

ANTITRUST LAW

Unit 13: DOJ/FTC Merger Review

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Statutes

STATUTORY SUBSTANTIVE STANDARDS**Clayton Act § 7, ¶ 1
Ch. 323, § 7, 38 Stat. 731 (1914)**

That no corporation engaged in commerce shall acquire, acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

**Clayton Act § 7, ¶ 1
(current version—marked for changes against 1914 version)**

~~That no corporation~~No person engaged in commerce ~~shall acquire, or in any activity affecting commerce shall~~ acquire, directly or indirectly, the whole or any part of the stock or other share capital ~~of another corporation~~and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce, ~~where~~or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be ~~to~~ substantially to lessen competition ~~between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or, or to~~ tend to create a monopoly ~~of any line of commerce.~~

Clayton Act § 7
(complete current version)

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal

by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary. [18 U.S.C. § 18]

Premerger Notification



FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS

Premerger Notification and the Merger Review Process

Under the Hart-Scott-Rodino (HSR) Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. The FTC administers the [premerger notification program](#), and its staff members answer questions and maintain a website with helpful information about how and when to file. The FTC also provides daily updates of deals that receive [early termination](#).

Steps in the Merger Review Process

Step One: Filing Notice of a Proposed Deal

Not all mergers or acquisitions require a premerger filing. Generally, the deal must first have a minimum value and the parties must be a minimum size. These [filing thresholds](#) are updated annually. In addition, some stock or asset purchases are exempt, as are purchases of some types of real property. For further help with filing requirements, see the [FTC's Guides to the Premerger Notification Program](#). There is a [filing fee](#) for premerger filings.

For most transactions requiring a filing, both buyer and seller must file forms and provide data about the industry and their own businesses. Once the filing is complete, the parties must wait 30 days (15 days in the case of a cash tender offer or a bankruptcy) or until the agencies grant early termination of the waiting period before they can consummate the deal.

Step Two: Clearance to One Antitrust Agency

Parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger. Staff from the FTC and DOJ consult and the matter is "cleared" to one agency or the other for review (this is known as the "clearance process"). Once clearance is granted, the investigating agency can obtain non-public information from various sources, including the parties to the deal or other industry participants.

Step Three: Waiting Period Expires or Agency Issues Second Request

After a preliminary review of the premerger filing, the agency can:

1. terminate the waiting period prior to the end of the waiting period (grant Early Termination or "ET");
2. allow the initial waiting period to expire; or
3. issue a Request for Additional Information ("Second Request") to each party, asking for more information.

If the waiting period expires or is terminated, the parties are free to close their deal. If the agency has determined that it needs more information to assess the proposed deal, it sends both parties a Second Request. This extends the waiting period and prevents the companies from completing their deal until they have "substantially complied" with the Second Request and observed a second waiting period. A Second Request typically asks for business documents and data that will inform the agency about the company's products or services, market conditions where the company does business, and the likely competitive effects of the merger. The agency may conduct interviews (either informally or by sworn testimony) of company personnel or others with knowledge about the industry.

Step Four: Parties Substantially Comply with the Second Requests

Typically, once both companies have substantially complied with the Second Request, the agency has an additional 30 days to review the materials and take action, if necessary. (In the case of a cash tender offer or bankruptcy, the agency has 10 days to complete its review and the time begins to run as soon as the buyer has substantially complied.) The length of time for this phase of review may be extended by agreement between the parties and the government in an effort to resolve any remaining issues without litigation.

Step Five: The Waiting Period Expires or the Agency Challenges the Deal

The potential outcomes at this stage are:

1. close the investigation and let the deal go forward unchallenged;
2. enter into a negotiated consent agreement with the companies that includes provisions that will restore competition; or
3. seek to stop the entire transaction by filing for a preliminary injunction in federal court pending an administrative trial on the merits.

Unless the agency takes some action that results in a court order stopping the merger, the parties can close their deal at the end of the waiting period. Sometimes, the parties will abandon their plans once they learn that the agency is likely to challenge the proposed merger.

In many merger investigations, the potential for competitive harm is not a result of the transaction as a whole, but rather occurs only in certain lines of business. One example would be when a buyer competes in a limited line of products with the company it seeks to buy. In this situation the parties may resolve the concerns about the merger by agreeing to sell off the particular overlapping business unit or assets of one of the merging parties, but then complete the remainder of the merger as proposed. This allows the procompetitive benefits of the merger to be realized without creating the potential for anticompetitive harm. Many merger challenges are resolved with a consent agreement between the agency and the merging parties.



ftc.gov



HART-SCOTT-RODINO
PREMERGER NOTIFICATION PROGRAM

INTRODUCTORY GUIDE I

WHAT IS THE PREMERGER
NOTIFICATION PROGRAM?
AN OVERVIEW

REVISED MARCH 2009

AN OVERVIEW

Guide I is the first in a series of guides prepared by the Federal Trade Commission's Premerger Notification Office ("PNO"). It is intended to provide a general overview of the Premerger Notification Program (the "Program") and to help the reader in determining which types of business transactions are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act or "the Act"). *Guide I* describes the basic reportability requirements and how the program works. It also provides a list of alternative information sources to assist you in deciding whether or not you need to file. This Guide will introduce you to certain terminology and concepts regarding the Act and the Premerger Notification Rules (the "Rules"), 16 C.F.R. Parts 801, 802 and 803. Additional information can be obtained on the Federal Trade Commission's website at <http://www.ftc.gov/bc/hsr>.

Other Guides in this series provide more detailed information. Guide II explains in greater detail certain terms used in the Act and the Rules, and analyzes a hypothetical transaction to determine whether it is reportable and Guide III contains "A Model Request for Additional Information and Documentary Material (Second Request)."

The Guides are not intended to address specific proposed transactions. If you are analyzing a transaction, we suggest that you not only consult the Act, the Rules, and the other Guides in this series, but also the additional material referenced in Section XII of this Guide. If you have specific questions not addressed in these reference sources, call the PNO between the hours of 8:30AM and 5:00PM, Monday through Friday, except holidays, at (202) 326-3100.

I. INTRODUCTION

The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission and the Department of Justice (the “enforcement agencies”) before consummating the proposed acquisition. The parties must wait a specific period of time while the enforcement agencies review the proposed transaction. The Program became effective September 5, 1978, after final promulgation of the Rules.¹

The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. In the past, the enforcement agencies found that it is often impossible to restore competition fully once a merger takes place. Furthermore, any attempt to reestablish competition after the fact is usually very costly for the parties and the public. Prior review under the Program enables the Federal Trade Commission (“FTC” or the “Commission”) and the Department of Justice (“DOJ”) to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.

In general, the Act requires that certain proposed acquisitions of voting securities, non-corporate interests (“NCI”) or assets be reported to the FTC and the DOJ prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Much of the information needed for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to proposed transactions and thus is immediately available for review during the waiting period.

Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties, as measured by their sales and assets. Small acquisitions, acquisitions involving small parties and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act’s coverage.

If either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from the parties to a reported transaction (a “second request”). A second request extends the waiting period for a specified period, usually 30 days (ten days in the case of a cash tender offer or a bankruptcy sale), after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the submitted information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction.

¹ The Premerger Notification Rules are found at 16 C.F.R. Parts 801, 802 and 803. The Rules also are identified by number, and each Rule beginning with Rule 801.1 corresponds directly with the section number in the C.F.R. (so that Rule 801.40 would be found in 16 C.F.R. § 801.40). In this Guide, the Rules are cited by Rule number.

The Program has been a success. Compliance with the Act's notification requirements has been excellent, and has minimized the number of post-merger challenges the enforcement agencies have had to pursue. In addition, although the agencies retain the power to challenge mergers post-consummation, and will do so under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the Program as a helpful tool in advising their clients about particular acquisition proposals.

