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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

**RE: "HSR Form Changes"; Comments Submitted to the Federal Trade Commission Regarding Proposed Amendments to the Hart-Scott-Rodino Premerger Notification Rules, the Premerger Notification and Report Form, and Associated Instructions**

We are writing on behalf of Cooley LLP to provide comments to the Federal Trade Commission ("FTC") regarding the proposed amendments to the Hart-Scott-Rodino Premerger Notification Rules, 16 C.F.R. §§ 801 to 803 (the "HSR Rules"), the Premerger Notification and Report Form (the "HSR Form"), and the associated Instructions (the "HSR Instructions"), published in the Federal Register at 75 Fed. Reg. 571100-44 (Sept. 17, 2010) ("Notice of Proposed Rulemaking").

Cooley LLP is a law firm of approximately 650 attorneys with nine offices across the country and a history of representing companies bringing breakthrough products and technologies to market. We regularly advise clients on proposed transactions, and during the last 10 years have submitted more than 280 Hart-Scott-Rodino filings. Our comments are submitted based on our experience working with clients and preparing HSR filings. The comments are not submitted on behalf of any client of the firm.

We appreciate the opportunity to comment on the proposed amendments, and want to acknowledge the considerable thought and effort that the FTC staff has put into drafting them. The proposed amendments include important changes to the HSR filing system, many of which will simplify reporting and lessen the burdens on filing parties, eliminating the need to submit documents and information that is of little use to the FTC and Department of Justice ("DOJ") in reviewing filings. In particular, we believe that eliminating the need to produce detailed information on the number and classes of voting securities to be acquired, outdated revenue data from the last Census base year, and balance sheets, will limit the burden on companies preparing HSR forms and are marked positive changes.

On the other hand, certain of the proposed provisions – as drafted – will impose substantial additional burdens for many filers and, we believe, will not materially improve the staff's ability to

identify transactions warranting further review. We urge the Commission to modify these provisions, discussed below, so as to limit the substantial additional demands imposed on filing parties.

We focus our comments in particular on proposed Items 4(d)(i) and 4(d)(ii) which introduce new categories of documents that all filing parties will be required to submit.[1] The scope of the additional burdens imposed on filing parties by these proposed Items does not appear to have been fully weighed by the Commission in making its proposals.

We note that when transactions raise substantive issues, the staff can and does ask the filing parties for additional documents and information, either informally during the initial HSR waiting period or through a Second Request. Additional blanket requests in the HSR Form impose a burden on all filing parties, including in transactions that raise no substantive antitrust issues. Because the vast majority of transactions raise no issues, and because all filers will bear the cost of the new requirements, we believe that the Commission should consider not only whether the new information will be helpful but whether (given the information currently provided by filing parties or available through public sources) the new requests will significantly improve staff's ability to detect anticompetitive transactions that would otherwise not be identified.

> ***Item 4(d)(i): Provide 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.***

The Commission's Notice of Proposed Rulemaking acknowledges that "[m]ost parties already submit [offering memoranda] along with their HSR filings," and therefore takes the position that proposed Item 4(d)(1) "should not create any additional burden for them or substantial additional burden for others." 75 Fed. Reg. at 57115.

We are concerned that, in fact, proposed Item 4(d)(i) would be a considerable expansion of the existing requirements of Item 4(c), and that the Notice of Proposed Rulemaking misses its full impact on filing parties in a number of significant ways.

The offering memoranda that are now required to be submitted are those which address *"market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets"* and which were either generated in the course of the current transaction or, if prepared for another transaction, were nonetheless provided to the acquiring person in the context of the filed-for transaction. The restriction of 4(c)'s coverage to "the transaction" means that filing parties are not required to submit documents other than those arising in that context.

Proposed Item 4(d)(i) would mandate that parties submit offering memoranda (and documents that serve the same function) that reference the acquired entity(s) or assets and which were

[1] Our focus on these portions of the proposed amendments should not be read to indicate our wholesale agreement with other proposed changes; this focus simply reflects particular concerns about the potential impact of Items 4(d)(i) and 4(d)(ii) on filing parties.

prepared within two years of the date that parties are now submitting their HSR filings – even when prepared in the context of transactions far removed from the subject of the current HSR filing. Parties would be required, for example, to search for and to submit, documents that do not even address competitive issues prepared for a failed bidder, in a deal to acquire a small portion of the acquired person's business, and which was never shared with the acquiring person in the current transaction. The result is certainly broader than what is required under the existing rules and what we believe to be common practice to submit.

