JOINT SUBMISSION

of

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ALCOA INC.,
BANK OF AMERICA CORPORATION,
BB&T CORPORATION,
CONOCOPHILLIPS,
HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED,
IAC/INTERACTIVECORP,
JPMORGAN CHASE & CO.,
NUSTAR ENERGY L.P.,
NYSE EURONEXT,
PPG INDUSTRIES, INC.,
QWEST COMMUNICATIONS INTERNATIONAL INC.,
SIGMA-ALDRICH CORPORATION,
THE VALSPAR CORPORATION,
UNITED RENTALS, INC.,
UNITED TECHNOLOGIES CORPORATION,
VALERO ENERGY CORPORATION and
WELLS FARGO & COMPANY

to the

FEDERAL TRADE COMMISSION

for the

HSR FORM CHANGES PROJECT

OCTOBER 18, 2010

JOINT COMMENTS TO THE FEDERAL TRADE COMMISSION ON PROPOSED AMENDMENTS TO THE HART-SCOTT-RODINO ACT PREMERGER NOTIFICATION AND REPORT FORM

October 18, 2010

On behalf of Wachtell, Lipton, Rosen & Katz and the undersigned companies, we submit the following comments in response to the Federal Trade Commission's proposed amendments to the Hart-Scott-Rodino Premerger Notification Rules, the Premerger Notification and Report Form (the "HSR Form"), and the HSR Form's associated Instructions, published on August 13, 2010.

We applaud the Commission for its efforts to streamline the HSR Form. HSR practitioners have long considered certain requirements in the HSR Form obsolete (e.g., listing individual securities filings of public companies in Item 4(a)) or likely to yield information of little or no value in analyzing the potential competitive impact of transactions (e.g., providing long-outdated revenue data in Items 5(a) and 5(b)(i)), and several of the proposed revisions will meaningfully reduce the burden on filing companies without impacting the antitrust agencies' ability to screen mergers for potential competitive concerns.

We believe that proposed new Item 4(d), however, runs counter to this streamlining effort and, if adopted in its current form, will substantially increase the time and resources required to prepare HSR filings. That increased burden will be most acute with respect to proposed Items 4(d)(i) and 4(d)(ii), which would require — for the first time in 32 years of HSR practice — production of general business documents not prepared for the purpose of evaluating or analyzing the transaction notified.[1] These proposed Items would constitute a significant step toward converting HSR filings into partial Requests for Additional Information and Documentary Material ("Second Requests"), despite the fact that 95.5% of all notified transactions are so competitively benign as to warrant no further investigation.[2] Given that the vast majority of notified transactions do not pose any competitive concern, proposed Item 4(d)'s increased burden on all notifying parties would be highly disproportionate to the probative value of the documents at issue. Moreover, proposed Item 4(d) may disrupt premerger notification practice to the extent it diverges from three decades of carefully considered interpretations by the Commission's Premerger Notification Office ("PNO") regarding the scope of Item 4(c) of the HSR Form. All these concerns are exacerbated by a pending Senate bill that would amend the HSR Act's confidentiality provision to require the sharing of HSR Forms — and all the documents submitted with them — with the Government Accountability Office.

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[1] Current Items 4(a) and 4(b) require production of certain securities filings and financial statements, but those documents are easily identifiable and usually available on the internet.

[2] *See* Federal Trade Comm'n and U.S. Dep't of Justice, *Hart-Scott-Rodino Annual Report*, Fiscal Year 2009, at 6, available at http://www.ftc.gov/os/2010/10/101001hsrreport.pdf.

We respectfully request that the Commission consider these comments and reevaluate the need for proposed Item 4(d). If the Commission is not inclined to exclude Item 4(d) entirely, we request (1) the limitation of proposed Item 4(d)(i) to offering memoranda prepared for the purpose of evaluating or analyzing the acquisition and shared with prospective purchasers, (2) deletion of proposed Item 4(d)(ii), and (3) explicit application of the PNO's relevant Item 4(c) interpretations to proposed Items 4(d)(i) and 4(d)(iii). Our concerns regarding proposed Item 4(d) are explained more fully below.