The Rules, which govern compliance with the Program, are necessarily technical and complex. We have prepared Guide I to introduce some of the Program's specially defined terms and concepts. This should assist you in determining if proposed business transactions are subject to the requirements of the Program.

II. DETERMINING REPORTABILITY

The Act requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of the Act, the Rules, and formal and informal staff interpretations.

As a general matter, the Act and the Rules require both acquiring and acquired persons to file notifications under the Program if all of the following conditions are met:

1. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of \$200 million (as adjusted)², regardless of the sales or assets of the acquiring and acquired persons³; or
2. As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of \$50 million (as adjusted) but at \$200 million (as adjusted) or less; and

² The 2000 amendments to the Act require the Commission to revise certain thresholds annually based on the change in the level of gross national product. A parenthetical "(as adjusted)" has been added where necessary throughout the Rules (and in this guide) to indicate where such a change in statutory threshold value occurs. The term "as adjusted" is defined in subsection 801.1 (n) of the Rules and refers to a table of the adjusted values published in the Federal Register notice titled "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act." The notice contains a table showing adjusted values for the rules and is published in January of each year.

³ See § 7A(a)(2) of the Act.

3. One person has sales or assets of at least \$100 million (as adjusted); and
4. The other person has sales or assets of at least \$10 million (as adjusted).

A. Size of Transaction Test

The first step is to determine what voting securities, NCI, assets, or combination thereof are being transferred in the proposed transaction. Then you must determine the value of the voting securities, NCI, and/or assets as well as the percentage of voting securities and NCI that will be “held as a result of the acquisition.” Calculating what will be held as a result of the acquisition (referred to as the “size of the transaction”) is complicated and requires the application of several rules, including Rules 801.10, 801.12, 801.13, 801.14 and 801.15. Generally, the securities and/or NCI held as a result of the transaction include those that will be acquired in the proposed transaction, as well as any voting securities and/or NCI of the acquired person, or entities within the acquired person, that the acquiring person already holds. Assets held as a result of the acquisition include those that will be acquired in the proposed transaction as well as certain assets of the acquired person that the acquiring person has purchased within the time limits outlined in Rule 801.13.⁴

If the value of the voting securities, NCI, assets or combination thereof exceeds \$200 million (as adjusted) and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

If the value of the voting securities, NCI, assets or combination thereof exceeds \$50 million (as adjusted) but is \$200 million (as adjusted) or less, the parties must look to the size of person test.

B. Acquiring and Acquired Persons/Acquired Entity

The first step in determining the size of person is to identify the “acquiring person” and “acquired person.” “Person” is defined in Rules 801.1(a)(1) and is the “ultimate parent entity” or “UPE” of the buyer or seller. That is, it is the entity that ultimately controls the buyer or seller.⁵ The “acquired entity” is the specific entity whose assets, NCI or voting securities are being acquired. The acquired entity may also be its own UPE or it may be an entity within the acquired person.

Thus, in an asset acquisition, the acquiring person is the UPE of the buyer, and the acquired person is the UPE of the seller. The acquired entity is the entity whose assets are being acquired. In a voting securities acquisition, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose securities are being bought, and the acquired entity is the

⁴ The Rules on when to aggregate the value of previously acquired voting securities and assets with the value of the proposed acquisition are discussed in greater detail in Guide II.

⁵ See “control” under 801.1(b).

issuer of the securities being purchased. In an acquisition of NCI, the acquiring person is the UPE of the buyer, the acquired person is the UPE of the entity whose NCI are being bought, and the acquired entity is the entity whose NCI are being acquired. Oftentimes the acquired person and acquired entity are the same.

In many voting securities acquisitions, the acquiring person proposes to buy voting securities from minority shareholders of the acquired entity, rather than from the entity itself (tender offers are an example of this type of transaction). These transactions are subject to Rule 801.30, which imposes a reporting obligation on the acquiring person and on the acquired person, despite the fact that the acquired person may have no knowledge of the proposed purchase of its outstanding securities.⁶ For this reason, the Rules also require that a person proposing to acquire voting securities directly from shareholders rather than from the issuer itself serve notice on the issuer of the shares to ensure the acquired person knows about its reporting obligation.⁷

C. Size of Person Test

Once you have determined who the acquiring and acquired persons are, you must determine whether the size of each person meets the Act's minimum size criteria. This "size of person" test generally measures a company based on the person's last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.⁸ The size of a person includes not only the entity that is making the acquisition or whose assets or securities are being acquired, but also the UPE and any other entities the UPE controls.⁹

If the value of the voting securities, NCI, assets or combination thereof exceeds \$50 million (as adjusted) but is \$200 million (as adjusted) or less, the size of person test is met, and no exemption applies, the parties must file notification and observe the waiting period before closing the transaction.

D. Notification Thresholds

An acquisition that will result in a buyer holding more than \$50 million (as adjusted) worth of the voting securities of another issuer crosses the first of five staggered "notification thresholds."⁹ The rules identify four additional thresholds: voting securities valued at \$100 million (as adjusted) or greater but less than \$500 million (as adjusted); voting securities valued at \$500 million (as adjusted) or greater; 25 percent of the voting securities of an issuer, if the 25 percent (or any amount above 25% but less than 50%) is valued at greater than \$1 billion (as adjusted);

⁶ See Rule 801.1; Rule 801.30.

⁷ See Rule 803.5.

⁸ See Rule 801.11.

⁹ See Rule 801.1(a)(1).

and 50 percent of the voting securities of an issuer if valued at greater than \$50 million (as adjusted).

The thresholds are designed to act as exemptions to relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. As such, when notification is filed, the acquiring person is allowed one year from the end of the waiting period to cross the threshold stated in the filing.¹⁰ If within that year the person reaches the stated threshold (or any lower threshold), it may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period.¹¹ For example, if you file to acquire \$100 million (as adjusted) of the voting securities of Company B and cross that threshold within one year, you would be able to continue to acquire voting securities of Company B for a total of five years without having to file again so long as your total holding of Company B's voting securities did not exceed either \$500 million (as adjusted) or 50 percent, *i.e.*, additional notification thresholds. Once an acquiring person holds 50 percent or more of the voting securities of an issuer, all subsequent acquisitions of securities of that issuer are exempt.¹²

These notification thresholds apply only to acquisitions of voting securities. The 50 percent threshold is the highest threshold regardless of the corresponding dollar value.

E. Exempt Transactions

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Act and the Rules set forth a number of exemptions, describing particular transactions or classes of transactions that need not be reported despite meeting the threshold criteria.¹³ For example, certain acquisitions of assets in the ordinary course of a person's business are exempted, including new goods and current supplies (*e.g.*, an airline purchases new jets from a manufacturer, or a supermarket purchases its inventory from a wholesale distributor).¹⁴ The acquisition of certain types of real property also would not require notification. These include certain new and used facilities, not being acquired with a business, unproductive real property (*e.g.*, raw land), office and residential buildings, hotels (excluding hotel casinos), certain recreational land, agricultural land and retail rental space and warehouses.¹⁵ In addition, the acquisition of foreign assets would be exempt where the sales in or

¹⁰ See Rule 803.7.

¹¹ See Rule 802.21.

¹² See § 7A(c)(3) of the Act, 15 U.S.C. § 18a(c)(3).

¹³ See § 7A(c) of the Act, 15 U.S.C. § 18a(c), and Part 802 of the Rules, 16 C.F.R. Part 802.

¹⁴ See Rules 802.1(b) and 802.1(c).

