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 AT
FRIDAY, NOVEMBER 7, 2014 (202) 514-2007
WWW.JUSTICE.GOV TTY (866) 544-5309

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
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Assistant Attorney General for Antitrust

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Deputy Assistant Attorney General

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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:

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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

CHRISTINE A. VARNEY
Assistant Attorney General

Scott D Hammond

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOHN TERZAKEN
Director of Criminal Enforcement

Lisa M. Phelan

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

Kenneth W. Gaul

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

FILED

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

OCT 26 2011

Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

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

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.

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.

Aside: Some Notes on Privilege

Able & Baker LLP
123 K Street NW Suite 1000
Washington, DC 20001
202-321-4000

WRITER'S EMAIL ADDRESS:
bruce.springsteen@ablebakerlaw.com

January 5, 2000

BY FACSIMILE
BY U.S. MAIL

David R. Bowie, Esq.
Joan M. Jett, Esq.
U.S. Department of Justice
Antitrust Division
City Center Building
1401 H Street, N.W.
Washington, DC 20530

Re: Acquisition by ABC Corp. of XYZ Corp.
DOJ File No. XX-XXXX-XXXX

Dear David and Joan:

This letter provides the legal basis for asserting privilege for the documents withheld or redacted in our client ABC's HSR filing of December 15. It also responds to David's letter to me dated December 29.

We believe that this letter will clarify what we deem to be a fundamental misunderstanding about the claims of privilege made in connection with ABC's HSR filing and the information we provided the staff with respect to those claims. Once this misunderstanding is corrected, we anticipate that the staff will agree that ABC substantially complied with the requirements of Item 4(c) of the Notification and Report Form and that ABC's initial filing was effective on the date it was made.

As reflected both in our conversations and in David's letter to me, the core of the staff's concern is that ABC is claiming privilege for communications by non-lawyer employees and advisors, including representatives of Investment Bank, which the staff apparently believes cannot be protected because of the identity of the communicants regardless of the purpose or subject matter of the communication. For example, without identifying any particular entries on ABC's privilege log, David asserts that any privilege claim is "suspect" when the documents are prepared by non-lawyers, including ABC's investment bankers, putatively "under the direct supervision" of non-lawyers.

The misunderstanding resides in the role of the non-lawyers in connection with the privileged communications. In each case, the non-lawyer employee or advisor in the communication in question functioned as an agent of ABC in providing information at *the specific request* of the General Counsel and the company's outside legal advisors that was necessary and appropriate to enable the lawyers to provide legal advice regarding the transaction to ABC or, alternatively, as agent of ABC under the direction, supervision, and control of the General Counsel and acting as a conduit of the legal advice given by the General Counsel and the company's outside legal advisors in connection with the transaction. None of the withheld or redacted communications would have been made except for the purpose of obtaining or conveying legal advice from counsel. Moreover, but for the regulatory questions presented by the transaction, none of the withheld or redacted communications would have occurred. I should also note that these non-lawyer employees and advisors were few in number, and that each was bound by strict contractual confidentiality obligations not to disclose to third parties the privileged communications to which they were privy.

Turning to the legal analysis, it is well established that both the attorney-client privilege and the work product doctrine apply to communications involving non-lawyer employees and advisors of the nature of the ones withheld or redacted by ABC in its HSR filing.

Attorney-Client Privilege

It is well established that the attorney-client privilege applies when communications are made through agents of the attorney or the client, or when an expert is retained by either to facilitate the rendering of legal advice. *See, e.g.*, THE RESTATEMENT OF LAW GOVERNING LAWYERS §§ 120-21 (1996) ("[P]rivileged persons . . . are the client, the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation[.]"); WEINSTEIN'S FEDERAL EVIDENCE § 503.10 (1996); *see also In re Bieter Co.*, 16 F.3d 929, 935 (1994) (proposed Supreme Court Standard 503(b) applies attorney-client privilege to communications "(1) between [the client] and his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.").

The "non-lawyers" that the staff suspects of engaging in unprivileged communications are either ABC employees who gathered information at the direction of counsel or prepared presentations of legal advice for the ABC Board of Directors, or investment banking experts retained by the ABC Legal Department for the purpose of assisting its lawyers in rending legal advice and presenting that advice to ABC's Board of Directors. Specifically, ABC's Strategic Planning Department gathered information at the direction of lawyers to enable them to provide legal counsel to Senior Management and the Board. *See Upjohn Company v. United*

States, 449 U.S. 383, 391 (1981) (attorney-client privilege includes "[m]iddle-level – and indeed lower-level – employees [who] can . . . have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to actual and potential difficulties."); *Carter v. Cornell University*, 173 F.R.D. 92, 94-95 (S.D.N.Y. 1997) (attorney-client privilege includes fact investigation by corporate employee at direction of attorney, following *Upjohn*). ABC's Strategic Planning Department also prepared presentations to ABC's Board of Directors that included legal advice. *See United States v. American Telephone and Telegraph Co.*, 86 F.R.D. 603, 620 (D.D.C. 1980) (privilege includes "conduits" for information).

Investment Bank, separate and apart from its role as an investment banker in the transaction, was retained to assist ABC's lawyers in rendering legal advice on certain regulatory issues in connection with this transaction. In that role, Investment Bank analyzed information gathered by ABC's Strategic Planning Department, combined it with additional information of its own, and at the direction of counsel prepared presentations to ABC's Board of Directors and Senior Management. *See United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (Friendly, J.) (holding that client's communications with law firm's accountant outside the lawyer's presence were privileged because "the privilege must include all the persons who act as the attorney's agents") (quoting Wigmore); *see also United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (following *Kovel* and permitting retained accountant to wear "two hats" and disclose information included in filed tax return without waiving the attorney-client privilege as to undisclosed communications); *Byrnes v. Empire Blue Cross/Blue Shield*, No. 98 Civ. 8520, 1999 WL 1006312, at *4-*5 (S.D.N.Y. Nov. 4, 1999) (communications directly to and from actuary retained by client with client's counsel privileged where actuary provided information and assisted counsel in rendering legal advice to client).[1]