DISCUSSION

Proposed Items 4(d)(i) and 4(d)(ii) add expansive new categories of documents that filing persons must collect, review, and submit with all HSR filings, including documents created in the ordinary course of business rather than for the purpose of evaluating or analyzing the proposed acquisition.

Item 4(d)(i)

Proposed Item 4(d)(i) calls for "all offering memoranda (or documents that served that function) that reference the acquired entity(s) or assets" prepared within the past two years. On its face, this proposal would not seem controversial, but as described and interpreted in the Commission's Statement of Basis and Purpose ("SBP"), proposed Item 4(d)(i) is in fact extraordinarily broad in scope. This breadth results from language in the SBP that seeks to differentiate proposed Item 4(d)(i) from all the scope limitations in existing Item 4(c) by requiring production of regular course of business documents "regardless" of whether the documents were prepared in connection with the current transaction, whether they were prepared by or for an officer or director, or whether they discuss any competition-related topic. Moreover, documents that serve the same function as an offering memorandum — broadly described to include even regular business documents if a seller "circulates" them to prospective buyers — must also be submitted with HSR filings. This language would distort the term "offering memoranda" as it is commonly understood in the business community, changing it from a transaction-specific marketing presentation to potentially any preexisting business document shared by the seller with a buyer in due diligence.[3]

Aside from a two-year time limit, the only scope limitation articulated by the SBP is that covered documents must "contain some reference to the acquired entity(s) or assets." But as proposed Item 4(d)(i) "is intended to capture documents from both the buyer and the seller," the foregoing scope limitation would be meaningless in a merger or other transaction in which the entire target company or its voting securities are up for sale. We believe one may infer that proposed Item 4(d)(i) reaches only those target company documents "circulate[d]" to prospective buyers.[4] Even assuming such an implicit scope limitation, however, proposed Item 4(d)(i) may

[3] We note that the SBP states that any "study, survey, analysis or report" could be responsive to proposed Item 4(d)(i). As the quoted language appears nowhere in the Instruction for proposed Item 4(d)(i), we are concerned that the PNO might broadly interpret proposed Item 4(d)(i) consistent with Item 4(c), further robbing the term "offering memoranda" of any limiting principle. To avoid such confusion, the language "study, survey, analysis or report" should be replaced with "offering memorandum" in the SBP.

[4] The SBP raises the additional interpretive question of whether proposed 4(d)(i) is intended to reach documents that were provided to other prospective buyers in prior transactions or prior iterations of the notified

nonetheless encompass all the ordinary course documents and financial data that target companies typically place in data rooms or otherwise share with buyers for due diligence purposes.

Production of such ordinary course documents is not supported by the basis articulated for proposed Item 4(d)(i) in the SBP. In particular, the SBP states

> *When a company is preparing to put itself up for sale, it will often draft or hire a third party to draft* a confidential information memorandum that lays out the details of the company for prospective buyers. Such offering memoranda are extremely valuable to the Agencies in their initial review.[5]

We do not disagree that documents drafted specifically for the purpose of selling a company that "lay[] out the details of the company for prospective buyers" might be valuable to the antitrust agencies in screening mergers, but that in no way supports the production of ordinary course of business documents provided in due diligence. To the contrary, producing such material with every HSR filing would inundate the agencies with vast amounts of irrelevant documents and financial data.

Finally, we disagree with the SBP's statement that "[m]ost parties already submit these [documents] along with their HSR Filings and proposed Item 4(d)(i) . . . should not create any additional burden for them or substantial additional burden for others." Filing parties currently do not submit offering memoranda that were *not* prepared in connection with the notified transaction and do *not* contain any "4(c) material." While it is relatively easy for filing parties to identify and submit true offering memoranda prepared to sell a company, compliance with proposed Item 4(d)(i) as interpreted in the SBP will impose significant additional burdens on all HSR filers. Consistent with the SBP's articulation of this proposed subpart's purpose, we believe Item 4(d)(i) should only call for offering memoranda prepared for the purpose of evaluating or analyzing the transaction and which were shared with prospective buyers.

