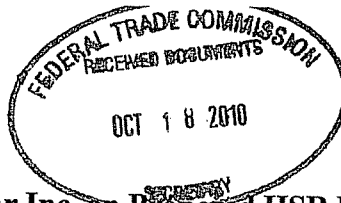


# HOWREY<sub>LLP</sub>



PUBLIC VERSION

**Comments of Caterpillar Inc. on Proposed HSR Form Changes  
Submitted by Paul C. Cuomo, Victor Cohen, and Ryan M. Foley of Howrey LLP**

**HSR Form Changes – Comment, Project No. P989316  
October 18, 2010**

These comments are submitted on behalf of our client, Caterpillar Inc. (“Caterpillar” or “the company”), in response to the request of the Federal Trade Commission (“FTC”) for comments on the proposed amendments to the Hart-Scott-Rodino (“HSR”) Premerger Notification Rules (the “Rules”), the Premerger Notification and Report Form (the “Form”) and associated Instructions (the “Instructions”).

Founded in 1925, Caterpillar designs, manufactures, remanufactures, markets and sells a wide range of products used in mining, construction, paving, tunnel boring, rail and other applications. In addition, Caterpillar manufactures and sells engines, turbines and power generation equipment and it also offers financial products and insurance. In 2009, Caterpillar had approximately \$32 billion in revenue, and the company currently employs over 90,000 people. Caterpillar has manufacturing facilities in over 20 countries, including the United States, Australia, Brazil, China, India, Indonesia, Japan, Mexico, Russia, Singapore and South Africa.

Caterpillar typically engages in several HSR reportable acquisitions each year and, as a result, has a strong interest in any proposed amendments to the Rules, Form, or Instructions. As the FTC has noted on several occasions, “[t]he vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation.”<sup>1</sup> This is consistent with Caterpillar’s experience with transactions and HSR filings as it has not received a request for additional information at any time in at least the last six years.

As a semi-regular HSR filer that tends to file for transactions that do not raise serious competitive issues, Caterpillar applauds the FTC in its attempt to streamline the HSR form and reduce the burdens associated with filing. Caterpillar believes that, on balance, however, the additional burdens imposed by the amendments will far outweigh any reduced burden on Caterpillar, as well as many other similarly-situated corporations. In particular, Caterpillar is concerned primarily with the proposed amendments to Items 4 and 5 of the Form. As the FTC is aware, unlike compliance with a voluntary request for information or second request, parties are unable to reduce the burdens involved in submitting an HSR filing through negotiation. Moreover, non-conforming filings can be rejected even when there is a good faith search for material and an inadvertent failure to supply all of the information the Form and HSR Regulations requires. As a result, the proposed amendments, if adopted, will create burdens and other concerns on every transaction requiring a filing, regardless of whether the transaction involves any competitive overlaps or concerns.

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<sup>1</sup> U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, v (2006); *see also* Federal Trade Comm’n Website, An FTC Guide To Mergers, *available at* <http://www.ftc.gov/bc/antitrust/mergers.shtml> (“Each year, the FTC and Department of Justice review many merger filings. Fully 95% of merger filings present no competitive issues.”).

Caterpillar summarizes its concerns with the specific proposed amendments below and illustrates those concerns with a handful of real-world examples based on its operations. In summary, however, the company believes that the proposed amendments to Items 4 and 5 raise the following issues and concerns:

- 1) ***Increased burden and compliance costs:*** Caterpillar is particularly concerned about the additional burdens the proposed changes to Item 4 and 5 will create. While there are certainly burdens associated with compliance with Item 4(c) of the current Form, Item 4(c) does limit what needs to be produced in three important ways (*i.e.*, transaction-specific materials, with “4(c) content,” created “by or for” officers or directors). As described in more detail below, there are no meaningful limitations on what needs to be produced for the proposed Item 4(d) documents, and in many cases Caterpillar may be required to conduct a worldwide search for documents before submitting an HSR filing if the proposed rules are adopted. The proposed changes to Item 5 will also create significant burdens on the company, as is addressed below.
- 2) ***Increased risk of inadvertent mistakes and resulting consequences:*** Given the expansive scope of the proposed Item 4(d) documents, it is possible that Caterpillar employees anywhere in the world could have responsive documents. For a company with 90,000 employees located in 23 countries, there is a real risk that Caterpillar could inadvertently miss Item 4(d) documents before filing, which could subject the company to “bounced” HSR filings. Even worse, if such documents are located after a transaction is consummated, the company and/or the certifying officer could be subject to civil penalties.
- 3) ***Risk of leaks for confidentiality transactions:*** Today, it is possible to complete and submit an HSR filing by working with a relatively limited set of individuals within the company (*i.e.*, transaction teams and Caterpillar’s Officer and Directors). Given the wide range of Caterpillar employees who could potentially have documents responsive to Item 4(d), conducting searches for Item 4(d) documents will increase the risk of leaks about non-public transactions, which has implications under securities law. To protect itself against this risk, Caterpillar may also be forced to contact and negotiate confidentiality agreements with third parties from whom it has received responsive documents, further increasing transaction costs and creating unnecessary disruptions to the efficient completion of an HSR filing.
- 4) ***Potential for delay:*** It is not uncommon for Caterpillar to execute letters of intent or definitive agreements that require an HSR filing within a few days of execution of such documents. Given the wide scope of documents potentially captured by Item 4(d), Caterpillar would need to start the search for Item 4(d) documents weeks before any transaction is finalized, which creates confidentiality issues as outlined above, or wait until the transaction is executed before the search process begins.

