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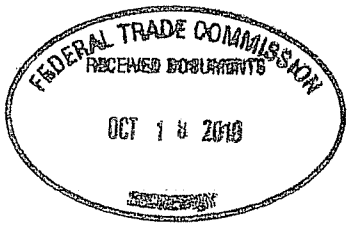

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October 18, 2010

VIA HAND DELIVERY

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

Re: HSR Form Changes --
Comments to Proposed Rules

Dear Mr. Clark:

Set forth herein are comments in response to the Notice of Proposed Rulemaking (the "Notice") concerning 16 C.F.R. Sections 801, 802, and 803, and related proposed amendments to the Premerger Notification and Report Form and associated Instructions, issued by the Federal Trade Commission (the "FTC") on August 13, 2010, and published in the *Federal Register* on September 17, 2010.

Our comments address concerns raised by the proposed new Item 4(d). In particular, we believe that the scope of proposed Items 4(d)(i) and 4(d)(ii) is overbroad and would impose an undue burden on reporting persons that, for the vast majority of reportable transactions, would significantly outweigh the potential benefit to the FTC and the Antitrust Division of the Department of Justice ("DOJ," and together with the FTC, the "Agencies").

For the reasons discussed below, we believe that proposed Items 4(d)(i) and 4(d)(ii) should be omitted from the final rules or, if not omitted, modified to limit their application.

Proposed Item 4(d)(i) is Overbroad And Should Be Omitted or Modified

In the Notice, the FTC proposes to require all reporting persons to "[p]rovide all offering memoranda (or documents that served that function) that reference the acquired entity(s) or assets. Documents responsive to this item are limited to those produced up to two years before the date of filing."

We believe that proposed Item 4(d)(i) is overbroad in a number of respects. First, unlike the existing Item 4(c), which is limited to documents "prepared by or for an officer or director," *any* employee of

the reporting person may qualify as a document custodian, thereby expanding significantly search obligations.

Second, the documents that would qualify as responsive to proposed Item 4(d)(i) are not limited to documents that evaluate or analyze the specific target of the reported transaction, much less limited to the relationship between the target and the acquiring person or a market in which the acquiring person competes. Rather, a document may qualify if it simply "references" the target. As a result, the document collection burden for reporting persons would be onerous without providing the Agencies with the benefit of an executive-level analysis of the proposed transaction.

Third, the vast majority of notified transactions raise no material competitive concerns. Thus, the substantial increase in burden and cost that would be imposed by proposed Item 4(d)(i) is not justified by the additional insight into the relevant competitive landscape that would be achieved by requiring the documents responsive to proposed Item 4(d)(i).

1. Proposed Item 4(d)(i) Is Not Limited to Documents "Prepared By Or For An Officer or Director"

Unlike Item 4(c), the proposed Item 4(d)(i), which would require the collection of "offering memoranda (or documents that served that function)," does not limit the scope of potential document custodians to officers and directors. Consequently, the obligation to review files and collect responsive documents may extend to all employees of a reporting person. That obligation would raise significant concerns for a number of reasons.

First, as written, the reporting person may need to review the files of all employees to respond to Item 4(d)(i). Many transaction agreements provide a limited time to complete the HSR process (parties sometimes have 5 business days or less to complete the process) and are time-sensitive, with the expiration or termination of the HSR waiting period often constituting the last condition to closing. Particularly in light of these timing considerations, the comprehensive document-review process that may be required by proposed Item 4(d)(i) would unduly burden the reporting persons.

Second, many proposed transactions are notified at a stage at which the transaction remains confidential, not just to the public, but to many employees of a reporting person as well. Satisfying proposed Item 4(d)(i) may jeopardize such confidentiality in many, if not virtually all, such transactions.

2. Proposed Item 4(d)(i) is Overbroad in its Subject Matter

Proposed Item 4(d)(i) uses ambiguous and overbroad language, as it requires the submission of any offering memoranda (or documents that served that function) that "reference" the acquired entity(s) or assets. As written, any such document that includes only the name of the target of a notified transaction would appear to fall within the scope of proposed Item 4(d)(i). All such documents would

need to be gathered and supplied, even if they have no meaningful evaluation or analysis of the target as it relates to the acquiring person or a market in which the acquiring person competes.

3. For the Vast Majority of Notified Transactions, The Costs Associated With Compliance With Proposed Item 4(d)(i) Would Outweigh The Benefit to the Merger Review Process

The vast majority of notified transactions do not raise any substantive antitrust concerns. If proposed Item 4(d)(i) were to be implemented, a significant burden (in both time and cost) would be imposed on reporting persons even where no competitive concerns are present.

The current Item 4(c) obligation provides sufficient insight into the competitive landscape to allow the Agencies to reach a conclusion as to the likely competitive effects. Given that backdrop, the substantial additional burden of proposed Item 4(d)(i) is not warranted.

4. An Alternative Proposal For Item 4(d)(i)

In our view, proposed Item 4(d)(i) should be omitted from the final rules. If proposed Item 4(d)(i) is not omitted from the final rules, we suggest that Item 4(d)(i) be narrowed in the following ways:

a. limit Item 4(d)(i) to those notified transactions that report an overlapping NAICS code;

b. limit Item 4(d)(i) to offering memoranda (or documents that served that function) generated in the past two years that are in the files of "officers or directors" who are aware of the transaction at the time of filing the Notification and Report Form; and

c. limit Item 4(d)(i) to offering memoranda (or documents that served that function) generated in the past two years that relate to a proposed sale of the target that include an evaluation or analysis of the target's position in relation to the acquiring person or a market in which acquiring person competes.