Work Product Doctrine

Not only are the communications involving non-lawyer employees and advisors listed on ABC's privilege log protected by the attorney-client privilege, they are also protected by work product immunity. The purpose of the work product doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on its adversary's preparation. *United States v. Nobles*, 422 U.S. 225, 238 (1975). In *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998), the Court of Appeals held that documents are protected by the work-product immunity if they were prepared "because of" anticipated litigation. Actual or threatened litigation is not a prerequisite for such immunity. In particular, the *Adlman* court held that work-product immunity applies to legal work performed in connection with a proposed transaction which, if it went forward, could pose the threat of

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[1] OPQ & Associates, another non-lawyer advisor to ABC whose employees appear in the privilege log provided to you today under separate cover, similarly analyzed information gathered by ABC's Strategic Planning Department, combined it with additional information of its own, and prepared presentations at the direction of counsel to ABC's counsel and Senior Management. As reported in the privilege log, the purpose of these communications was to provide data and other information requested by ABC's counsel to enable them to provide legal advice to ABC.

litigation. The court stated that "where a party faces the choice of whether to engage in the conduct based on its assessment of the likely result of the anticipated litigation . . . the preparatory documents should receive protection." *Id*. at 1196. *See also Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126-27 (D.C. Cir. 1987).

The withheld documents and redacted communications listed in ABC's privilege log were all prepared to analyze and respond to the regulatory risk of the proposed acquisition of XYZ, and thus, fall squarely within the work-product immunity. In the absence of this risk, none of the withheld or redacted communications would have occurred. *See United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1995) ("Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within [Federal Rule of Civil Procedure] 26(b)(3)."). Work product prepared in anticipation of a government agency investigation is plainly protected by the work-product immunity. *See Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993). As one court of appeals recently explained in rejecting government lawyers' attempt to discover attorney work-product:

> [To adopt the government's reasoning] would undermine lawyer effectiveness at a particularly critical stage of a legal representation. It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur. For instance, lawyers routinely . . . consider whether business decisions might result in antitrust . . . lawsuits . . . If lawyers had to wait for specific claims to arise before their writings could enjoy work-product protection, they would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively.

In re Sealed Case, 146 F.3d 881, 886 (D.C. Cir. 1998). The *Sealed Case* court continued by explaining the importance of protecting antitrust advice from government inspection:

> Likewise, asked by a client to evaluate the antitrust implications of a proposed merger and advised that no specific claim had yet surfaced, a lawyer knowing that work product is unprotected would not likely risk preparing an internal legal memorandum assessing the merger's weaknesses, jotting down on a yellow legal pad possible areas of vulnerability, or sending a note to a partner – "After reviewing the proposed merger, I think it's O.K., although I'm a little worried about . . . What are your views?" Nor would the partner respond in writing, "I disagree. This merger is vulnerable because . . ." Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman*'s words,

> "demoraliz[e]" the legal profession, and "the interests of the clients and the cause of justice would be poorly served." 329 U.S. at 511.

In re Sealed Case, 146 F.3d at 886-87 (ellipses and brackets in original).

We also note that, as reported in the privilege log, many of the documents prepared by non-lawyer employees or advisors contain or reflect the legal advice and legal theories of ABC's inside and outside legal counsel. The original communication of this advice and the legal theories was necessary in order for the non-lawyer employees and advisors to understand the attorney's request for data and other information necessary for the attorney to provide further legal advice to ABC, and the advice and theories were naturally reflected in the responses from the non-lawyer employees and advisors. This advice and legal theories represent the "opinion work product" of ABC's legal counsel and as such are entitled to the highest level of work product protection. *See, e.g., Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974); *United States v. Adlman*, 134 F.3d 1194, 1203 (2d Cir. 1995). The fact that counsel's legal advice and theories are summarized in communications created by a non-lawyer outside advisor does not negate the work product protection. *National Education Training Group, Inc. v. Skillsoft Corp.*, No. M8-85, 1999 WL 378337, at *5-*6 (S.D.N.Y. June 10, 1999) (notes of outside director's assistant protected by work product doctrine where they summarized the legal advice of company's attorneys concerning pending litigation).

Turning to the question of technical compliance, in the response to Item 4(c) in its December 15 HSR filing, ABC included copies of all studies, surveys, analyses, and reports prepared by or for its officers or directors for the purpose of evaluating or analyzing its proposed acquisition of XYZ having the requisite subject matter, with the exception of a handful of privileged communications. For documents reflecting privileged communications, we provided a privilege log pursuant to the instructions for Item 4(c) and 16 C.F.R. § 803.3. Since our HSR filing, we listened carefully to your concerns and prepared a supplemental privilege log at your request. We also have prepared an additional log, which we are sending to you today under separate cover, that provides even more information on the Item 4(c) documents at issue and presents the data in the form we will use for ABC's response to the Second Request.

Most of the "examples of the deficiencies" listed in the first full paragraph on page two of David's September 21 letter are, at most, minor technical defects of form that were corrected in ABC's supplemental privilege log. For example, each one of the nineteen entries at issue on ABC's supplemental privilege log is a communication protected by the attorney-client privilege *and* attorney work-product immunity. The entries that list the ABC Strategic Planning Department or Investment Bank as authors are jointly authored documents for which we cannot list a single individual. We have provided you with the names of the members of the ABC Strategic Planning Department and the individuals at Investment Bank who contributed to those documents.

ABC submits that the original privilege log included in the July 31 filing substantially complied with the requirements of Item 4(c) and the HSR Act's implementing regulations, so that the filing was proper and effective as of the date it was made. To the extent there was any technical deficiency, the deficiency was immaterial and corrected in the supplemental submissions. It appears that the privilege questions in this matter result not from any deficiency in the privilege log, but rather from a misunderstanding of the applicability of the privilege to communications by non-lawyer employees and advisors in the circumstances presented here.

In sum, the staff was provided in the initial filing with the documents that explain ABC's decision to pursue the proposed acquisition. Moreover, the staff is entitled to – and we will promptly provide – whatever additional information it may reasonably need to analyze the transaction. What the staff is not entitled to – and what we cannot divulge – are the privileged communications and attorney work product revealed only to ABC's officers and directors through its strategic planning staff and investment bankers, who gathered and analyzed information essential to the legal analysis and prepared presentations of the resulting legal advice.