#### **ITEM 4**

At present, Item 4(c) of the Form requires the submission of “all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . .” The fact that documents with “4(c) content” need not be produced with the Form unless they are prepared by or for an officer or director, and relate to the contemplated transaction, works to

define the scope of the search and resulting production of documents. The notice of proposed rulemaking ("NPRM" or "Notice") issued by the FTC on August 13, 2010,<sup>2</sup> proposes to create several new categories of documents responsive to Item 4.

#### **Item 4(d)(i) – Offering Memoranda**

Item 4(d)(i) expands the requirements relating to the submission of traditional "offering memoranda" under Item 4(c). Proposed Item 4(d)(i) would require the submission of "all offering memoranda (or documents that served that function) that reference the acquired entity(s) or assets . . . produced up to two years before the date of filing." Caterpillar is opposed to proposed Item 4(d)(i).

1. Item 4(d)(i) is overly broad, vague and subject to different interpretations, thereby making compliance extremely difficult, if not impossible. Proposed Item 4(d)(i) calls for the submission of offering memoranda which make "reference" to the to-be-acquired entity or assets, as well as "documents that otherwise serve [the] function" of those offering memoranda. The terms "serve the function" and "reference" are not defined and are subject to misunderstanding and differing interpretations. A document which merely "references" the entity or assets would need to be submitted even though it would be of dubious value in an antitrust analysis if it lacks any 4(c) content or other discussion. Documents that "serve the function" of an offering memorandum also must be submitted; however, this term is not defined in the proposed amendments.
2. There is no requirement that documents responsive to Item 4(d)(i) be prepared "by or for" an officer or director; thus, this item requires the collection and review of documents provided to any employee within the company regardless of their location or involvement in a particular transaction. This is especially troublesome for Caterpillar, as in the ordinary course of business employees within the company may receive solicited and unsolicited memoranda and these employees are not limited to Caterpillar officers and other higher-level employees, or even a definable group of people.

Employees receiving this information are located around the world and Caterpillar does not (and cannot feasibly) maintain a clearinghouse for these documents. For instance, Caterpillar's Strategic Investment Group regularly receives, collects and reviews offering memoranda while its Business Intelligence Group gathers information and documents for ordinary course competitive analyses unrelated to consideration of particular transactions. Other employees within Caterpillar (e.g., procurement employees) can also receive offering memoranda, not from parties seeking to enter into a transaction with Caterpillar, but from potential suppliers, customers, or other business partners.

Because no central repository for offering memoranda (or documents that served that function) exists or is feasible, and because many qualifying documents may never have been analyzed or further circulated by their respective recipients, for every HSR filing Caterpillar would be required to search a limitless number of its business people to fully comply with Item 4(d)(i). The breadth and depth of the search would lead to less reliable results than the current Item 4(d) and would subject the company and its certifying officers to civil penalties.

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<sup>2</sup> Reporting and Waiting Period Requirements, 75 Fed. Reg. 57110 (proposed Sept. 17, 2010).

This burden is further compounded by the fact that Caterpillar employees frequently change jobs and locations to diversify their experiences within the company.