Item 4(d)(ii)

Similarly, proposed Item 4(d)(ii) requires the production of all documents prepared in the past two years by any third-party advisor, including but not limited to investment banks and consultants,[6] for an officer or director of a filing party, that discuss competition-related topics and "also reference the acquired entity(s) or assets," whether or not the documents were prepared in connection with the proposed transaction. The addition of such documents created for a company in the ordinary course of business might require filing parties to search *all files of every officer and director of the filing company*, regardless of his or her involvement in,

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transaction during the previous two years. Again, one might interpret the proposal to be limited implicitly to the notified transaction, but the language in the SBP to the contrary would undermine such a reading.

[5] *SBP*, at 22 (emphasis added).

[6] We assume that proposed Item 4(d)(ii) would only require the production of documents prepared by third-party advisors retained by a filing person and would not cover unsolicited materials received from investment banks, consultants, information services or any other third party that was not retained by a filing person.

or knowledge of, the subject transaction — a markedly different exercise than that currently required by Item 4(c).

Proposed Item 4(d)(ii)'s requirement that filing parties submit documents not prepared for the purpose of evaluating or analyzing the notified transaction is not consistent with the purpose of proposed Item 4(d) articulated by the SBP, in which the FTC states that "[c]ertain categories of documents typically *created in the course of a transaction* are quite useful for the Agencies' initial substantive analysis of transactions . . . . The Commission thus proposes new Item 4(d) to enumerate these documents and require their submission with the Form."[7] Similarly, in justifying proposed Item 4(d)(ii), the SBP explains that "[i]nvestment bankers, consultants or other third party advisors are often *active at all stages of a transaction, generating* due diligence, valuation and other broad categories of materials. Some of these materials contain competition-related content and can be invaluable to the Agencies in their initial review of the potential competitive impact of a transaction."[8] Focused as they are on the "transaction," these statements do not support a requirement to submit broad categories of third-party materials created in the ordinary course of business for purposes other than evaluating or analyzing the notified transaction.

If adopted, this requirement could convert a simple, transaction-focused notification into a burdensome document production, contrary to Congress's intent in drafting the HSR Act.[9] While the SBP contends that "[m]any parties already submit such competition-related third party materials along with their HSR Filings and proposed Item 4(d)(ii) . . . should not create substantial additional burden for them or substantial additional burden for others," we believe that filing parties generally submit only competition-related materials created by third-party advisors *for the purpose of evaluating or analyzing the transaction* — i.e., 4(c) documents. Even if a few filing parties occasionally produce additional documents not directly required by current Item 4(c) — presumably pursuant to 16 C.F.R. § 803.1(b) — that in no way reflects on the burden of requiring filing persons to conduct a comprehensive document production as contemplated by proposed Item 4(d) and certify to its completeness. By eliminating the requirement that responsive documents be prepared for purposes of analyzing or evaluating the notified transaction, this Item will dramatically broaden the scope of the parties' document search and production and create a substantial additional burden for all HSR filers.

Contrary to the SBP's assertions, the burdens created by proposed Item 4(d)(ii) will be onerous in most transactions, and especially burdensome in time-sensitive transactions, including mergers that present no competitive overlap or pose no conceivable competitive concern. The burden would be especially onerous for large financial institutions, which may have responsive documents held in numerous business units, including lending, credit analysis

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7 *SBP*, at 22 (emphasis added).

8 *Id*. at 23 (emphasis added). We note that such documents, if prepared for an officer or director, are already responsive to current Item 4(c).

9 In debating the HSR Act, Rep. Rodino asserted that the purpose of the HSR Act was to provide the Agencies with "advance notice, together with specific economic data *on the merger*." *See* H.R. Rep. 1373 (Jul. 28, 1976), at 11 (emphasis added).

and equity research departments that have nothing to do with the notified transaction.[10] Searching all those business units would be extremely difficult, as they are typically separately firewalled to protect the confidentiality of client information and avoid conflicts of interest.