Very truly yours,

Bruce F.J. Springsteen

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

July 21, 2009

VIA FACSIMILE AND EXPRESS MAIL

HeartWare International, Inc.
c/o Beau W. Buffier, Esquire
Shearman & Sterling LLP
599 Lexington Ave.
New York, NY 10022

PUBLIC

Re: *Petition to Limit or Quash Subpoenas* Ad Testificandum *Dated April 24, 2009,* File No. 091-0064

Dear Mr. Buffier:

On June 26, 2009, HeartWare International, Inc. ("HW") filed its Petition to Limit or Quash Subpoenas *Ad Testificandum* Dated April, 24, 2009 ("Petition").[1] The challenged subpoenas were issued in the Commission's investigation to determine whether there is reason to believe that Thoratec Corp.'s acquisition of HW would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18. This letter advises you of the Commission's disposition of the Petition seeking to limit or quash subpoenas issued to Messrs. Douglas Godshall and James Schuermann for oral testimony at investigational hearings conducted (and to be continued) in accordance with the provisions of Commission Rules 2.8, 2.8A and 2.9, 16 C.F.R. §§ 2.8, 2.8A, 2.9.[2] The Petition was referred to the full Commission for determination by Commissioner Pamela Jones Harbour, acting in her sole

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[1] Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1), requires that a petition to limit or quash a subpoena be filed prior to the subpoena's return date or within twenty days after service, whichever first occurs. Even though this Petition may be untimely under a technical reading of the rule, the Commission will entertain it because the events giving rise to HW's claims for relief did not occur until after the expiration of the filing deadline, and HW's Petition was filed promptly after receipt of staff's June 24 letter announcing the reconvening of the investigational hearings.

[2] In ruling on the Petition, the Commission does not reach the issue of whether HW has standing to file the Petition without joining Messrs. Godshall and Schuermann as parties to the Petition. While the Commission understands that counsel for Petitioner also represents Messrs. Godshall and Schuermann, no statement to that effect appears in the Petition. The Commission assumes that the individuals subpoenaed are aware of the instant Petition and have elected not to raise any additional objections particular to themselves regarding further compliance with the subpoenas.

discretion as the Commission's delegate pursuant to the provisions of Rule 2.7(d)(4), 16 C.F.R. § 2.7(d)(4).

I. Background and Summary

The Federal Trade Commission issued subpoenas *ad testificandum* on April 24, 2009 ("subpoenas"), to Douglas Godshall and James Schuermann for oral testimony at investigational hearings. Mr. Godshall is HW's President and Chief Executive Officer. Mr. Schuermann is the Vice President for Sales and Marketing for HW. Investigational hearings were held on June 5th (Godshall) and June 11th (Schuermann). During the course of these investigational hearings, testimony was withheld by the witnesses upon advice of counsel because the admission of an exhibit, or the testimony being sought, would have elicited information that might be subject to claims of attorney-client privilege and/or the work-product doctrine. Counsel objected to the use of Godshall Exhibit No. 10 (two emails and an attached revenue model spreadsheet) on the ground that the documents had been inadvertently produced, and were subject to both attorney-client privilege and the work-product doctrine.[3] HW's counsel requested the return of the inadvertently produced documents. Commission counsel briefly questioned the witness regarding the factual bases for the privilege claim, and obtained information indicating this exhibit was produced at the "explicit" request of Mr. Buffier,[4] and that it had been requested as part of the "joint defense" of the proposed merger.[5] Commission counsel then stated that the privilege and work-product issues would be submitted to the Commission's General Counsel for an evaluation of the protections claimed and instructions regarding the proper disposition of the documents. At the same time, staff reserved the right to recall Mr. Godshall for further

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[3] Godshall IH 245:12-249:20, Jun. 5, 2009. The exhibit was described by Commission counsel as consisting of two emails and a spreadsheet "entitled HeartWare revenue model." *Id.* at 245:20. The top email was from Godshall to Schuermann dated April 15, 2009, "subject re e-mailing HVAD financials JFApril09.XLS." *Id.* at 245:21-23. The transcript provides no further information regarding either the identity of the second email or the contents of either email or the attachment.

[4] *Id.* at 246:4

[5] *Id.* at 248:7-12.

testimony, depending on the determination of the General Counsel regarding the documents.[6] HW's counsel also reserved its right to object.[7]

Later during the Godshall investigational hearing, counsel instructed the witness not to respond to questions regarding the substance of his conversations with customers regarding their reaction to the proposed merger transaction on the grounds that communications at the request of counsel were protected by the work-product doctrine.[8] HW's counsel made a clear distinction between (1) the substance of the conversations between the witness and customers undertaken at the behest and under the supervision of counsel, and (2) the identity of the third parties with whom the conversations were held.[9] Mr. Godshall identified ten customers with whom he spoke on behalf of HW's counsel, and one further person with whom he might have had such a conversation. He was not, however, permitted to testify as to the substance of those conversations, regarding either the questions asked or the answers given.

In similar manner, Mr. Schuermann was permitted to testify regarding conversations he had with customers regarding their reactions to the transaction when those conversations were not pursuant to counsel's request and direction.[10] The witness did provide some limited information regarding conversations with third parties about the transaction when those discussions had not been undertaken at the direction of counsel. Counsel for HW advised

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[6] *Id.* at 249:10-18. Staff subsequently advised HW's counsel that the staff would delete these documents from their files, and advised that such deletion did not constitute the Commission's agreement as to the validity of the protections being asserted. Petition, Exhibit E at 1 (Letter from James Southworth to Beau Buffier, dated June 12, 2009). Staff also requested "a written description of the process used to review HeartWare's submission for privileged materials." *Id.* The Commission understands that HW has not provided either the requested information regarding HW's privilege review processes or an updated privilege log that includes the deleted documents.

[7] *Id.* at 249:19-20.

[8] *Id.* at 287:7-12, and 20-21.

[9] The conversation between the witness and third parties was subject to work-product protection, but the identities of the third parties were not subject to such protections, according to HW's counsel. *Compare id.* at 288:17-20 (Mr. Buffier: "I'm going to instruct Mr. Godshall not to answer if any of [the substance of] those communications were held at the direction of legal counsel.") *with id.* at 287:20-21 (Mr. Buffier: "You can answer if you remember which doctors [you spoke with].").