¹⁵ See Rules 802.2(c) - (h).

into the U.S. attributable to those assets were \$50 million (as adjusted) or less.¹⁶ Once it has been determined that a particular transaction is reportable, each party must submit its notification to the FTC and the DOJ. In addition, each acquiring person must pay a filing fee to the FTC for each transaction that it reports (with a few exceptions, *see* IV below).

III. THE FORM

The Notification and Report Form (“the Form”) solicits information that the enforcement agencies use to help evaluate the antitrust implications of the proposed transaction. Copies of the Form, Instructions, and Style Sheet are available from the PNO, (202) 326-3100, as well as the FTC website at <http://www.ftc.gov/bc/hsr>.

A. Information Reported

In general, a filing party is required to identify the persons involved and the structure of the transaction. The reporting person also must provide certain documents such as balance sheets and other financial data, as well as copies of certain documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction.

The Form also requires the parties to disclose whether the acquiring person and acquired entity currently derive revenue from businesses that fall within any of the same industry and product North American Industry Classification System (“NAICS”) codes,¹⁷ and, if so, in which geographic areas they operate. Identification of overlapping codes may indicate whether the parties engage in similar lines of business. Acquiring persons must also describe certain previous acquisitions in the last five years of companies or assets engaged in businesses in any of the overlapping codes identified. Please note that an acquiring person must complete the Form for all of its operations; an acquired person, on the other hand, must limit its response in Items 5 through 7 to the business or businesses being sold and does not need to answer Item 8.¹⁸ In addition, the acquired person does not need to respond to Item 6 in a pure asset transaction.

¹⁶ *See* Rules 802.50 and 802.51.

¹⁷ For information concerning NAICS codes *see* the *North American Industry Classification System, 2002*, published by the Executive Office of the President, Office of Management and Budget and available from the National Technical Information Service, 5285 Port Royal Road, Springfield VA 22161 (Order Number PB 2002-101430) or online at <http://www.ntis.gov/search/product.aspx?ABBR=PB2002101430>; and The *2002 Economic Census Numerical List of Manufactured and Mineral Products* published by Bureau of the Census, available from the Government Printing Office or online at <http://www.census.gov/prod/ce02/02numlist/m31r-nl.pdf>. Information regarding NAICS also is available at the Bureau of the Census website at <http://www.census.gov/epcd/www/naics.html>.

¹⁸ *See* 803.2(b).

B. Contact Person

The parties are required to identify an individual (listed in Item 1(g) of the Form) who is a representative of the reporting person and is familiar with the content of the Form. This contact person is, in most cases, either counsel for the party or an officer of the company. This person must be available during the waiting period.

C. Certification and Affidavits

Rule 803.5 describes the affidavit that must accompany certain Forms. In transactions where the acquiring person is purchasing voting securities from non-controlling shareholders, only the acquiring person must submit an affidavit. The acquiring person must state in the affidavit that it has a good faith intention of completing the proposed transaction and that it has served notice on the acquired person as to its potential reporting obligations.¹⁹ In all other transactions, each of the acquired and acquiring persons must submit an affidavit with their Forms, attesting to the fact that a contract, an agreement in principle, or a letter of intent has been executed and that each person has a good faith intention of completing the proposed transaction. These required statements govern when the parties may make a premerger notification filing. The affidavit is intended to assure that the enforcement agencies will not be presented with hypothetical transactions for review.²⁰

Rule 803.6 provides that the Form must be certified and the rule specifies who must make the certification.²¹ One of the primary purposes of the certification is to preserve the evidentiary value of the filing. It also is intended to place responsibility on an individual to ensure that information reported is true, correct, and complete. Both the certification and the affidavit must be notarized, or may be signed under penalty of perjury.²²

¹⁹ See Rule 803.5(a)(i)(I) through (vi) for the full requirements of such notice. In tender offers, the acquiring person also must affirm that the intention to make the tender offer has been publicly announced. See Rule 803.5(a)(2).

²⁰ See Statement of Basis and Purpose to Rule 803.5, 43 Fed. Reg. 33510-33511 (1978).

²¹ The certification may be signed by a general partner of a partnership; an officer or director of a corporation; or, in the case of a natural person, the natural person or his/her legal representative.

²² 28 U.S.C. § 1746 allows use of the following statement in lieu of a notary's jurat: "I declare (or certify, verify or state) under penalty of perjury *under the laws of the United States of America* that the foregoing is true and correct. Executed on (date) [and] (Signature)." The italicized text is necessary only if signed outside the territorial United States.

D. Voluntary Information

The rules provide that reporting persons also may submit information that is not required by the Form.²³ If persons voluntarily provide information or documentary material that is helpful to the competitive analysis of the proposed transaction, the enforcement agencies' review of a proposed transaction may be more rapid. However, voluntary submissions do not guarantee a speedy review. Voluntary submissions are included in the confidentiality coverage of the Act and the Rules.

E. Confidentiality

Neither the information submitted nor the fact that a notification has been filed is made public by the agencies except as part of a legal or administrative action to which one of the agencies is a party or in other narrowly defined circumstances permitted by the Act.²⁴ However, in response to inquiries from interested parties who wish to approach the agencies with their views about a transaction, the agencies may confirm which agency is handling the investigation of a publicly announced merger.²⁵ The fact that a transaction is under investigation also may become apparent if the agencies interview third parties during their investigation.

F. Filing Procedures

The parties should complete and return the original and one copy of the Form, along with one set of documentary attachments, to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. Three copies of the Form, along with one set of documentary attachments, should be sent to the Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530 (for non-USPS deliveries, use zip code 20004).

IV. THE FILING FEE

In connection with the filing of a Form, Congress also mandated the collection of a fee from each acquiring person. The filing fee is based on a three-tiered system that ties the amount paid to the total value of the voting securities, NCI or assets held as a result of the acquisition:²⁶

²³ See Rule 803.1(b).

²⁴ See Section 7A(h) of the Act.

²⁵ A publicly announced merger is one in which a party to the merger has disclosed the existence of the transaction in a press release or in a public filing with a governmental body.

²⁶ The filing fee thresholds are adjusted annually for changes in the GNP during the previous year. The fees themselves are not adjusted.

| VALUE OF VOTING SECURITIES, NCI OR ASSETS TO BE HELD | FEE AMOUNT |
|--|-------------------|
| greater than \$50 million (as adjusted) but less than \$100 million (as adjusted) | \$45,000 |
| \$100 million (as adjusted) or greater but less than \$500 million (as adjusted) | \$125,000 |
| \$500 million (as adjusted) or greater | \$280,000 |

For transactions in which more than one person is deemed to be the acquiring person, each acquiring person must pay the appropriate fee (except in consolidations and in transactions in which there are two acquiring persons that would have exactly the same responses to Item 5 of the Form).²⁷ In addition, an acquiring person will have to pay multiple filing fees if a series of acquisitions are separately reported.²⁸

The filing fee must be paid at the time of filing to “The Federal Trade Commission” by electronic wire transfer, bank cashier’s check or certified check. Rule 803.9 contains specific instructions for payment of the filing fee. In addition, information is available at <http://www.ftc.gov/bc/hsr/filing2.htm>.

V. THE WAITING PERIOD

After filing, the filing parties must then observe a statutory waiting period during which they may not consummate the transaction. The waiting period is 15 days for reportable acquisitions by means of a cash tender offer, as well as acquisitions subject to certain federal bankruptcy provisions, and 30 days for all other types of reportable transactions.²⁹ The waiting period may be extended by issuance of a request for additional information and documentary material.³⁰ Any waiting period that would end on a Saturday, Sunday or legal public holiday will expire on the next regular business day.