One example of the dramatically expanded reach of the proposed amendment is the following:

> *Example 1 – A filing triggered by an officer's exercise of a small amount of options that results in his/her crossing the $50 million (as adjusted) threshold of holdings of the issuer he/she works for would require the issuing company to canvass its files for any offering memorandum and equivalent documents on past, unrelated, transactions involving the sale of the issuer or of any of its subsidiaries or assets[2] – a potentially significant burden.*

We believe that the additional burden on filers outweighs the additional benefits to be realized by the agencies from receiving the documents called for in proposed 4(d)(i), particularly because the agencies will be receiving all responsive 4(c) documents to evaluate the transaction. If the FTC and DOJ want to simply ensure access to the kinds of documents that the Notice indicates are routinely submitted now (and therefore implement a change that will genuinely add little to the filing parties' burden), a far narrower approach is sufficient – i.e., requiring only that all offering memoranda or similar documents – whether for the filed-for transaction or otherwise – shared with the acquiring person must be submitted.[3]

We also believe that 4(d)(i) inadvertently draws in more subject matter than intended and, as a result, will also be far more burdensome than intended. 4(d)(i) calls not only for formal offering memoranda but also all date responsive documents that "served that function".

The difficulty with this approach is that 4(d)(i) does not limit itself to just those documents that in some way, even marginally, touch on competitive subjects (unlike Item 4(c)). As a result, filing

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[2] This breadth of coverage – extending not only to the specific issuer whose voting securities are being acquired, but also to entities controlled by that issuer (and any assets under its control) – is a function of how broadly the term "reference" in 4(d) may be read, and is separately addressed in our comments.

[3] Needless to say, even though the proposed 4(d)(i) will prove to be burdensome for many filers, its cost/benefit as applied to small transactions – especially those submitted at the $50 million (as adjusted) level, are likely to be especially skewed towards a burden with little offsetting benefit. In FY 2009, no transactions filed at the $50 million (as adjusted) resulted in a Second Request. See Hart-Scott-Rodino Annual Report Fiscal Year 2009, Exhibit A, Table V, available at http://www.ftc.gov/os/2010/10/101001hsrreport.pdf. As the clearance figures from Table V demonstrate, along with occasional Second Requests issued in prior fiscal years, that's not to say that no competitive issues present themselves in low dollar threshold filings but only that their appearance, in such transactions, have routinely been significantly less frequent than those appearing in asset acquisitions and acquisitions of control.

parties will have to consider whether or not a series of presentations – on topics of little interest to the FTC and DOJ – are the equivalent of a formal offering memorandum.

> *Example 2 – An Issuer has been actively marketing itself for sale for several years. It has presented to a number of interested, but ultimately unsuccessful, potential acquirers in the last two years – each time making numerous separate management presentations. Among other topics, separate "management presentations" have addressed the company's benefits plans, environmental issues, and tax liabilities, each time updated to include the latest available information. As a result, the Issuer will first have to carefully reconstruct the appropriate "set" of presentations that can be fairly characterized as the equivalent of an offering memorandum and then submit all the presentations to the unsuccessful bidders (in addition to those for the successful bidder). Those presentations which do not address "market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets" – the touchstones of item 4(c) – are unlikely to provide the FTC or DOJ with any relevant information to consider in its competitive assessment of the transaction.*[4]

The prospect of drawing in a considerable volume of irrelevant presentations adds significantly to the burden faced by filing parties, first to identify and locate these documents and then to have them reviewed and readied for submission.

The fact that proposed Item 4(d)(i) includes offering memoranda that "reference the acquired entity or assets" has far reaching consequences, as reflected in the following example.

> *Example 3 – A multinational company, with more than a dozen international offices, has over the previous two years unsuccessfully engaged in efforts to sell substantially all of the assets of two of its peripheral operations – one in Singapore for $200,000 and another in South Africa for $400,000. In a multibillion acquisition in which it is filing as the acquired person (for the acquisition of all of its voting securities), 4(d)(i) appears to require that the company search its files for any presentations serving the purpose of offering memoranda even for these inconsequential attempted sales.*[5]

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[4] It is worth noting the interplay between this scenario and Example 1, in which an officer's option exercise triggers a filing. Even if that officer would end up with less than 1% of the Issuer's outstanding voting securities (valued in excess of $50 million, as adjusted), the Issuer would nonetheless be obligated to evaluate which presentations are responsive to 4(d)(i) and would, under Example 2, still end up submitting a substantial number of separate presentations – many of which are unlikely to be helpful even if the filing had been for an acquisition of control, much less for the acquisition of a relatively insignificant minority stake.