3. Caterpillar believes that the proposed requirements of Item 4(d)(i) would greatly undermine its ability to keep confidential sensitive business information. As explained above, the proposed amendments to 4(d)(i) request documents that may not even relate to the proposed transaction. As a result, persons who are otherwise unaware of a transaction would need to be queried for relevant documents. Caterpillar, which regularly files HSR notification on the basis of a letter of intent or immediately following public announcement of a transaction, would need to delay HSR notification until all employees with potentially responsive documents could be queried, or accept the risk of disclosure of a non-public transaction in advance of signing. Moreover, proposed Item 4(d)(i) would require Caterpillar to turn over memoranda received on a confidential basis from third parties who are not party to the proposed transaction. The provision of third party offering memoranda that merely reference the target could potentially require Caterpillar to contact and negotiate waivers with third parties who are otherwise not privy to a contemplated transaction. Thus, in order to fully comply with Item 4(d)(i), Caterpillar would have to risk breaching a duty to keep confidential certain internal and external documents, or accept delay to the efficient expedition of a contemplated transaction.
4. The Commission notes in the NPRM that, "without a date cutoff, a search for these documents could be extremely burdensome. Accordingly, the Commission propose[d] a limit of two years before the date of filing for documents responsive to [Item 4(d)(i)]." Caterpillar respectfully disagrees with the Commission that the two-year time limitation significantly reduces the burden on potential filers. Instead, it notes that proposed Item 4(d) will, in many cases, still require a burdensome, worldwide search to determine which documents "reference" a target entity or assets. A search of this nature may result in the identification of a vast number of potentially responsive documents, the review of which would take a great deal of time and likely generate significant legal fees. Furthermore, in most cases the company typically considers transactions for no more than six to twelve months prior to an HSR filing; thus, Caterpillar believes the two-year "limit" in the proposed Item 4(d)(i) will, if adopted, actually lengthen the time period necessary for its document searches for future HSR filings

Caterpillar believes that the present requirement to file offering memoranda that satisfy the traditional 4(c) document criteria is sufficient to provide the governmental agencies with relevant documents that evaluate and/or analyze "the acquisition" for the "initial review" envisioned by the HSR Act and Rules promulgated by the FTC in 1978. These documents often constitute the basis of the transaction and have been relied upon by the highest levels of Caterpillar management. Documents that merely "reference" the target or "serve the function" of offering memoranda are of limited, if any, value measured against the burden and other consequences imposed upon Caterpillar to produce such documents. Proposed Item 4(d)(i) should not be accepted by the FTC.

#### **EXAMPLE**

Company A, a Brazilian producer of engine components, is considering a sale. In contemplation of the transaction, Company A prepares an offering memorandum, the 200th page of which references Company C, a competitor of Company A with regard to the provision of a single type

of engine component. Company A's agent, Investment Bank I, solicits Employee Z in Caterpillar's Strategic Investment Group by sending Employee Z the 200-page offering memorandum. Employee Z fails to read or acknowledge the offering memorandum. Talks between Company A and potential purchasers stall and Company A remains independent. Employee Z subsequently transfers to supervise operations of a Caterpillar manufacturing facility in Russia. Nearly two years later, Caterpillar enters into an internally-confidential letter of intent to purchase certain assets of Company C. Because Company C is referenced in the memorandum received a year earlier from Company A, Caterpillar is required to submit the offering memorandum under Item 4(d)(i) of the Form. However, because Employee Z is unaware of the unannounced acquisition of Company C, Caterpillar must disclose to, and fully search, Employee Z, his successor, or any other employees throughout the world who may have some offering memoranda referencing Company C. Even in the unlikely event that the company receives a completely reliable set of responsive documents in its search of a vast number of its employees, the agencies are likely to receive a huge volume of documents unrelated to the transaction triggering the HSR filing, further increasing the time required of and expense to agencies in reviewing the HSR filing.

#### **Item 4(d)(ii) – Third Party Analyses**

The Notice of Item 4(d)(ii) proposes that filing persons must submit "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) . . . 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." Caterpillar is opposed to the adoption of this proposal for the reasons stated below.

1. The FTC's proposed Item 4(d)(ii) is unreasonably broad in scope. Proposed Item 4(d)(ii) is not limited to documents prepared in connection with the proposed transaction, nor is it limited to documents in the possession of officers or directors with some prior knowledge of the proposed transaction. Thus, a document prepared by a third person for an entirely unrelated analysis, which merely mentions the entity or assets to be acquired outside the context any Caterpillar operations, would need to be submitted. Examples include: voluminous market publications and periodicals; industry databases; unsolicited financial analyses from investment bankers created solely for business development purposes; and privileged memoranda prepared by outside counsel. The value of these categories of information for an initial evaluation is quite dubious, and the requirement that these classes of documents must be produced in response to Item 4(d)(ii) may create a "chilling effect" on the efficient completion of an officer or director's duties.<sup>3</sup>
2. The two year time period is far too extensive and provides little relief from the burdens of searching a company's officers' and directors' files for documents responsive to proposed Item 4(d)(ii). The search for documents that are unrelated to any specific transaction, but merely reference an entity or assets prepared up to two years earlier would create tremendous