A. Beginning of the Waiting Period

In most cases, the waiting period begins after both the acquiring and acquired persons file completed Forms with both agencies. However, for certain transactions in which a person buys

²⁷ For example, if two separate UPEs jointly control an acquisition vehicle and own no other entities, their Item 5 responses would be identical.

²⁸ See Rule 803.9(a) - (c).

²⁹ See Rule 803.10; 11 U.S.C. § 363(b)(2), as amended (1994).

³⁰ See Section VIII(C), *infra*.

voting securities from persons other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person files a complete Form. In a reportable joint venture formation, the waiting period begins after all acquiring persons required to file submit complete Forms.³¹ It is important to note that failure to pay the filing fee or the submission of an incorrect or incomplete filing will delay the start of the waiting period.³²

B. Early Termination

Any filing person may request that the waiting period be terminated before the statutory period expires. Such a request for “early termination” will be granted only if (1) at least one of the persons specifies it on the Form; (2) all persons have submitted compliant Forms; and (3) both antitrust agencies have completed their review and determined not to take any enforcement action during the waiting period.³³

The PNO is responsible for informing the parties that early termination has been granted. The Act requires that the FTC publish a notice in the Federal Register of each early termination granted. Moreover, grants of early termination also appear on the FTC’s website at <http://www.ftc.gov/bc/earlyterm/index.html>.

When it’s requested, early termination is granted for most transactions. On the average, requests for early termination are granted within two weeks from the beginning of the waiting period. In any particular transaction, however, the time that it takes to grant a request for early termination depends on many factors, including the complexity of the proposed transaction, its potential competitive impact, and the number of filings from other parties that the enforcement agencies must review at the same time.

VI. REVIEW OF THE FORM

Once a Form has been filed, the enforcement agencies begin their review. The FTC is responsible for the administration of the Program. As a result, the PNO determines whether the Form complies with the Act and the Rules.

The Form is assigned to a member of the PNO staff to assess whether the transaction was subject to the reporting requirements and whether the Form was completed accurately. If the filing appears to be deficient, the staff member will notify the contact person as quickly as possible so that errors can be corrected. It is important to correct the errors as soon as possible because the waiting period does not begin to run until the Form is filled out accurately, all required

³¹ The joint venture entity does not file. *See* Rule 802.41.

³² *See* Rules 803.3 and 803.10(a).

³³ *See* Formal Interpretation 13 issued August 20, 1982.

information and documentary material are supplied and payment of the filing fee is received.³⁴

When the PNO determines that the Forms comply with all filing requirements, letters are sent to the parties identifying the beginning and ending of the waiting period, as well as the transaction number assigned to the filing. The conclusion that the parties have complied with the Act and the Rules may be modified later, however, if circumstances warrant.

VII. ANTITRUST REVIEW OF THE TRANSACTION

Initially, both agencies undertake a preliminary substantive review of the proposed transaction. The agencies analyze the filings to determine whether the acquiring and acquired firms are competitors, or are related in any other way such that a combination of the two firms might adversely affect competition. Staff members rely not only on the information included on the Form but also on publicly available information. The individuals analyzing the Form often have experience either with the markets or the companies involved in the particular transaction. As a result, they may have industry expertise to aid in evaluating the likelihood that a merger may be harmful.

If, after preliminary review, either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction. Other than members of the PNO, no one at either agency will initiate contact with any of the persons or any third parties until it has been decided which agency will be responsible for investigating the proposed transaction.³⁵ This clearance procedure is designed to minimize the duplication of effort and the confusion that could result if both agencies contacted individual persons at different times about the same matter. The clearance decision is made pursuant to an agreement that divides the antitrust work between the two agencies.

Of course, any interested person, including either of the parties, is free to present information to either or both agencies at any time. However, if the clearance decision has not yet been resolved, the person must make a presentation, or provide written information or documents, to both agencies. If you are representing a party that wishes to make a presentation, or provide written information or documents, you may inform the PNO of that fact; the PNO will let staff attorneys at both agencies who are reviewing the matter know that persons wish to come in and make a presentation, or provide written information or documents.

³⁴ For transactions in which a person buys voting securities from someone other than the issuer (third party and open market transactions), the waiting period begins after the acquiring person submits a complete and accurate Form. An incorrect or incomplete Form from the acquired person will not stop the running of the waiting period. However, the acquired person still is obligated to correct any deficiencies in its filing.

³⁵ Staff at either agency may initiate contact with a person prior to the resolution of which agency will handle the matter by first notifying the other agency and offering the other agency the opportunity to participate.

VIII. SECOND REQUESTS

Once the investigating agency has clearance to proceed, it may ask any or all persons to the transaction to submit additional information or documentary material to the requesting agency. The request for additional information is commonly referred to as a “second request.”³⁶ As discussed above, although both agencies review each Form submitted to them, only one agency will issue second requests to the parties in a particular transaction.

A. Information Requested

Generally, a second request will solicit information on particular products or services in an attempt to assist the investigative team in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as requests for the production of documents. A model second request has been produced jointly by the FTC and DOJ for internal use by their attorneys and is contained in *Guide III*. Because every transaction is unique, however, the model second request should be regarded only as an example.

B. Narrowing the Request

Parties that receive a second request and believe that it is broader than necessary to obtain the information that the enforcement agency needs are encouraged to discuss the possibility of narrowing the request with the staff attorneys reviewing the proposed transaction. Often, the investigative team drafts a second request based only on information contained in the initial filing and other available material. At this point, the investigative team may not have access to specific information about the structure of the company or its products and services. By meeting with staff, representatives of the company have an opportunity to narrow the issues and to limit the required search for documents and other information. If second request modification issues cannot be resolved through discussion with staff, the agencies also have adopted a formal internal appeals process that centralizes in one decision maker in each agency the review of issues relating to the scope of and compliance with second requests.³⁷

The enforcement agency issuing the second request may have determined that certain data sought in the request can resolve one or more issues critical to the investigation. In such a situation, the agency’s staff may suggest use of the informal “quick look” procedure. Under the quick look, the staff will request the parties to first submit documents and other information, which specifically address the critical issues (*e.g.*, product market definition or ease of entry). If the submitted information resolves the staff’s concerns in these areas, the waiting period will be terminated on a *sua sponte* basis and the parties will not have to expend the time and cost of responding to the full second request. Of course, if the submitted information does not resolve the staff’s concerns on determinative issues, then the parties will need to respond to the full

³⁶ See Rule 803.20(a)(1) for the identities of persons and individuals that are subject to such request.

³⁷ See 66 Fed. Reg. 8721-8722, February 1, 2001.

second request.

C. Extension of the Waiting Period

The issuance of a second request extends the statutory waiting period until 30 days (or in the case of a cash tender offer or certain bankruptcy filings,³⁸ 10 days) after both parties are deemed to have complied with the second request (or in the case of a tender offer and bankruptcy, until after the acquiring person has complied).³⁹ During this time, the attorneys investigating the matter may also be interviewing relevant parties and using other forms of compulsory process to obtain information.

The second request must be issued by the enforcement agency before the waiting period expires. If the waiting period expires and the agencies have not issued a second request to any person to the transaction, then the parties are free to consummate the transaction. The fact that the agencies do not issue second requests does not preclude them from initiating an enforcement action at a later time.⁴⁰ All of the agencies' other investigative tools are available to them in such investigations.⁴¹

IX. AGENCY ACTION

After analyzing all of the information available to them, the investigative staff will make a recommendation to either the Commission or the Assistant Attorney General (depending on which agency has clearance).