[10] Schuermann IH 235:12-15, Jun. 11, 2009 (Ms. Delbaum: "At this point, Mr. Schuermann, I'll just caution you not to reveal any communications that you had at our request. If you have knowledge of customer reaction outside of that, feel free to answer.").

Mr. Schuermann not to answer any questions about the substance of any conversations that he had with third parties at the direction of counsel.[11]

Subsequent conversations between Bureau of Competition staff and HW's counsel were not successful in resolving the dispute regarding the witnesses' right to withhold answers regarding the substance of conversations undertaken at the request of counsel, and the revenue model and associated documents. On June 24, staff sent a letter to HW's counsel directing the reappearance of the witnesses "to provide testimony regarding communications they had with customers about the proposed acquisition," stating staff's belief that HW had not "established the necessary factual predicate to show that this information is protected work product."[12] The letter further directed the witnesses to reappear to answer questions about "sales and market shares with respect to any relevant product being developed by HeartWare," citing HW's privilege claims respecting the revenue model as the reason for not having examined Mr. Schuermann about sales and market shares during his investigational hearing on June 11.[13]

The Petition, dated June 26, 2009, was filed on June 29. The Petition seeks to limit or quash the reappearance of the witnesses for further investigational hearing examination. Petition at 19. In addition to reiterating HW's claims of attorney-client privilege and work-product protections, the Petition claims that it would be unduly burdensome to require Mr. Schuermann "to return to Washington, D.C. for further hearings," Petition at 18, because staff already had an extended opportunity in which these issues could have been raised with Mr. Schuermann.

II. Third-Party Interviews by HeartWare's Managers at the Direction of Counsel in Anticipation of Litigation Are Entitled to Protection as Trial Preparation Materials.

Commission Rule 2.9(b)(2), 16 C.F.R. § 2.9(b)(2), permits a witness at an investigational hearing to refuse to answer questions the answers to which are privileged. That rule, however, does not provide any guidance regarding the perimeters of the privileges that may be asserted. The Commission will read Rule 2.9(b)(2) *in pari materia* with Rule 3.31(c)(3)(Hearing preparations: Materials.), 16 C.F.R. § 3.31(c)(3). The latter rule protects trial preparation materials from discovery if they were "prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent)." *Id.* The protections afforded by this rule are not absolute; they may be overcome upon a showing

[11] *Id.* at 250:18-25.

[12] Petition, Exhibit C (Letter from James Southworth to Beau Buffier, dated Jun. 24, 2009) at 1.

[13] *Id.* at 1-2.

> that the party seeking discovery has substantial need of the materials in preparation of its case and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

Id. (emphasis added). The protections afforded to trial preparation materials under Rule 3.31(c)(3) are substantially similar to the work-product doctrine. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 2D §§ 2021 - 2028 at 313-415 (1994); *Hickman v. Taylor*, 329 U.S. 495 (1947). Our rule should be construed accordingly.

Commission staff do not appear to question that some third-party interviews undertaken by these two witnesses were done in anticipation of litigation for HW or its attorneys, and at the direction of counsel. Mr. Godshall's testimony on the latter point stands unrebutted in this record:

> Q: Have you talked to any customers about this transaction?
>
> A: I've spoken with many customers and have been advised by – have been requested by counsel to speak to customers, to help educate counsel as well as to collect customer opinion. So since the transaction, my customer discussions on the subject of this deal have been at the direction of counsel.

Godshall IH at 286:18-25. On the current record, HW has provided an adequate factual basis to support its assertion that customer interviews conducted by HW managers at the direction of counsel in anticipation of litigation are entitled to trial preparation materials protections within the meaning of Rules 2.9(b)(2) and 3.31(c)(3).

Commission staff could only overcome the qualified protections of Rule 3.31(c)(3) by showing that there was a "substantial need [for the customer interview materials] . . . and that [staff are] unable without undue hardship to obtain substantial equivalent materials by other means." Customer reactions to prospective mergers are important to the merger review process; however, that importance, standing alone, is not sufficient to overcome the protections of our rule under the circumstances. The Commission understands that staff have had a reasonable opportunity to interview each of HW's customers identified in the investigational hearing testimony of Messrs. Godshall and Schuermann. The record does not support a finding that staff are "unable without undue hardship to obtain the substantial equivalent of the [customer interviews identified by the testimony of Messrs. Godshall and Schuermann] by other means." *Id.* The Commission also believes that staff can obtain comparable information from other third-party interviewees, at least to the extent that the identity of those third parties has been provided by HW.[14] Accordingly, the Petition shall be granted in part.[15]

III. Additional Investigative Hearing Time Is Not Unduly Burdensome.

HW has not demonstrated that resumption of the investigational hearings is unwarranted. Directing the witnesses to reappear for further examination regarding sales and market shares does not necessarily raise any claim of privilege.[16] HW's does not dispute staff's right to question Mr. Schuermann regarding sales and market share information.[17] Rather, it objects to the resumption of Mr. Schuermann's investigational hearing on the grounds that staff had, and failed to avail themselves of, the opportunity to examine Mr. Schuermann regarding those subjects during the first 9½ hours (including breaks) of his investigational hearing on June 11. Petition at 18. HW claims that staff should not have a "second bite of the apple" because doing so would constitute an "abuse of process" and would be "presumptively unreasonable" in light of the 7-hour limitation on civil litigation depositions conducted pursuant to Fed. R. Civ. P. 30(d)(1). Petition at 18-19.

The mistake lies in HW's assumption that Commission investigational hearings should be governed, by analogy, by the limitations included within the Federal Rules of Civil Procedure. To the extent that the scope of the Commission's Rules of Practice regarding its conduct of investigations should be construed by analogy to some other legal activities, the

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[14] HW does not contest its obligation to identify the customers whose interviews were conducted by its managers at the request of counsel in anticipation of litigation. Godshall IH at 287:20-21. *See also Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) ("Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them.").