Proposed Item 4(d)(ii) is Overbroad And Burdensome And Should Be Omitted or Modified

Unlike Item 4(c), proposed Item 4(d)(ii) would require the production of documents generated in connection with matters other than the notified transaction. Proposed Item 4(d)(ii) would require production of "studies, surveys, analyses, and reports prepared [in the last two years] by investment bankers, consultants, or other third-party advisors, if they were prepared for an officer or director . . . for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and that also *reference* the acquired entity(s) or assets" [emphasis added], whether or not related to the notified transaction.

This proposal has deficiencies that are similar to those identified above in connection with proposed Item 4(d)(i). First, proposed Item 4(d)(ii) may compromise the confidentiality of the transaction to the extent officers or directors who are not aware of the notified transaction would need to review their files for responsive documents, which likely would be required given the statement that responsive documents need not relate to the transaction.

Second, proposed Item 4(b)(ii) would expand the document search to collect documents that (i) are unrelated to the notified transaction, and (ii) do not purport to evaluate or analyze the *target* with respect to competition, but simply "reference" the target. That expanded search would impose a substantial increase in costs (in time and money) associated with HSR Act compliance, even where the search obligation is limited to "officers or directors."

Third, the vast majority of notified transactions raise no material competitive concerns. Proposed Item 4(d)(ii) does not require the evaluation or analysis to relate to the competition between the target and the acquiring person or to a market in which the target and the acquiring person compete. Accordingly, for the vast majority of reported transactions, the proposed Item 4(d)(ii) imposes a substantial increase in burden and cost that is not justified by additional insight into the relevant competitive landscape.

To the extent a rule requiring documents generated outside the context of the notified transaction is necessary, that rule should be limited so that: (i) it applies only to notified transactions that involve a competitive "overlap" between the parties; (ii) it does not compromise the confidentiality of a proposed transaction; and (iii) the documents obtained evaluate or analyze the target in relation to the acquiring person or in a market in which the acquiring person competes.

1. Proposed Item 4(d)(ii) Is Not Limited to Documents In the Files of Persons Knowledgeable About the Notified Transaction

As discussed above, transactions are often notified under the HSR Act while still confidential, even as to a significant number of employees of the reporting person. While such confidentiality is not jeopardized under the current Item 4(c) (since Item 4(c) is limited to documents created in connection with the reported transaction), the confidentiality concern raised by proposed Item 4(d)(ii) is substantial. As proposed, the item may require all officers and directors (not just those involved in the negotiation and/or assessment of the reported transaction) to review their files for documents generated in connection with other transactions or commercial initiatives unrelated to the notified transaction.

2. Proposed Item 4(d)(ii) Is Overbroad In Its Subject Matter

Proposed Item 4(d)(ii) would reach any evaluative or analytical document (which the Agencies have interpreted broadly) generated within the prior two years by a third-party advisor so long as the document "references" the target. Any document that evaluates an enumerated topic and simply mentions the target would appear to respond to proposed Item 4(d)(ii), even if the document does not evaluate or analyze the target in relation to the acquiring person or a market in which the acquiring

person competes. Proposed Item 4(d)(ii) thus would require the review and possible production of documents that would be irrelevant to a competitive assessment of the target or the market(s) in which the target and acquiring person compete.

The expanded document collection obligation that would result from proposed Item 4(d)(ii) would also substantially extend the timeline associated with HSR compliance, which, as discussed above, would burden many time-sensitive transactions.

3. For the Vast Majority of Notified Transactions, The Costs Associated With Compliance With Proposed Item 4(d)(ii) Would Outweigh The Benefit to the Merger Review Process

The vast majority of notified transactions do not raise any substantive antitrust concerns. If proposed Item 4(d)(ii) were to be implemented, a significant burden (in both time and cost) would be imposed on reporting persons even where no competitive concerns are present.

The current Item 4(c) obligation provides sufficient insight into the competitive landscape to allow the antitrust regulators to reach a conclusion as to the likely competitive effects. Given that backdrop, the substantial additional burden of proposed Item 4(d)(ii) is not warranted.

4. An Alternative Proposal For Item 4(d)(ii)

In our view, proposed Item 4(d)(ii) should be omitted from the final rules. If proposed Item 4(d)(ii) is not omitted, we suggest that Item 4(d)(ii) be narrowed in the following ways:

a. limit the Item 4(d)(ii) obligation to those notified transactions that report an overlapping NAICS code;

b. limit Item 4(d)(ii) to third-party documents in the files of officers or directors who are aware of the notified transaction at the time of the filing of the Notification and Report Form; and

c. limit Item 4(d)(ii) to third-party documents that evaluate or analyze the target in relation to the acquiring person or a market in which the acquiring person competes.

In the event you would like to discuss the foregoing, please contact Theodore C. Whitehouse at (202) 303-1118 or Jonathan J. Konoff at (212) 728-8627.

Respectfully submitted,

Theodore C. Whitehouse