[5] The problem presented in this example – the need to submit presentations unrelated to the filed-for transaction and dealing with immaterial aspects of the business to be acquired, is of course further compounded by the problems addressed in Example 2. The acquired person not only has to locate, review and produce presentations on these prior immaterial transactions but is also required to submit presentations on these transactions, serving the function of an offering memorandum, even if they have no competitive content whatsoever.

If it is not the staff's intent the reach such documents, we suggest that a more precise definition of "reference" should be provided, as the 4(d)(i) requirement captures all offering memorandum (or documents that served that function) that reference the acquired entity(s) or assets. Indeed, the proposed HSR Instructions might even cover offering memoranda for exclusive licenses to intellectual property, which would fall well below HSR thresholds, or offers for non-exclusive licenses to intellectual property or licenses to lease real estate, which themselves would have been non-reportable.

> *Example 4 – A biotech company ("BioTech") routinely seeks collaboration partners with whom to outlicense, on an exclusive basis, certain of its intellectual property. Each such presentation displays its corporate name prominently, as well as briefly referencing itself within the presentation (e.g., one of BioTech's Phase II compounds is [x]). Within the two year window of 4(d)(i), BioTech is set to file as the acquired person in which 100% of its outstanding voting securities will be acquired. In this example, must BioTech submit all of its exclusive licensing presentations in its response to 4(d)(i)?*

To address these issues with the scope of proposed Item 4(d)(i), we recommend that:

- "Reference" be defined as "specifically relating to the acquisition of" or that this phrase be substituted in its place.
- Only documents generated for (or provided to) the acquirer in connection with the filed-for transaction, and which discuss *"market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets"* be required to be submitted.
- An alternative be considered which, although still imposing a heavy additional burden on filing parties, would partially reduce the burden:
    - The offering memoranda (or equivalent documents) would first need to relate to a material portion of the subject matter of the filed-for transaction; and
    - The acquired person would only be required to submit presentations (which served the function of an offering memorandum), if those separate presentations would have been responsive to Item 4(c) if they had been prepared for the filed-for transaction;[6] and
    - An acquiring person should only need to provide presentations (and similar documents) that it had actually received in connection with the filed-for transaction or earlier consideration of an acquisition from the seller within the last two years.

[6] So, with 4(c) subject matter (i.e., relating to *"market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets"*) and prepared by or for an officer or a director.

With these changes, the FTC and DOJ would still receive offering memoranda (and equivalent presentations) that – however marginally – addressed competitive issues for transactions (including those which were not completed in the prior two years for the same entity(s) or assets). The result would be to ensure that the FTC and DOJ have access to all (even arguably) competitively relevant information in these documents, while simultaneously reducing the burden on the acquired person – in some instances substantially – by not requiring that it search for and produce presentations on competitively irrelevant topics or relating to immaterial unconsummated transactions.[7]

- A carve-out might also be considered so as to exclude from 4(d)(i)'s coverage those transactions least likely to present competitive issues, including:

  - Filings, by both the acquiring and acquired person, triggered by the acquisitions made by officers and directors not entitled to rely on the "solely for the purpose of investment" exemption set forth in 16 C.F.R. § 802.9 strictly due their position within the issuer whose voting securities are being acquired, would be excluded from the coverage of 4(d)(i). The acquiring persons, in these cases, would still be required to end up with total holdings of no greater than 10% of the issuer's outstanding voting securities and to also confirm their intent to hold "solely for the purpose of investment."

  - Filings at the $50 million (as adjusted) level.[8]

Lastly, with respect to 4(d)(i), it is worth noting that a significant number of transactions advance to within a period of just a few days before execution of a definitive agreement before the number of individuals aware of the transaction (i.e., "over the wall") expands beyond a core group, in order to prevent leaks about the deal. This streamlines HSR preparation, limiting the number of individuals who could have generated or received 4(c) documents. In order to collect documents responsive to Item 4(d)(i), however, filers will need to obtain documents from personnel that are outside the core group, which will delay filings or require bringing more people "over the wall" in circumstances where the business interests for not doing so would otherwise have excluded them. Indeed, it may make it impossible to file – as is sometimes done today – on a non-public deal known to only a small number of people in a company in advance of a public announcement.[9]

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[7] In those instances in which the FTC or DOJ nonetheless concludes additional materials – not containing competitive content – about a former uncompleted transaction would be important to its review, the agencies can request them.

[8] We are also supportive of exclusions that would reach to higher thresholds, starting next at the $100 million (as adjusted) level.