[15] Granting the Petition in part recognizes the validity of the privilege claim, but is not a limitation upon staff's right to ask questions regarding customer interviews, including without limitation issues related to: (1) the unprivileged details of otherwise privileged conversations, (2) issues related to the scope of privilege being claimed with respect to otherwise privileged conversations, or (3) the further examination of the factual bases for such claims of privilege. In any subsequent questioning, HW may assert further privilege claims, and staff may seek resolution of such claims through a district court enforcement action commenced by the FTC's General Counsel in accordance with the provisions of Rule 2.13, 16 C.F.R. § 2.13.

[16] Staff's request to resume the investigational hearings of the witnesses may be based in part on HW's assertion that Godshall Exhibit 10 is protected by claims of privilege and the work-product doctrine, but that does not provide a ground for prohibiting the resumed examination of these witnesses. It is not necessary to resolve whether that exhibit is privileged to dispose of the Petition.

[17] Petition at 17-18.

Supreme Court has observed that the appropriate analogy is to the grand jury, not to civil litigation.[18] Commission rules applicable to the conduct of investigational hearings do not include time limitations comparable to those cited by HW's Petition.[19] Rule 2.9(b)(6) vests the person conducting an investigational hearing with broad discretion to "take all necessary action[s] to regulate the course of the hearing;" that, of necessity, includes the discretion to adjourn and reconvene a hearing at a later date, especially when, as here, doing so will permit all parties to the hearing to become better informed regarding the scope and validity of any claimed rights to withhold particular evidence or testimony.

HW claims that the Commission should prohibit reconvening these adjourned investigational hearings because reconvening them will impose a "substantial burden and expense" for these witnesses. Petition at 3 and 18. HW cites no legal authority for its burdensomeness claim.[20] Accordingly, the Commission finds that the burdens claimed are not of a magnitude sufficient to justify the discretionary quashing of these subpoenas by the Commission.[21] That said, the Commission is aware that reconvening investigational hearings will impose some burden. The Commission encourages staff to consider reconvening these

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[18] *Fed. Trade Comm'n v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) ("[The FTC] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not. When investigatory and accusatory duties are delegated to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.").

[19] *See* Rules 2.8 (Investigational Hearings), 2.8A (Withholding Requested Materials), and 2.9 (Rights of Witnesses in Investigations), 16 C.F.R. §§ 2.8, 2.8A, 2.9.

[20] Furthermore, HW does not contest the relevance of the subject area to be covered in the resumed investigational hearing. Petition at 17-18 ("[HW] has never disputed or objected to Mr. Schuermann being questioned as to his views on 'sales and market shares with respect to any relevant product being developed by HeartWare.' [HW's] sole objection has been with respect to questions about the substance of the document (and communications surrounding the document) to the extent that such questions would divulge information protected by the work-product doctrine or the attorney-client privilege.").

[21] *See Fed. Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) ("Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."). HW has provided the Commission with no cognizable justification for why it should afford HW greater relief than it could obtain from a district court in a subpoena enforcement action initiated by the Commission.

investigational hearings at a location that will mitigate some of the travel burden for the witnesses.[22]

IV. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED THAT Commission staff may, subject to Petitioner's right to withhold information in accordance with the terms of the Commission's Rules of Practice and this Letter Ruling, reconvene the adjourned investigational hearings of Messrs. Godshall and/or Schuermann at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

Donald S. Clark
Secretary

[22] The Commission does not know whether staff will need to recall both witnesses in light of this ruling, or whether they ever intended to re-examine Mr. Godshall concerning sales and market shares; the latter point was unclear from the June 24 letter to HW's counsel.

Investigations

Updated: March 2021

U.S. Department of Justice

Antitrust Division

[Counsel for the Antitrust Division]
450 5th St., NW, Suite [X]
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****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

Hart-Scott-Rodino
Premerger notification Program

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[6] modifications with staff. 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, <u>and information shall be provided separately for</u>, each [name or list of product(s) or service(s) at issue].

D 13. The term "Relevant Area" means, <u>and information shall be provided separately for</u>, (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 <u>responsive to any Specification included in this Request</u> produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this Request. [<u>except</u> 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) <u>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</u>.

(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)

Preclosing Warning Letters

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

August 3, 2021

By Electronic Mail

Jane Doe
Law Firm XYZ
Washington, DC 20001

Re: *Company A Side/Company B Side Transaction*, FTC File No. XXX-XXXX

Dear Ms. Doe:

As you know, the Federal Trade Commission's Bureau of Competition has been conducting a nonpublic investigation to determine whether the above-referenced transaction may violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Although the waiting period will expire imminently, the Commission's investigation remains open and ongoing.

Please be advised that if the parties consummate this transaction before the Commission has completed its investigation, they would do so at their own risk. Any inaction by the Commission before the expiration of the waiting period should not be construed as a determination regarding the lawfulness of the transaction. Indeed, no such determination could be made unless and until the Commission completes its investigation. The parties cannot stop the investigation or avoid an enforcement action by consummating. To the contrary, and in keeping with its commitment to aggressive enforcement, the Commission may challenge transactions—before or after their consummation—that threaten to reduce competition and harm consumers, workers, and honest businesses.

Accordingly, even if the parties consummate the above-referenced transaction, the Commission may still take further action as the public interest may require, which may include any and all available legal actions and seeking any and all appropriate remedies.

Sincerely,

Holly Vedova
Acting Director
Bureau of Competition

Update:
New Proposed HSR Notification Changes

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review

New form will implement congressional requirements and modernize information collection

June 27, 2023

Tags: Competition | Bureau of Competition | Merger | Horizontal | Vertical | Hart-Scott-Rodino Act (HSR)

The Federal Trade Commission, with the concurrence of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, is proposing changes to the premerger notification form and associated instructions, as well as the premerger notification rules implementing the Hart-Scott-Rodino (HSR) Act.

The HSR Act and its implementing rules require the parties to certain mergers and acquisitions to submit premerger notification to the FTC and the Antitrust Division of the U.S. Department of Justice (the Agencies), which involves completing HSR Forms, and to wait a specified period of time before consummating their transaction.

The proposed changes to the HSR Form and instructions would enable the Agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period, which is typically 30 days. This initial competition review is critical for the agencies to identify transactions that require an in-depth investigation. During an in-depth investigation, the agencies determine whether the proposed transaction would violate the antitrust laws and, if so, to seek to block the proposed transaction and prevent harm to the American public.