A. No Further Action

If the staff finds no reason to believe competition will be reduced substantially in any market, it will recommend no further action. Assuming that the agency concurs in that recommendation, the parties are then free to consummate their transaction upon expiration of the waiting period. As with a decision not to issue a second request, a decision not to seek injunctive relief at that time does not preclude the enforcement agencies from initiating a post-merger enforcement action at a later time.

B. Seeking Injunctive Relief

If the investigative staff believes that the transaction is likely to be anticompetitive, it may recommend that the agency initiate injunction proceedings in U.S. district court to halt the

³⁸ See 11 U.S.C. § 363(b), as amended (1994).

³⁹ See § 7A(e) of the Act.

⁴⁰ See § 7(A)(i)(1) of the Act.

⁴¹ See § 7(A)(i)(2) of the Act.

acquisition. If the Commission or the Assistant Attorney General concurs in the staff's recommendation, then the agency will file suit in the appropriate district court. If it is a Commission case, the FTC is required to file an administrative complaint within twenty days (or a lesser time if the court so directs) of the granting of its motion for a temporary restraining order or for a preliminary injunction.⁴² The administrative complaint initiates the FTC's administrative proceeding that will decide the legality of the transaction. If it is a DOJ case, the legality of the transaction is litigated entirely in district court.

C. Settlements

During an investigation, the investigative staff may, if appropriate, discuss terms of settlement with the parties. The staff of the FTC is permitted to negotiate a proposed settlement with the parties; however, it must then be presented to the Commission, accepted by a majority vote, and placed on the public record for a notice and comment period before it can be made final. A proposed settlement negotiated by DOJ staff must be approved by the Assistant Attorney General and also placed on the public record for a notice and comment period before it will be entered by a district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

X. FAILURE TO FILE

A. Civil Penalties

If you consummate a reportable transaction without filing the required prior notification or without waiting until the expiration of the statutory waiting period, you may be subject to civil penalties. The Act provides that "any person, or any officer, director or partner thereof" shall be liable for a penalty of up to \$16,000 a day for each day the person is in violation of the Act. The enforcement agencies may also obtain other relief to remedy violations of the Act, such as an order requiring the person to divest assets or voting securities acquired in violation of the Act.⁴³

B. Reporting Omissions

If you have completed a transaction in violation of the Act, it is important to bring the matter to the attention of the PNO and to file a notification as soon as possible. Even a late filing provides information to the enforcement agencies that assists them in conducting antitrust screening of transactions and antitrust investigations. The parties should include a letter with the notification from an officer or director of the company explaining why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future. The letter should be addressed to the Deputy Director, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW,

⁴² FTC Act Section 13(b).

⁴³ See § 7A(g) of the Act, as amended by the Debt Collection Improvements Act of 1996, Pub. L. No. 104134 (Apr. 26, 1996); 61 Fed. Reg. 54548 (Oct. 21, 1996); 61 Fed. Reg. 55840 (Oct. 29, 1996).

Washington DC 20580.

C. Deliberate Avoidance

The Rules specifically provide that structuring a transaction to avoid the Act does not alter notification obligations if the substance of the transaction is reportable.⁴⁴ For example, the agencies will seek penalties where the parties split a transaction into separate parts that are each valued below the current filing threshold in order to avoid reporting the transaction, but the fair market value of the assets being acquired is actually above the threshold.⁴⁵

XI. OTHER GUIDES IN THIS SERIES

Guide I is the first in a series of guides prepared by the PNO. Others include:

Guide II: *To File Or Not To File -- When You Must File a Premerger Notification Report Form*, which explains certain basic requirements of the program and takes you through a step-by-step analysis for determining whether a particular transaction must be reported.

Guide III: *A Model Request for Additional Information and Documentary Material (Second Request)*, which contains materials designed for the attorneys of the antitrust enforcement agencies in preparing requests for additional information. It is included in this series to provide an example of what you might expect if either enforcement agency issues a second request.

XII. OTHER MATERIALS

To make effective use of these guides, you must be aware of their limitations. They are intended to provide only a very general introduction to the Act and Rules and should be used only as a starting point. Because it would be impossible, within the scope of these guides, to explain all of the details and nuances of the premerger requirements, you must not rely on them as a substitute for reading the Act and the Rules themselves. To determine premerger notification requirements, you should consult:

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390, and amended by Pub. L. No. 106-553, 114 Stat. 2762.
2. The Premerger Notification Rules, 16 C.F.R. Parts 801 – 803. (2008).
3. The Statement of Basis and Purpose for the Rules, 43 Fed. Reg. 33450 (July 31, 1978); 48 Fed. Reg. 34428 (July 29, 1983); 52 Fed. Reg. 7066

⁴⁴ See Rule 801.90.

⁴⁵ See, e.g., *United States v. Sara Lee Corp.*, 1996-1 Trade Cas. (CCH) ¶ 71,301 (D.D.C. 1996).

(March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 61 Fed. Reg. 13666 (March 28, 1996); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4987 (January 31, 2005); 70 Fed. Reg. 11502 (March 8, 2005); 70 Fed. Reg. 73369 (December 12, 2005); 71 Fed. Reg. 35995 (June 23, 2006).

4. The formal interpretations issued pursuant to the Rules, compiled in 6 Trade Reg. Rep. (CCH) at ¶ 42,475.

It is advisable to check the Federal Register for more recent Rules changes that have not yet been incorporated into the Code of Federal Regulations or these guides. For an up-to-date list of Federal Register notices related to the Statement of Basis and Purpose, see <http://www.ftc.gov/bc/hsr/basispurp.shtm>. For other HSR-related rulemakings, see <http://www.ftc.gov/bc/hsr/rulemaking.shtm>. Amendments and formal interpretations, as well as the other material referenced above, are available on the Premerger Notification Office website at <http://www.ftc.gov/bc/hsr>.

There are also non-governmental publications that, while not officially endorsed by the FTC, contain useful compilations of materials relevant to the Program:

1. Commerce Clearing House's *Trade Regulation Reporter* reprints the Act, the Rules, the Form, and the Formal Interpretations.
2. The American Bar Association's Section of Antitrust Law publishes a *Premerger Notification Practice Manual (2007 Edition)* that provides a collection of informal interpretations of the PNO.
3. A loose-leaf treatise by Axinn, Fogg, Stoll and Prager, *Acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act* (published by Law Journal SeminarsPress), explains requirements of the Form, the Rules, and the Act, and includes a discussion of the legislative history of the Act.

Finally, if you have questions about the program or a particular transaction not answered by the Commission's HSR website, the staff of the PNO is available to assist you. The PNO answers thousands of inquiries each year and is prepared to provide prompt informal advice concerning the potential reportability of a transaction and completion of the Form. For general questions, contact the PNO at (202) 326-3100.

HART-SCOTT-RODINO ACT

Clayton Act § 7A. Premerger notification and waiting period

(a) *Filing.* Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—

- (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and
- (2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person—
 - (A) in excess of \$200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19 (a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or
 - (B)
 - (i) in excess of \$50,000,000 (as so adjusted and published) but not in excess of \$200,000,000 (as so adjusted and published); and
 - (ii)
 - (I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more;
 - (II) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more; or (III) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of \$10,000,000 (as so adjusted and published) or more.