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<sup>3</sup> For example, in order to avoid burdensome reviews of their files in advance of every HSR filing, officers and directors might take affirmative steps not to receive the broad classes of documents covered by the proposed Item 4(d)(ii) if this amendment is adopted.

work and heightened expense for Caterpillar. In this regard, sophisticated entities, such as Caterpillar, regularly receive unsolicited documents from third persons recommending acquisitions in various industries, and it is fairly common for such documents to include a listing of competitors and their market shares. Even if Caterpillar did not file for an acquisition referenced in the unsolicited materials, or did not adopt the report for any other reason, it would be required to submit the report solely because the entity or assets to be acquired are mentioned in passing in an otherwise voluminous report. Caterpillar has no way of tracking which officers and directors may have received responsive information, and would be required to search all such officers and directors for Caterpillar, as well as each of its subsidiaries, for these non-transaction-specific documents in order to full comply with Item 4(d)(ii).<sup>4</sup>

Due to burdens discussed above, as well as the fact that many documents responsive to Item 4(d)(ii) are already routinely submitted by Caterpillar pursuant to Item 4(c), the company believes that Item 4d(ii) should not be adopted by the FTC.

## **EXAMPLES**

### **Example 1:**

In January 2009, Caterpillar Officer A, who receives several detailed, heavy-equipment market publications via email each week, receives and fails to read a spreadsheet with voluminous market research from a third party industry research company. In this scenario, Officer A subscribed to this weekly third party report one year prior in order to obtain access to a single industry report for a marketing presentation. The January 2009 spreadsheet makes reference to Company A, a small manufacturer of heavy-machinery hoses, amongst tens of other small and large industry players. In late 2010, Caterpillar signs a letter of intent to purchase Company A with no involvement from Officer A, and must now search the files of Officer A and all its other officers and directors for similar references to Company A. This process would require Caterpillar to search nearly every hard-copy and electronic third party study, report, and database in the possession of each officer and director in order to comply with Item 4(d)(ii), including those persons with no prior knowledge of the proposed transaction (e.g., Officer A).

### **Example 2:**

In late-2008, Caterpillar Subsidiary A investigates the acquisition of certain assets of Company A, a railroad machinery manufacturer. An officer of Subsidiary A, Officer Z, requests that Subsidiary A's outside antitrust attorneys review the acquisition of Company A. While outside counsel determines that Subsidiary A has no overlap with Company A, the memoranda created by the attorneys reference the market share of Company B, a marginal competitor of Company A. Subsidiary A fails to purchase Company A. Two years later, Caterpillar agrees to purchase Company B, in a transaction that is being negotiated at the parent company level without input from Officer Z. Given its potential responsiveness to Item 4(d)(ii), Caterpillar would be required



to disclose to, and search the files of, Officer Z, who has no direct information related to the acquisition of Company B, locate the privileged memorandum prepared by outside counsel almost two years earlier, and prepare a Statement of Non-Compliance for the HSR filing.

#### **Item 4(d)(iii) – Synergies and/or Efficiencies**

Item 4(d)(iii) proposes to require the submission of all studies, surveys, analyses or reports evaluating or analyzing synergies or efficiencies that were prepared by or for an officer or director in connection with the transaction. Caterpillar is less concerned with the additional burdens associated with new Item 4(d)(iii), as it largely captures those documents as part of its compliance with the current Item 4(c). The company does, however, note that Item 4(d)(iii) increases the burden of production by requiring the production of another broader class of material for initial review.

While Caterpillar agrees with the FTC that “[d]ocuments that discuss synergies and/or efficiencies likely to result from a transaction can be very useful in the Agencies’ initial review,” it also believes that the FTC should note that, at the time of an HSR filing, any analysis of the potential synergies and efficiencies may be incomplete. For this reason, Caterpillar requests that the FTC amend the Rules to make clear that filers will not be prejudiced by any omissions if it later discovers or accounts for such synergies and efficiencies.

#### **ITEM 5**

At present, Item 5 of the Form requires filing persons to submit revenue information for United States operations by NAICS codes for a “base” year, as well as the current year. For the base year, the Form requires the use of six- and ten-digit NAICS codes for revenues representing manufacturing operations and six-digit NAICS codes for revenues from non-manufactured operations, such as retail and wholesale operations - which include products imported into the United States for resale. For the current year, revenues must be listed on the Form by seven-digit NAICS codes for manufacturing operations, and six-digit NAICS codes for non-manufacturing operations. Revenues representing products produced outside the United States and imported into the United States are represented by six-digit non-manufacturing NAICS codes, including wholesale and retail sales codes. Exempt from reporting of current year revenues are those for non-manufactured operations when the revenues from those operations are less than one million dollars. There is no exemption for similar de minimis revenues from United States manufacturing operations.