Key proposals include:

- Provision of details about transaction rationale and details surrounding investment vehicles or corporate relationships.
- Provision of information related to products or services in both horizontal products and services, and non-horizontal business relationships such as supply agreements.
- Provision of projected revenue streams, transactional analyses and internal documents describing market conditions, and structure of entities involved such as private equity investments.
- Provision of details regarding previous acquisitions.
- Disclosure of information that screens for labor market issues by classifying employees based on current Standard Occupational Classification system categories.

These proposed changes also address Congressional concerns that subsidies from foreign entities of concern can distort the competitive process or otherwise change the business strategies of a subsidized firm in ways that undermine competition following an acquisition. Under the Merger Filing Fee Modernization Act of 2022, the agencies are required to collect information on subsidies received from certain foreign governments or entities that are strategic or economic threats to the United States.

The Notice will be published in the Federal Register later this week. Comments are due 60 days after publication. For more details about the Notice of Proposed Rulemaking, please read the related FAQ on the Federal Register Notice page.

The Commission vote to publish for public comment the Notice of Proposed Rulemaking containing proposed amendments to the HSR Rules was 3-0. FTC Chair Lina M. Khan was joined by Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya in a statement on the Commission's proposed amendments.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

Media Contact

Victoria Graham
Office of Public Affairs
415-848-5121

UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
Regarding Proposed Amendments to the
Premerger Notification Form and the Hart-Scott-Rodino Rules
Commission File No. P239300

June 27, 2023

Today, the Federal Trade Commission, with the collaboration and concurrence of the Department of Justice's Antitrust Division, is issuing a Notice of Proposed Rulemaking ("NPRM") to amend the Hart-Scott-Rodino ("HSR") Form and Instructions.[1] This marks the first time in 45 years that the agencies have undertaken a top-to-bottom review of the form (the "HSR Form") that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act.[2]

These proposed changes are designed to effectuate the goals that Congress laid out when crafting the HSR Act. Lawmakers passed that statute to solve a specific problem. While the Clayton Act had prohibited mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly," antitrust enforcers had struggled to block unlawful mergers prior to their consummation and before they could cause widespread harm. A primary reason was that businesses faced limited obligations to report their proposed mergers to antitrust enforcers and—critically—faced no restrictions on their ability to consummate the deal right away. "Midnight deals" were the norm, allowing companies to close deals quickly to avoid government detection. As a result, even once the FTC implemented a limited merger notification program in 1969,[3] the agencies were left seeking post-acquisition relief.

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[1] The Hart-Scott-Rodino Act of 1978 provides that the FTC, with the concurrence of the Assistant Attorney General, shall require parties to file notifications of transactions that "contain such documentary material and information . . . as is necessary and appropriate" to allow a determination "whether such acquisition may, if consummated, violate the antitrust laws" and to "prescribe such other rules as necessary and appropriate." 15 U.S.C. § 18a(d)(1), (2)(C).

[2] Congress determined that only deals over a certain size should be notified. The original valuation threshold was set at $15 million, but was raised to $50 million in 2000 and is adjusted every year to reflect changes in gross national product. Currently, transactions valued at $111.4 million or more must be reported. *See* Revised Jurisdictional Thresholds, 88 Fed. Reg. 5,004 (Feb. 27, 2023).

[3] In order to assist antitrust enforcers in obtaining preliminary injunctions, the FTC initiated a merger notification program on May 6, 1969. The program was expanded by resolutions in 1972, 1973, and 1974, but proved ineffective because the Commission could not require a waiting period. *See* Bill Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, Speech at the 35th Annual Corporate Counsel Institute, at nn.24-26 (Oct. 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

For lawmakers, the agencies' inability to halt mergers pre-acquisition contravened the prophylactic orientation of the Clayton Act, which was designed to stop monopolies in their incipiency, before they ripened into full-scale violations of the Sherman Act.[4] In practice, it would take on average five years for antitrust enforcers to obtain a court order requiring the unwinding of an illegal merger.[5] During this time, the acquiring firm would reap ill-gotten gains; the assets and management of the companies would become commingled; and key employees would have often left.[6] As a result, post-consummation merger enforcement was often a "costly exercise in futility."[7]

The HSR Act addressed this problem by creating for certain transactions a premerger notification regime that included two key requirements: (1) that firms proposing a merger submit information needed to assess preliminarily whether a deal may violate the antitrust laws, and (2) that these firms wait for a short period, typically 30 days, after filing before consummating the deal. As a result of these requirements, enforcers now have a short period after a merger filing comes in to determine whether it is likely to violate the antitrust laws and whether to open an in-depth investigation. Absent any further inquiry from the agencies during that period, the merging parties are free to consummate their deal after the initial waiting period expires, usually 30 days or less.

Much has changed in the 45 years since the HSR Act was passed. Deal volume, for example, has soared. The House Report for the HSR Act estimated that the statute would "requir[e] advance notice" for approximately "the largest 150 mergers annually."[8] Today, the agencies often receive more than 150 filings each month.[9] Transactions are increasingly complex, in both deal structure and potential competitive impact. Investment vehicles have also changed, alongside major transformations in how firms do business.

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[4] S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950) ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."). *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[5] H.R. REP. No. 1373, 94th Cong., 2d Sess., at 9 (1976) [hereinafter "House Report"]. The House Report on what would become the HSR Act recounted the saga of the El Paso Natural Gas merger challenge, which spawned seventeen years of litigation before the illegally-acquired firm was successfully divested. As the Report noted, "But the costs—to the firms, the courts and the marketplace—were immense." House Report at 10.

[6] House Report at 8 ("Yet by the time it wins the victory . . . it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged."). *See also* John Warren Titus, *Stop, Look and Listen: Premerger Notification Under Hart-Scott-Rodino Antitrust Improvements Act*, 1979 DUKE L. J. 355, 357 (1979).

[7] 122 Cong. Rec. 25051 (remarks of Rep. Rodino).

[8] House Report at 11.

[9] FTC, Premerger Notification Program, https://www.ftc.gov/enforcement/premerger-notification-program (last visited June 27, 2023). *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf; Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro Bedoya Regarding the HSR Premerger Notification (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy21hsrannualreportrksstatement.pdf.