(III) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of \$10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

(b) Waiting period; publication; voting securities

(1) The waiting period required under subsection (a) of this section shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the “Assistant Attorney General”) of—

(i) the completed notification required under subsection (a) of this section, or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term “voting securities” means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

(c) *Exempt transactions.* The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

- (2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;
- (3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;
- (4) transfers to or from a Federal agency or a State or political subdivision thereof;
- (5) transactions specifically exempted from the antitrust laws by Federal statute;
- (6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;
- (7) transactions which require agency approval under section 1467a(e) of title 12, section 1828 (c) of title 12, or section 1842 of title 12, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 1843 (k) of title 12; and (B) does not require agency approval under section 1842 of title 12;
- (8) transactions which require agency approval under section 1843 of title 12 or section 1464 of title 12, if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 1843 (k) of title 12; and (B) does not require agency approval under section 1843 of title 12;
- (9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;
- (10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;
- (11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and
- (12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

(d) *Commission rules.* The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, consistent with the purposes of this section—

- (1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and
 - (2) may—
 - (A) define the terms used in this section;
 - (B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and
 - (C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.
- (e) Additional information; waiting period extensions

- (1)
 - (A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.
 - (B)
 - (i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person to determine—
 - (I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or
 - (II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person.
 - (ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with

investigative staff, in order to avoid undue delay of the merger review process.

- (iii) Not later than 90 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.
 - (iv) Not later than 120 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.
 - (v) Not later than 180 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress— (I) which reforms each agency has adopted under this subparagraph; (II) which steps each has taken to implement such internal reforms; and (III) the effects of such reforms.
- (2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person,
- (A) all the information and documentary material required to be submitted pursuant to such a request, or
 - (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.
- (f) *Preliminary injunctions; hearings.* If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 18 of this title, or section 45 of this title, or an action is filed by the United States, alleging that a proposed acquisition violates such section 18 of this title, or section 1 or 2 of this title, and the Federal Trade Commission or the Assistant Attorney General

- (1) files a motion for a preliminary injunction against consummation of such acquisition *pendente lite*, and
 - (2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief *pendente lite* pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.
- (g) Civil penalty; compliance; power of court.
- (1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.
 - (2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—
 - (A) may order compliance;
 - (B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and
 - (C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.
- (h) *Disclosure exemption.* Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.
- (i) Construction with other laws
- (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or

the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

- (2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act [15 U.S.C. 1311 et

(j) Omitted^[1]

(k) *Extensions of time.* If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103 (a) of title 5), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

[¹ Omitted in original.]

two thresholds are met. Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than \$10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than \$1,000,000. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product. The new thresholds, which take effect immediately, are \$41,034,000 for Section 8(a)(1), and \$4,103,400 for Section 8(a)(2)(A).

DATES: January 24, 2022.

FOR FURTHER INFORMATION CONTACT: Christopher M. Grengs, (202–326–2612), Bureau of Competition, Office of Policy and Coordination.

Authority: 15 U.S.C. 19(a)(5).

April J. Tabor,
Secretary.

[FR Doc. 2022–01215 Filed 1–21–22; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds for Section 7A of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of Section 7A of the Clayton Act.

DATES: February 23, 2022.

FOR FURTHER INFORMATION CONTACT: Nora Whitehead (202–326–3100), Bureau of Competition, Premerger Notification Office, 400 7th Street SW, Room 5301, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390 (“the Act”), requires all persons

contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). Note that while the filing fee thresholds are revised annually, the actual filing fees are not similarly indexed and, as a result, have not been adjusted for inflation in over a decade. The new thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

| Subsection of 7A | Original threshold (million) | Adjusted threshold (million) |
|--|------------------------------|------------------------------|
| 7A(a)(2)(A) | \$200 | \$403.9. |
| 7A(a)(2)(B)(i) | 50 | 101. |
| 7A(a)(2)(B)(i) | 200 | 403.9. |
| 7A(a)(2)(B)(ii)(i) | 10 | 20.2. |
| 7A(a)(2)(B)(ii)(i) | 100 | 202. |
| 7A(a)(2)(B)(ii)(II) | 10 | 20.2. |
| 7A(a)(2)(B)(ii)(II) | 100 | 202. |
| 7A(a)(2)(B)(ii)(III) | 100 | 202. |
| 7A(a)(2)(B)(ii)(III) | 10 | 20.2. |
| Section 7A note: Assessment and Collection of Filing Fees ¹ (3)(b)(1) | 100 | 202. |
| Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2) | 100 | 202. |
| Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2) | 500 | 1.0098 billion. |
| Section 7A note: Assessment and Collection of Filing Fees (3)(b)(3) | 500 | 1.0098 billion. |

¹ Public Law 106–553, Sec. 630(b) amended Sec. 18a note.

Any reference to these thresholds and related thresholds and limitation values in the HSR rules (16 CFR parts 801–803) and the Antitrust Improvements Act Notification and Report Form (“the HSR Form”) and its Instructions will also be adjusted, where indicated by the term “(as adjusted)”, as follows:

| Original threshold | Adjusted threshold |
|---------------------|--------------------|
| \$10 million | \$20.2 million. |
| \$50 million | \$101 million. |
| \$100 million | \$202 million. |
| \$110 million | \$222.2 million. |
| \$200 million | \$403.9 million. |
| \$500 million | \$1.0098 billion. |
| \$1 billion | \$2.0196 billion. |

By direction of the Commission.

April J. Tabor,
Secretary.

[FR Doc. 2022–01214 Filed 1–21–22; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Award of a Single-Source Cooperative Agreement To Fund National Institute for Communicable Diseases (NICD), South Africa

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), announces the award of approximately \$5,000,000 for Year 1 of funding to the National Institute for Communicable Diseases (NICD), South Africa. The award will provide accurate, timely, and high-quality strategic information to enable the South African Government (SAG) to track critical infectious disease pathogens, monitor interventions, and inform policy and programming to reduce disease transmission and burden. Annual award amounts for years 2–5 will be set at continuation.

DATES: The period for this award will be September 30, 2022, through September 29, 2027.

FOR FURTHER INFORMATION CONTACT: Dr. Karidia Diallo, Center for Global Health, Centers for Disease Control and

16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

TRANSACTION NUMBER ASSIGNED

FEE INFORMATION (For Payer Only)

TAXPAYER IDENTIFICATION NUMBER _____
 OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

AMOUNT PAID \$ _____

NAME OF PAYER (if different from PERSON FILING) _____

WIRE TRANSFER or CERTIFIED CHECK / MONEY ORDER ATTACHED

WIRE TRANSFER CONFIRMATION NO. _____

FROM (NAME OF INSTITUTION) _____

IS THIS A CORRECTIVE FILING? YES NO CASH TENDER OFFER? YES NO BANKRUPTCY? YES NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? YES NO
 (Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(voluntary) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? YES NO
 IF YES, list jurisdictions: _____

ITEM 1

NAME
 HEADQUARTERS ADDRESS
 ADDRESS LINE 2
 CITY, STATE, COUNTRY
 ZIP CODE
 WEB SITE

1(a) PERSON FILING

1(b) PERSON FILING NOTIFICATION IS an acquiring person an acquired person both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION
 Corporation Unincorporated Entity Natural Person Other (Specify) _____

1(d) DATA FURNISHED BY
 calendar year fiscal year (specify period): _____ (month/year) to _____ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

Not Applicable This report is being filed on behalf of a foreign person pursuant to § 803.4. This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME
 ADDRESS
 CITY, STATE, COUNTRY
 ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME
 ADDRESS
 CITY, STATE, COUNTRY
 ZIP CODE

Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) _____ %

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1
 FIRM NAME
 BUSINESS ADDRESS
 CITY, STATE, COUNTRY
 ZIP CODE
 TELEPHONE NUMBER
 FAX NUMBER
 E-MAIL ADDRESS

CONTACT PERSON 2
 FIRM NAME
 BUSINESS ADDRESS
 CITY, STATE, COUNTRY
 ZIP CODE
 TELEPHONE NUMBER
 FAX NUMBER
 E-MAIL ADDRESS

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME
 FIRM NAME
 BUSINESS ADDRESS
 CITY, STATE, COUNTRY
 ZIP CODE
 TELEPHONE NUMBER
 FAX NUMBER
 E-MAIL ADDRESS