[9] Note that this risk exists even if any of our suggested narrower alternatives to the proposed 4(d)(i) are adopted, and the problem applies with equal force to the demands under proposed 4(d)(ii), given the range of documents it requires and who within the filing party may have access to responsive materials.

> ***Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors if they were prepared for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) 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. Documents responsive to this item are limited to those produced up to two years before the date of filing.***

The Notice of Proposed Rulemaking, in discussing this proposed new requirement, states, "investment 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 which contain competition related content, and indicates that many parties already submit such documents with their HSR filings (emphasis added). 75 Fed. Reg. at 57115. The Notice suggests, therefore, that proposed Item 4(d)(ii) "should not create substantial additional burden." 75 Fed. Reg. at 57115.

While HSR filers may submit such "competition-related third party materials," this new Item 4(d)(ii) is not limited to documents related to the transaction for which the HSR filing is being submitted. In our view, this expansion beyond the filed-for transaction will impose a substantial burden on filing parties, particularly as it could conceivably call for an enormous amount of materials that are difficult to locate and burdensome to review.

This proposal extends to all reports prepared by consultants that "reference the acquired entity(s) or assets" even if not prepared in connection with the proposed transaction, and even if for an insignificant part of the proposed assets to be acquired – such as the small peripheral operation in Singapore and South Africa, referenced in Example 3 above. And, although the proposal is limited to documents prepared for officers and directors, it may require a search for documents prepared for any officer or director of a company's subsidiaries, which for large multinational companies, could entail a very large number of people. Indeed, the notice advises, "[i]f such studies, surveys, analyses and reports are found in the files of any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions), they should be deemed to have been prepared for that individual." Notice of Proposed Amendments, 75 Fed. Reg. 57115. And because documents may not be kept by those officers or directors, companies may have to search the files of company personnel who may had contact with an officer.

The main difficulty with using this approach on what constitutes "prepared for" in the context of 4(d)(ii), and unlike its operation in the 4(c) context, is that 4(d)(ii) sweeps in all such documents – referencing the acquired entity(s) or assets – for a two year period prior to filing. As a result, there is the prospect that certain filers will need to locate and process a considerable amount of potentially responsive, but often largely irrelevant, materials.

*Example 5 – A vice president of a foreign subsidiary of a large multinational corporation regularly receives third party research reports, investment banking newsletters, and similar materials both on specific companies and entire industries. The U.S. parent decides to make a minority investment in an issuer,[10] is the corporation required to locate all such materials and to then carefully review them for any reference,[11] no matter how insubstantial, to the issuer in which the investment is being made?*

The result could be that an enormous quantity of materials would need to be located and reviewed. In addition, some of the types of materials (especially such things as third party analyst reports) are voluminous and might only make passing reference to the acquired entity (e.g., putting their name on a list of companies considered in the industry overview, or attached to a single dot in a large presentation noting their "leadership" or "niche" status on a grid). [12]

Given the potential breadth of 4(d)(ii) we recommend that:

- Only documents commissioned by the filing party, or received by them in order to evaluate the filed-for transaction (rather than those merely received by them at any point in the prior two years) be deemed responsive.

- Alternatively, limit the search group to the files of officers or directors actively involved in the filed-for transaction.

## Conclusion

In focusing on Items 4(d)(i) and 4(d)(ii), we have addressed our comments to those of the proposed amendments which we believe will have the most significant impact on filing parties and for which we have suggestions for how – if these provisions are not entirely eliminated – their burdens on filing parties can be reduced while preserving their intended goal of assisting the antitrust agencies in identifying transactions that warrant further investigation.

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[10] The issue, of course, also arises in the context of acquisitions of control and we also believe it is overly burdensome in that context. The minority investment example is highlighted, however, since the burden there is comparatively greater relative to the likely benefit to the FTC and DOJ.

[11] The breadth of the existing term "reference" affects 4(d)(ii) in much the same way it affects 4(d)(i). See supra, Example 4.

[12] As with 4(d)(i), the burden is especially disproportionate when considering small transactions less likely to be of competitive consequence, and the likelihood that any truly competitively significant documents will already be supplied in response to Item 4(c) – the example of the officer exercising options in his company, putting him/her just above the $50 million (as adjusted) threshold, applies with equal force to 4(d)(ii). See supra, Example 1. For this reason, it is also worth considering excluding certain classes of transactions from the 4(d)(ii) filing burdens – see supra at 5-6 (recommended changes to the coverage of 4(d)(i) for certain transactions).

We hope that this submission is useful in highlighting unanticipated burdens of the proposed new document requests, and will lead the Commission to reconsider its proposals.

Sincerely,

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