The costs associated with the requirement that all parties produce these materials at the outset with their HSR filings appear to vastly outweigh any benefits in terms of more effective merger enforcement. Current agency practice is to issue highly targeted voluntary requests for additional documents and information during the initial waiting period if there is any reason to believe that a Second Request may be warranted, and notifying parties have strong incentives to comply promptly in order to avoid a Second Request. Those targeted voluntary requests are typically focused on particular product overlaps and are much narrower and less burdensome — in terms of both search scope and the type of documents requested — than proposed Items 4(d)(i) and Item 4(d)(ii). For instance, such voluntary requests would almost never encompass the target's entire due diligence data room, or require a company-wide search of all officers and directors to find any document referring to the target company or its assets. Through this focused and judiciously applied process, both agencies have determined that more than 95% of all notified transactions do not warrant the burdens and expenses of a Second Request.[11] In view of this long-standing agency practice, we perceive no policy justification for applying the open-ended document requests of proposed Items 4(d)(i) and 4(d)(ii) to any HSR filing, much less to the 95% of transactions that are competitively benign.

Imposing these document production burdens would also be contrary to Congress's intent that "the premerger data sought by the Government can be compiled rapidly."[12] The legislative history of the HSR Act shows that Congress did not intend to impose burdensome document searches in connection with Second Requests, contemplating that "the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them," such that "lengthly [*sic*] delays and extended searches should consequently be rare."[13] If extended searches should be an exception at the Second Request stage, they certainly should not be the rule at the notification stage.

Aside from the burden and expense of gathering, reviewing and producing large volumes of electronic and paper documents, the obligation to search personnel who had no prior knowledge of, or connection with, the notified transaction will significantly delay many HSR filings, since most companies, fearing leaks and insider-trading risks, will not initiate such company-wide document searches until a transaction is publicly announced. Compliance with proposed Item 4(d)(ii) will be especially onerous, and perhaps impossible, for parties filing on letters of intent or contemplating unsolicited tender offers, as in those circumstances HSR filings

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[10] For example, a financial institution's lending arm may use third-party analyst reports to perform credit analyses on a potential borrower that later becomes an acquisition target of the financial institution's private equity affiliate. Similarly, a financial institution's equity research group, trust operations, or investment advisory unit may use third-party industry surveys in the analysis of a company that is later acquired by the financial institution or its private equity affiliate.

[11] *See* Federal Trade Comm'n and U.S. Dept. of Justice, *Hart-Scott-Rodino Annual Report*, Fiscal Year 2009, at 6, available at http://www.ftc.gov/os/2010/10/101001hsrreport.pdf.

[12] 122 Cong. Rec. 30,868 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino), at 30,876.

[13] *Id*.

are often made prior to or immediately upon public announcement of the transaction or commencement of the tender offer.[14] Requiring parties to exigent, confidential, or critically time-sensitive transactions to delay their HSR filings in order to conduct 4(d)(ii) document searches will impede merger and acquisition activity without achieving the desired benefits articulated in the SBP.

In light of the foregoing, we believe that at most the HSR Form should only call for third-party materials discussing competition-related topics prepared for officers or directors *in connection with the notified transaction* — documents that are already responsive to current Item 4(c). As a result, we urge the Commission to delete Item 4(d)(ii) from the proposed amendments.

Applicability of Prior PNO Interpretations

We note that since 1978 the PNO has developed an extensive body of interpretative advice for filing companies regarding the requirements of Item 4(c) of the HSR Form. As the PNO's former Assistant Director once stated, "apparently applying the instruction is more difficult than anyone fathomed."[15] As much of the language in current Item 4(c) and proposed Item 4(d) is identical, many of the existing Item 4(c) interpretations will be directly relevant to the interpretation of proposed Item 4(d) — e.g., the treatment of privileged documents,[16] the definition of officers and directors,[17] the responsiveness of draft documents,[18] the treatment of documents prepared for widespread distribution, such as analyst reports or industry surveys,[19] and the treatment of documents created in connection with a previously contemplated transaction different from the one ultimately agreed to.[20] To ensure consistency

