

From: [Walsh, Kathryn E.](#)
To: [REDACTED] [Gillis, Diana L.](#); [Shaffer, Kristin](#); [Storm, Evan](#); [Berg, Karen E.](#); [Carson, Timothy](#)
Cc: [REDACTED]
Subject: RE: Questions re New Form Instructions
Date: Friday, September 16, 2016 11:08:49 AM

See our answers embedded below.

From: [REDACTED]
Sent: Thursday, September 15, 2016 2:23 PM
To: Walsh, Kathryn E.; Gillis, Diana L.; Shaffer, Kristin; Storm, Evan; Whitehead, Nora
Cc: [REDACTED]
Subject: Questions re New Form Instructions

All -

After reviewing the new instructions for the HSR form, we wanted to raise a few questions with you. We thought it would be best to submit them collectively in one email so as not to over-burden you with separate (and likely duplicative) sets of questions.

- **OCR & DVD Submissions:** We often receive documents where OCR is not possible, *e.g.*, it is a scanned pitch book that the client only received in hard copy and OCR simply isn't able to capture the text (as in the case of a chart) or we have a scanned document with handwritten notes. In such case, the chart and handwritten notes will be visible in the document, but any text contained in the chart or handwritten notes will not be searchable. In these instances, do we need to forego the DVD option and submit in paper format, or can we include a note indicating that a certain document was not able to be made such that it is searchable?

You should run the OCR and/or text extraction software on all documents. Even if you've determined that the OCR and/or text extraction software isn't producing high quality results, you should produce the resulting searchable PDF on the DVD and note the issue.

- **DVD Submission Review Timeline:** How quickly do you anticipate that filers will be notified of issues in connection with the acceptability of the DVD and its contents? Are DVD filings going to be reviewed as virus-free and searchable upon submission, or will it potentially be several days before a party is notified of an error and thus the waiting period could start later than the date the parties filed their HSR forms?

Our front office staff use your DVD to create a record for the filing in our database, so we will let you know very quickly if there are virus and/or readability issues (this is why we require a contact name and phone number on the DVD). As for filing errors, the process will be the same – you'll hear from us in a day or two about any problems with your filing and an error does not necessarily mean a bounce. If you file on DVD and there is an error, you will have to resubmit all 4 DVDs to the FTC and DOJ.

- **3(a):** In a transaction where UPE A will acquire related companies from UPE B and UPE C in the same transaction, but the company being acquired from UPE C is non-reportable, we have

historically listed UPE C in 2(a) and checked non-reportable, and then not included anything on UPE C within 3(a) (other than perhaps a note referencing UPE C's acquired company in the 3(a) narrative). Now, are we supposed to separately list UPE C and UPE C's controlled acquired entity in the 3(a) boxes and then note in the 3(a) description that the portion of the transaction involving UPE C is not reportable and state the reason?

You should include all of this information in the 3(a) narrative, not in the 3(a) boxes.

- **3(b):** The new instruction reads "Also furnish agreements not to compete and other agreements between the parties." What do you intend the parties should submit as "other agreements between the parties"? Are you looking for "side agreements" between the parties as referenced in the Editor's Note to Interpretation No. 172 in the ABA Premerger Notification Manual (5th ed.)? Or do you intend to capture other ancillary agreements such as employee agreements, escrow agreements, supply agreements, etc. (many of which may only exist in draft form at that stage)?

In general, schedules or attachments do not need to be submitted with the agreement, but if there are schedules and/or attachments relevant to understanding the deal, such as additional agreements between the parties, these schedules and/or attachments should be submitted as well. The instructions do not conflict with or change the advice contained in PNPM 172 (5th ed).

- **4(c):** For third-party documents, is it correct that we no longer need to provide author and title information? For example, if acquiring UPE hired McKinsey to commission a report on target's market, our Item 4 log only needs to indicate that the document was prepared by McKinsey, and does not need to provide names and titles of the individual authors at McKinsey?

Correct – this is actually a long-standing position, see our blog on 4(c)/4(d).

<https://www.ftc.gov/news-events/blogs/competition-matters/2015/01/how-avoid-common-hsr-filing-mistakes-item-4c-4d>

As always, many thanks for your guidance. Please let us know if you have any questions.

Best,