The Notice proposes to delete the requirement to submit revenue for the “base” year due to the time lag of obtaining company figures based upon the economic census. Normally it takes from three to five years for information based upon the census to be published, thereby limiting the value of base year revenue information for comparison purposes. Caterpillar agrees with the FTC’s decision to eliminate from Item 5 the requirement to submit revenue information for a base year. This will ease the burden of submitting information that is not current and which may not be available to Caterpillar due to poor record-keeping by entities acquired by Caterpillar.

Additionally, however, the Notice proposes to: (1) revise current year revenue information requirements under Item 5 by requiring filing persons to classify revenues for United States manufacturing operations at the ten-digit NAICS code level, in lieu of the current seven-digit level requirement; and (2) require submission of revenue information at the ten-digit NAICS

code level for manufactured products that are manufactured outside the United States, but are sold in or into the United States.


#### **Item 5 – Submission of Revenue by Ten-Digit NAICS Codes**

Current year revenue is required under current Item 5 to be classified at the seven-digit NAICS code level for manufacturing operations. The FTC proposes to revise this to require classification at the ten-digit NAICS code level. The FTC believes that this will provide “more useful NAICS code information” for its initial review than it currently receives in Item 5. Caterpillar does not have significant concerns with this proposed amendment because the additional burden on Caterpillar would be minimal.

#### **Item 5 – Revenue Information for Foreign Manufactured Products**

Currently, the Instructions to the Form require that Item 5 information be supplied “only with respect to operations conducted within the United States.”<sup>5</sup> Thus, foreign sales made directly to a United States customer are not currently reported in Item 5, while transfers from a foreign person to its wholesale or retail operation in the United States are currently reported under a non-manufacturing NAICS code. The Notice seeks to revise reporting of foreign sales to require that sales made directly to a United States customer, and inter-company transfers of manufactured products from foreign operations to the United States, be reported within a ten-digit NAICS code for manufactured products. Sales made at the wholesale or retail level in the United States would continue to be reported at the six-digit NAICS code level for wholesale and retail operations. The Notice indicates that the rationale behind this proposed revision is “to provide a more complete picture of the impact of the transaction at the initial review stage.”

Caterpillar opposes the proposed amendment, primarily because the burdens associated with compliance would be substantial



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<sup>5</sup> 16 C.F.R. § 803.2(c)(1) (2010).

<sup>6</sup> The FTC previously recognized a similar burden prior to adopting the HSR Rules in 1978, noting that “few companies kept segregated data concerning imports,” and “even if such data existed, it would not be maintained by [SIC code] seven-digit product categories.” *Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rules*, 43 Fed. Reg. 33451, 33530 (published July 31, 1978). As a result, the Commission removed from the first Form the requirement that an entity provide the dollar value of imported products by US Census Bureau SIC code.



While the Notice does not address the substantial burdens associated with the proposed inclusion of foreign manufactured product information under Item 5, Caterpillar believes that the burdens in obtaining such information would be substantial, and that such burdens strongly outweigh any benefit to the government's investigation of a proposed transaction, especially given the fact that 95 % of transactions requiring an HSR filing raise no competitive issues. Caterpillar believes that information relating to NAICS codes for foreign manufactured product should not be required in the Form but rather, should be the subject of a voluntary submission or request for additional information that would focus on the exact product that is under review. This would limit Caterpillar's burden of compliance, as other more readily available information would likely prove more useful to the government's investigation than additional, double-counted, revenue information supplied under manufacturing NAICS codes.

#### **EXAMPLES**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## **CONCLUSION**

As a general matter, Caterpillar appreciates the FTC's efforts in amending the HSR Form and corresponding Rules and agrees with the overall objective of attempting to reduce the burdens associated with submitting an HSR filing. Unfortunately, after consideration and consultation with counsel, for the reasons described above, Caterpillar believes that the proposed changes fall far short of achieving this objective. Caterpillar is extremely concerned by the proposed amendments to Items 4, as well as the proposed amendments to Item 5 regarding foreign manufactured products, and urges the FTC not to adopt these changes.

If you have any questions about these comments, please contact Paul Cuomo of Howrey at (202) 383-6547 or [cuomop@howrey.com](mailto:cuomop@howrey.com).