The HSR form, meanwhile, has largely stayed the same. Against the backdrop of these vast changes, the information currently collected by the HSR form is insufficient for our teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws. Our staff are put in the position of expending significant time and effort to develop even a basic understanding of key facts. They must often rely on extensive third-party interviews and materials, information that can be challenging to obtain in 30 days. Much of the key information, moreover, is known only to the firms proposing the merger, such as the exact timeline of the proposed transaction, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave key gaps.

The lack of relevant information is especially problematic during periods of high merger activity, including the recent surge where the number of HSR reportable transactions doubled.[10] The Commission's recent 6(b) inquiry into unreported acquisitions by Apple, Amazon, Facebook (now Meta), Google, and Microsoft during 2010-2019 also highlighted the importance of collecting more information on the firm's history of acquisitions, including non-horizontal and small prior acquisitions.[11] The study captured how these firms structured acquisitions, the sectors they had identified as strategically important for acquisitions, and how these acquisitions figured into the companies' overall business strategies.[12]

The proposed revisions to the HSR form draw on learnings from these experiences. They seek to fill key gaps that our staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured. In addition, the current HSR form fails to capture information about key aspects of competition, such as labor markets or research and development activity. The NPRM proposes to address these and other shortcomings.

Congress also recently recognized that assessing risks to competition in today's economy will require collecting additional forms of information. The Merger Filing Fee Modernization Act of 2022 requires that merging firms provide data about any subsidies they have received from certain foreign governments and other entities of concern.[13] The NPRM proposes changes to fulfill this statutory requirement.

Many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world. For example, competition enforcers in other jurisdictions already require firms to provide narrative responses with information about business lines, the transaction's structure and rationale, business overlaps, and vertical and other relationships.

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[10] FY 2021 HSR reportable transactions were double those of FY 2020—3,520 versus 1,637.
[11] FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019 (Sept. 15, 2021), https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study; *see* Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.
[12] *See* Press Release, Fed. Trade Comm'n , FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021) and accompanying statements, https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.
[13] The Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459.

Accordingly, much of what would be required in the updated HSR form should be familiar to market participants and their counsel.

This NPRM reflects tremendous work by staff across the FTC, in particular from the Premerger Notification Office, the Office of Policy and Coordination, and the Office of Policy Planning, as well as from throughout the Bureau of Competition, the Office of General Counsel, and the Bureau of Economics. We are deeply grateful to this team for their diligent efforts, as well as to our partners at DOJ for their collaboration.

This proposal is designed to ensure that we can efficiently and effectively discharge our statutory obligations and faithfully execute on the mandate that Congress has given us. We look forward to the public comments.

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AXINN

Axinn Antitrust Insight: FTC Proposes Massive Revisions to HSR Filing Requirements Amounting to a Fundamental Shift in the U.S. Merger Review Regime to Mirror European and Chinese Systems

June 28, 2023

PRACTICE AREAS

Antitrust

On June 27, 2023, the FTC published for public comment the first major overhaul to the HSR form in decades. If adopted, the proposal would dramatically increase the amount of information that must be provided with an initial premerger notification, increasing both the burden on the parties preparing their forms and the likelihood that they will receive questions from the FTC/DOJ during the initial waiting period.

And because many of the new requirements are subjective and will necessarily have little prior precedent against which compliance can be judged, Staff will have a significant new tool to delay transactions by threatening to “bounce” the original filing for not adequately disclosing an overlap, a rationale for the transaction, etc. HSR practice does not currently allow the lengthy pre-notification process used in the European Union, United Kingdom, and other burdensome jurisdictions (from which the new rules draw inspiration) to ensure that filings will be deemed complete and in good order before they are formally submitted, so clouds of jeopardy and uncertainty will loom over all HSR filings if the amendments are adopted in their current form.

In accordance with a Congressional mandate, the proposed changes would require disclosure of economic subsidies from certain foreign governments and entities, including most notably China. The definition of “subsidy” is quite broad, including tax credits and government purchases, which will require parties to expand their due diligence into subsidy issues before making an HSR filing.

The proposed rules would also narrow parties’ flexibility to file HSR based only on early-stage letters of intent. Taken together, the proposed revisions to the HSR rules—if they survive judicial challenges—will require companies engaged in M&A to be prepared to marshal the required information in a timely fashion to “start the HSR clock.”

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The public comment period is scheduled to run until August 28, after which the FTC will have to respond to comments and publish a final rule, so it is unlikely that these changes will become effective until the fourth quarter of 2023 at the earliest.

Significant Proposed Changes to the HSR Form

Under the FTC's proposal, the HSR form would be significantly reorganized and expanded so as to require the upfront submission in all deals of a variety of information that is currently sought by the FTC or DOJ (collectively, the "Agencies") either in post-filing "voluntary access letters" or in Second Requests.

New Obligations to Submit Narrative Responses: For example, the revised HSR form would for the first time require the parties to submit narrative descriptions not only of their current business operations, but also of any horizontal overlaps between the parties and their respective strategic rationales for the transaction, requiring parties to take substantive positions on market definition at an early stage likely to have ramifications throughout the deal review process. Parties would also be required to disclose proactively a variety of specific information about (i) any overlapping product or service, including annual sales for the prior two years, (ii) contact information for their top 10 customers overall and in each "category" of such customers they identify, and (iii) a description of any licensing, non-compete, or non-solicitation agreements related to each such product. The form would also require similar disclosures of certain vertical relationships between the parties (or between one party and a competitor of the other) involving "any product, service, or asset (including data)" over the preceding two years. Notably, at least as currently proposed, those requirements would not be subject to any market share or revenue threshold, but rather would apply to any horizontal overlap or covered vertical relationship, no matter how small or competitively insignificant.

New Obligations to Provide Labor and Employment Information: In keeping with the Agencies' recent focus on labor market competition, the HSR form would also require significant new disclosures related to employment issues. For example, the form would require the parties to identify their respective headcount in each of their five largest "standard occupational classifications" (as defined by the Bureau of Labor Statistics) and, for the five largest such classifications in which *both* parties employ workers, break those headcounts out by "commuting zones" (as defined by the USDA's Economic Research Service). The form would also require the disclosure of certain pending or recently concluded enforcement actions brought by the Department of Labor, NLRB, or OSHA (whether or not related to the proposed transaction).