ITEM 2**2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS**

| NAME | NON-REPORTABLE |
|------|--------------------------|
| | <input type="checkbox"/> |

LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

| NAME | NON-REPORTABLE |
|------|--------------------------|
| | <input type="checkbox"/> |

2(b) THIS ACQUISITION IS (put an "X" in all the boxes that apply)

- | | |
|--|--|
| <input type="checkbox"/> an acquisition of assets | <input type="checkbox"/> a consolidation (see § 801.2) |
| <input type="checkbox"/> a merger (see § 801.2) | <input type="checkbox"/> an acquisition of voting securities |
| <input type="checkbox"/> an acquisition subject to § 801.2 (e) | <input type="checkbox"/> a secondary acquisition |
| <input type="checkbox"/> a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50) | <input type="checkbox"/> an acquisition subject to § 801.31 |
| <input type="checkbox"/> an acquisition subject to § 801.30 (specify type) | <input type="checkbox"/> an acquisition of non-corporate interests |
| | <input type="checkbox"/> other (specify) |

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED (acquiring person only in an acquisition of voting securities)

- \$50 million (as adjusted)
 \$100 million (as adjusted)
 \$500 million (as adjusted)
 25% (see Instructions) (as adjusted)
 50%
 N/A

| | | |
|--|--|--|
| 2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD (\$MM) \$ | (v) VALUE OF NON-CORPORATE INTERESTS ALREADY HELD (\$MM) \$ | |
| (ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD % | (vi) PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD % | |
| (iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ | (vii) TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ | (ix) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM) \$ |
| (iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION % | (viii) TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION % | (x) AGGREGATE TOTAL VALUE (\$MM) \$ |

ITEM 3**3(a) DESCRIPTION OF ACQUISITION**

ACQUIRING UPE(S)

NAME

ADDRESS

ADDRESS LINE 2

CITY, STATE

ZIP CODE, COUNTRY

ACQUIRED UPE(S)

NAME

ADDRESS

ADDRESS LINE 2

CITY, STATE

ZIP CODE, COUNTRY

ACQUIRING ENTITY(S)

NAME

ADDRESS

ADDRESS LINE 2

CITY, STATE

ZIP CODE, COUNTRY

ACQUIRED ENTITY(S)

NAME

ADDRESS

ADDRESS LINE 2

CITY, STATE

ZIP CODE, COUNTRY

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)*(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE)*

ATTACHMENT NUMBER

NAME OF PERSON FILING NOTIFICATION

DATE

ITEM 4

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See *Item by Item instructions*). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION None

CENTRAL INDEX KEY NUMBER

| | |
|--|--|
| | |
|--|--|

4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS None

ATTACHMENT OR REFERENCE NUMBER

| | |
|--|--|
| | |
|--|--|

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS None

ATTACHMENT OR REFERENCE NUMBER

| | |
|--|--|
| | |
|--|--|

4(d) ADDITIONAL DOCUMENTS None

ATTACHMENT OR REFERENCE NUMBER

| | |
|--|--|
| | |
|--|--|

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

Check None at the bottom of the page and provide explanation if you are not reporting revenue

| 6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE | DESCRIPTION | YEAR TOTAL DOLLAR REVENUES (\$MM) |
|--|-------------|---|
|--|-------------|---|

Attachment:

| | | | |
|--|--|--|----------------------------------|
| | | | <input type="checkbox"/> Overlap |
|--|--|--|----------------------------------|

NONE (PROVIDE EXPLANATION)

NAME OF PERSON FILING NOTIFICATION

DATE

5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY

Not Applicable

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

Attachment:

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

Attachment:

| CODE | DESCRIPTION |
|------|-------------|
| | |

ITEM 6**6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION**

Attachment:

| NAME | CITY | STATE | COUNTRY |
|------|------|-------|---------|
| | | | |

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

| ISSUER/ UNINCORPORATED ENTITY | SHAREHOLDER/ INTEREST HOLDER | HQ ADDRESS | % HELD |
|----------------------------------|---------------------------------|------------|--------|
| | | | |

6(c)(i) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

| UPE OF FILING PERSON | ISSUER/ UNINCORPORATED ENTITY | % HELD |
|----------------------|----------------------------------|--------|
| | | |

6(c)(ii) HOLDINGS OF ASSOCIATES (ACQUIRING PERSON ONLY)

Attachment:

| TOP LEVEL ASSOCIATE | ISSUER/ UNINCORPORATED ENTITY | % HELD |
|---------------------|----------------------------------|--------|
| | | |

ITEM 7

OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION None

| CODE | DESCRIPTION | PERSON / ASSOCIATE / BOTH |
|------|-------------|---------------------------|
| | | |

7(b)(i) LIST THE NAME OF EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

| UPE OF OTHER FILING PERSON | ENTITY THAT OVERLAPS (IF DIFFERENT) |
|----------------------------|-------------------------------------|
| | |

7(b)(ii) LIST THE NAME OF EACH ASSOCIATE OF THE ACQUIRING PERSON THAT ALSO DERIVED DOLLAR REVENUES
(ACQUIRING PERSON ONLY)

| TOP LEVEL ASSOCIATE | ENTITY THAT OVERLAPS (IF DIFFERENT) |
|---------------------|-------------------------------------|
| | |

7(c) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

| CODE | GEOGRAPHIC MARKET INFORMATION |
|------|-------------------------------|
| | |

7(d) GEOGRAPHIC MARKET INFORMATION FOR ASSOCIATES OF THE ACQUIRING PERSON
(ACQUIRING PERSON ONLY)

| CODE | GEOGRAPHIC MARKET INFORMATION |
|------|-------------------------------|
| | |

ITEM 8

PRIOR ACQUISITIONS (ACQUIRING PERSON ONLY)

| | | | |
|-------------------|-------------------------------------|---------------------------------|--|
| NAICS Code | | | |
| | | | |
| Acquired Entity | | | |
| Former HQ Address | | | |
| Acquisition Type | <input type="checkbox"/> Securities | <input type="checkbox"/> Assets | <input type="checkbox"/> Non Corporate Interests |
| Notes | Date of Acquisition: | | |

CERTIFICATION

This **NOTIFICATION AND REPORT FORM**, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)

TITLE

SIGNATURE

DATE

Subscribed and sworn to before me at the

City of _____, State of _____

[SEAL]

this _____ day of _____, the year _____

Signature _____

My Commission expires _____

**16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS**Approved by OMB
3084-0005**Attach the Affidavit required by § 803.5 to the Form.****THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS**

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. §18a. The maximum daily civil penalty amount is listed in 16 C.F.R. §1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, Federal Trade Commission, 400 7th St. SW, Room #5301, Washington, DC 20024
and
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

NAME OF PERSON FILING NOTIFICATION

DATE

ENDNOTES

| ENDNOTE NUMBER | PERTAINING TO | ENDNOTE TEXT |
|----------------|---------------|--------------|
| | | |

ATTACHMENTS

AttachTotal:

| ATTACHMENT NUMBER | ATTACHMENT DESCRIPTION | | |
|----------------------|------------------------|-------------|--|
| | | DESCRIPTION | |
| | | | |
| | ATTACHED TO ITEM | | |

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

OMB: 3084-0005

GENERAL

The Notification and Report Form (“the Form”) is required to be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 (“the Rules”). These instructions specify the information that must be provided in response to the items on the Form.

Information

The central office for information and assistance concerning the Form and the Rules is:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov

Copies of the Form, Instructions and Rules as well as information to assist in completing the Form are available at the [PNO website](#).