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[14] Delaying cash tender offers would directly contradict the intent of accelerated waiting periods in the HSR Act. *See* 15 U.S.C. § 18a(b)(1)(B). Similar timing and burden concerns would arise in bankruptcy transactions and FDIC distressed sales, where quick action is also essential. *Cf.* 11 U.S.C. § 363(b)(2); Dodd-Frank Wall Street Reform and Consumer Protection Act, § 210(a)(1)(G), Pub. Law 111-203.

[15] Prepared Remarks of Marian R. Bruno, *Hart-Scott-Rodino at 25*, Amer. Bar Ass'n, "Mergers & Acquisitions: Getting Your Deal Through the New Antitrust Climate," June 13, 2002, available at http://www.ftc.gov/speeches/other/brunohsr25.shtm. *See also* Marian R. Bruno et al., *Locating and Identifying Item 4(c) Documents*, Antitrust, Spring 2002, at 46 ("Item 4(c) . . . has probably generated more debate than any other part of the Form. . . . The ambiguity of the language in the instruction lends itself to varying interpretations, frequently making difficult an unequivocal determination of what does and does not qualify as a 4(c) document.").

[16] *See* 16 C.F.R. § 803.3(d); Federal Trade Comm'n, Formal Interp. 8, Sept. 13, 1979, available at http://www.ftc.gov/bc/hsr/frmlintrps/fi08.htm; *see also* ABA Section of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007), Interp. 256. We note that the proposed Instructions to Item 4(d) do not expressly indicate that filing parties may withhold or redact documents based on a claim of privilege. While 16 C.F.R. § 803.3(d) would apply to Item 4(d), thus allowing the filing parties to withhold or redact privileged documents that are responsive to Item 4(d), we believe that the Instructions could be improved by adding to proposed Item 4(d) the same "Note" that appears in the Instructions to Item 4(c).

[17] *See* ABA Section of Antitrust Law, Premerger Notification Practice Manual (4th ed. 2007), Interp. 257.

[18] *See* Marian R. Bruno et al., *Locating and Identifying Item 4(c) Documents*, Antitrust, Spring 2002, at 48.

[19] *Id.* at 49.

[20] *Id.*

and avoid confusion, we respectfully request that the Commission and its staff confirm the applicability of those interpretations to proposed Items 4(d)(i) and 4(d)(iii).[21]

Confidentiality

Finally, the broadened document production requirements of all parts of proposed Item 4(d) deserve careful consideration in light of S.2991, a bill recently reported out of Senate committee that would amend the HSR Act's confidentiality provisions to allow the Government Accountability Office ("GAO") access to HSR filings and the documents accompanying those filings.[22] If S.2991 becomes law and the Commission adopts proposed Item 4(d), large volumes of highly confidential, competitively sensitive documents describing the plans and strategies of filing parties would be made available to the GAO. Given the uncertainty surrounding HSR confidentiality rules in the future, we believe the Commission should undertake with caution any effort to expand the documentary scope of such filings.

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We thank the Commission for considering these comments. Please do not hesitate to contact David Neill, Nelson Fitts or Franco Castelli at Wachtell, Lipton, Rosen & Katz (212-403-1000) if you have any questions.

Respectfully submitted,

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NuStar Energy L.P.
NYSE Euronext
PPG Industries, Inc.
Qwest Communications International Inc.
Sigma-Aldrich Corporation
The Valspar Corporation
United Rentals, Inc.
United Technologies Corporation
Valero Energy Corporation
Wells Fargo & Company

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[21] This request would also extend to proposed Item 4(d)(ii) should the Commission determine not to delete it.

[22] The text of S.2991, which was reported by the Committee on Homeland Security and Governmental Affairs on July 28, 2010, is available at http://www.wlrk.com/docs/S2991-McCaskillSubstituteAmendment-2.pdf.