New Obligations to Identify Corporate Governance Information: Similarly, to support the Agencies' enforcement of Section 8 of the Clayton Act, which restricts interlocking directorates, and similar concerns under other statutes, the HSR form would for the first time require the parties to affirmatively list their directors, officers, and board observers for the prior two years (including, for buyers, those of entities that they control even if they have no relation to the proposed transaction). Both parties would also be required to identify any other companies for which those individuals serve, expect to serve, or have served within the prior two years as directors, officers, or board observers.

Additional Disclosure Obligations for Certain Transactions: The FTC proposal would also impose a number of specific disclosure obligations on specific classes of transactions. For example, filing persons would be required to disclose whether they have any existing defense or intelligence procurement contracts valued at $10 million or more, or any pending bids to obtain such contracts. The proposal would also make mandatory the currently voluntary question as to whether any non-U.S. competition regulator has been or is expected to be notified of the transaction (including the date of the notification or expected notification).

Modifications and Expansion of Certain Existing HSR Form Requirements: The FTC proposal would also increase disclosure requirements in a number of other areas covered by the current HSR form, such as by obligating the parties to provide a deal structure diagram and details/timing of key pre-closing conditions in addition to a narrative transaction description, requiring the identification of additional minority investors and holders of non-voting securities, increasing the geographic overlap information required for industries where competition tends to be in local or regional geographic markets (including the identification of franchisee locations where applicable), and requiring the inclusion of the "business name" along with legal entity names for subsidiaries. The proposal would also significantly expand the current requirement to disclose prior acquisitions in overlapping NAICS codes, by expanding the covered period from 5 years to 10 years, eliminating the exception for targets with assets and sales below $10 million, and requiring a response for the first time from acquired persons. The new proposed rules also require production of complete translations of any responsive foreign language documents. These changes would be partially offset by some reduction in the sales data currently required in Item 5 of the HSR Form (most notably the elimination of the requirement for manufacturing entities to provide data by NAPCS code).

Overall, the result of these changes is a step-change increase in the burden of preparing HSR forms, particularly for large acquirers or private equity funds that may need to gather and submit information for businesses with little or no relationship to the transaction at issue.

Expanded Document Filing Requirements

The FTC's proposal would also significantly expand the scope of documents that must be provided with an HSR filing beyond the current requirements of Items 4(c) and 4(d), in at least four ways.

First, the FTC would for the first time require the submission not only of transaction-related documents, but also of certain ordinary course competitive analyses. Specifically, it would require the submission of "all plans and reports" that were (i) provided to the Board of the acquiring or acquired entity (or any entity that it controls or is controlled by), (ii) prepared or modified within one year of the filing date, and (iii) that analyze "market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party" to the transaction, whether or not those documents themselves discuss or relate to the transaction. It would also require the production of any such semi-annual or quarterly reports that were provided to the acquiring or acquired entity's CEO, the CEO of any entity that controls or is controlled by such entity, or such CEOs' direct reports, again without regard to whether they relate to the transaction.

Second, the proposed rules would expand the current requirement to produce Item 4(c) or 4(d) documents that were prepared "by or for" an officer or director to also include documents prepared by or for the "supervisory deal team leads" for a given transaction, i.e., the individuals who "functionally lead or coordinate the day-to-day process for the transaction at issue," whether or not they are officers or directors.

Third, the proposed rules would expand Items 4(c) and 4(d) to require the production not only of final documents, but also of draft documents that were shared with an officer, director, or "supervisory deal team lead." This change will put a premium on the training of the often relatively junior personnel who typically prepare initial drafts of deal documents and are more likely to use careless or inaccurate terminology that may tend to attract investigatory interest.

Finally, the form would require the submission of any agreement between the acquiring person and any entity within the acquired person (whether or not part of the transaction) that is either in effect at the time of the filing or at any point in the preceding year. The FTC explains that as necessary to "reveal any business interactions or relationships that exist prior to the transaction and that may be affecting premerger competition," but it could create substantial burden, particularly for transactions between companies with multiple lines of business that may interact in unexpected (and benign) ways.

Restricting Filing Based on Letters of Intent

Under current law, parties can file an HSR as soon as they have any executed agreement, even if it is only a short, non-binding letter of intent. The FTC proposes to reduce the number of those early filings by requiring the submission of a "term sheet or draft agreement that reflects sufficient detail about the proposed transaction to allow the Agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical."

Requiring Document Preservation

Although it is certainly best practice under current law to issue a litigation hold when a Second Request is known to be imminent, parties do not today uniformly suspend their document retention policies for "routine" HSR notifications that do not appear likely to raise antitrust concerns. The FTC's proposed rules, however, would add an affirmative obligation to do so, requiring the signatory to the HSR to certify that the company has taken "the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period." Related to that requirement, the FTC also proposes to require each HSR filing to "identify and list all communications systems or messaging applications on any device . . . that could be used to store or transmit information or documents related to its business operations" (and implicitly ensure that any such systems, including IM systems, don't delete business-related documents during the waiting period).

Foreign Subsidy Reporting

Last year, Congress enacted a requirement that parties making HSR filings disclose whether they had received subsidies from a "foreign entity of concern" and directed the FTC, in consultation with the DOJ, CFIUS, and other relevant agencies, to publish rules to make that requirement effective. The FTC's proposal would apply to entities that receive a "subsidy" (as that term is defined in the Tariff Act to broadly include a range of financial contributions, including tax credits or exemptions) from a number of countries and entities that "threaten U.S. strategic or economic interests," including the governments of China, Russia, Iran, or North Korea or any agency or arm of those states. It then requires three disclosures:

First, filing parties would have to describe any such subsidy received in the last two years, based on their knowledge and belief following good faith diligence; the FTC invited public comment on whether there should be a de minimis exception to that requirement, but has not yet proposed such a limit.

Second, parties would also have to disclose which of their products are produced in any of those countries of concern and are subject to "countervailing duties" in the U.S. or any other jurisdiction.

Third, parties would have to identify which of their products, based on their knowledge or belief, are produced in whole or in part in a covered country that is currently the subject of an investigation in any jurisdiction for potential countervailing duties.