Definitions

The definitions used in this Form are set forth in the Rules. See [Statute, Rules and Formal Interpretations](#) for copies of the Hart-Scott-Rodino Act (“the Act”), the Rules, and the Federal Register Notices issuing the Rules and Rule amendments (“Statements of Basis and Purpose”).

The term “documentary attachments” refers only to materials submitted in response to Item 3(b), Item 4 and to submissions pursuant to § 803.1(b) of the Rules.

The terms “person filing” or “filing person” mean the ultimate parent entity (“UPE”). (See § 801.1(a)(3)). The terms are used herein interchangeably.

Filing

Parties should file the completed Form, together with all documentary attachments, with the Premerger Notification Office (“PNO”) of the Federal Trade Commission (“FTC”) and the Premerger Unit of the Antitrust Division of the Department of Justice (“DOJ”) (together, “the Agencies”). Filers have the option of submitting a [DVD filing](#) or a [paper filing](#). Filings should be submitted to:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024

and

Department of Justice
Antitrust Division
Premerger and Division Statistics Unit
450 Fifth Street, N.W., Suite 1100
Washington, D.C. 20530

If one or both delivery sites are unavailable, the Agencies may announce alternate sites for delivery through the media and, if possible, at the [PNO website](#).

If submitting a DVD filing

- 1) Provide the FTC with:

TWO (2) DVDs, each containing the Form, affidavit, certification and all documentary attachments, along with the original hard copies of the cover letter, certification and affidavit.

- 2) Provide DOJ with:

TWO (2) DVDs containing the same content as above, along with **THREE** (3) hard copies of the cover letter.

The Form must be a searchable PDF document. All other files must be in searchable PDF or MS Excel spreadsheet format and saved in color, if applicable. This includes the affidavit and certification.

Label each DVD with the name of the person filing, the name of a contact person and that person’s phone number. Leave space on the DVD for the Agencies to write the assigned transaction number and date of receipt.

If the DVD or files contain viruses, passwords, or are not readable, the filing will not be accepted and the waiting period will not start.

For further instructions on DVD filing and specific DVD requirements, go to [HSR Resources](#) on the [PNO website](#).

If submitting a paper filing

- 1) Provide the FTC with:

ONE (1) original and **ONE** (1) copy of the Form, certification page and affidavit, along with an original cover letter and **ONE** (1) set of documentary attachments.

- 2) Provide DOJ with:

TWO (2) copies of the Form, certification page and affidavit, along with **THREE** (3) copies of the cover letter, and **ONE** (1) set of documentary attachments.

Affidavits

Affidavit(s) are required by § 803.5 and must attest to the good faith of the persons filing to complete the transaction. Affidavits must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:

- 1) that the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
- 2) in the case of a tender offer, that the intention to make the tender offer has been publicly announced; and

- 3) the good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

- 1) the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
- 2) the specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
- 3) the fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
- 4) the anticipated date of receipt of such notification by the Agencies; and
- 5) the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

Responses

Enter the name of the person filing notification in Item 1(a) on page 1 of the Form, and enter the same name and the date on which the Form is completed at the top of each page of the Form.

If there is insufficient room on the Form for a response to a particular item, attach "additional pages" behind that item on the Form. Filers must submit a complete set of additional pages within each copy of the Form.

Each additional page should identify, at the top of the page, the name of the person filing notification, the date on which the Form is completed and the item to which it is addressed.

Voluntary submissions pursuant to § 803.1(b) should be identified as V-1, V-2, etc.

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars.

Limited Response

The acquired person should limit its response in Items 5-7:

- 1) in the case of an acquisition of assets, to the assets being acquired;
- 2) in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such acquired entities; and
- 3) in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are being acquired and all entities controlled by such acquired entities.

Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b)).

Information need not be supplied regarding assets, voting securities or non-corporate interests currently being acquired

when their acquisition is exempt under the Act or Rules. (See § 803.2(c)).

Year

All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) Data

The Form requests "dollar revenues" for non-manufactured and manufactured products with respect to operations conducted within the United States, and for products manufactured outside of the United States and sold into the United States. (See § 803.2(d)). Filing persons must submit data by 6-digit NAICS code to reflect both non-manufacturing and manufacturing dollar revenues. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must also submit data by 10-digit NAPCS code. (See Item 5 below).

In reporting information by 6-digit NAICS code, refer to the *North American Industry Classification System - United States, 2017* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by 10-digit NAPCS code, refer to the concordance tables between 2012 product codes and 2017 NAPCS-based product codes published by the Bureau of the Census.

Information regarding NAICS and NAPCS is available at www.census.gov. This site also provides assistance in choosing the proper code(s) for reporting in Item 5 of the Form.

Thresholds

Filing fee and notification thresholds are adjusted annually pursuant to 15 U.S.C. § 18A(a)(2)(A) based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). The current threshold values can be found at [Current Filing Thresholds](#).

END OF GENERAL SECTION

[Online Style Sheet for the Form](#)

[Online Tips for the Form](#)

THE FORM - ITEM BY ITEM

Fee Information

The fee for filing the Form is based on the aggregate total value of assets, voting securities and controlling non-corporate interests to be held as a result of the acquisition:

| Value of assets, voting securities and controlling non-corporate interests to be held | Fee Amount |
|---|------------|
| greater than \$50 million (as adjusted) but less than \$100 million (as adjusted) | \$45,000 |
| \$100 million (as adjusted) or greater but less than \$500 million (as adjusted) | \$125,000 |
| \$500 million or greater (as adjusted) | \$280,000 |

For current thresholds and fee information, see the [PNO website](#).

Amount Paid

Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges.

Payer Identification

Provide the payer's name and 9-digit Taxpayer Identification Number (TIN). If the payer is a natural person with no TIN, provide the natural person's social security number.

Method of Payment

The preferred method of payment is by electronic wire transfer (EWT). For EWT payments, provide the EWT confirmation number and the name of the financial institution from which the EWT is being sent. If the EWT confirmation number is not available at the time of filing, provide this information to the PNO within two business days of filing.

In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the [PNO website](#) on the [Filing Fee Information](#) page.

There are now specific, limited criteria for paying by certified check. Please see the [Filing Fee Information](#) page for details.

Corrective Filings

Put an X in the appropriate box to indicate whether the notification is a corrective filing (i.e., an acquisition that has already taken place without filing, in violation of the statute). See [Procedures for Submitting Post-Consummation Filings](#) for more information on how to proceed in the case of a corrective filing.

Cash Tender Offer

Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy

Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination

Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18A(b)(2), and on the [PNO website](#). Note that if either party in any transaction requests early termination, it may be granted and published.

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority. Response to this item is voluntary.

Index of Hyperlinks in these Instructions:

[PNO website](#): <https://www.ftc.gov/enforcement/premerger-notification-program>

[Statute, Rules and Formal Interpretations](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations>

[HSR Resources](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources>

[Current Filing Thresholds](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>

[Online Style Sheet for the Form](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet>

[Online Tips for the Form](#):
https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf

[Filing Fee Information](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>

[Procedures for Submitting Post-Consummation Filings](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations>

[Online Tips for Item 4\(c\)](#):
<https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf>

[Online Tips for Item 4\(d\)](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>

[Online Tips for Item 5](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5>

[Online Tips for Item 6](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form>

[Online Tips for Item 7](#):
<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form>

ITEM 1**Item 1(a)**

Provide the name, headquarters address and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE. (See § 801.1(a)(3)).

Item 1(b)

Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2).

Item 1(c)

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, or other (specify). (See § 801.1).

Item 1(d)

Put an X in the appropriate box to indicate whether data furnished in Item 5 is by calendar year or fiscal year. If fiscal year, specify the time period.

Item 1(e)

Put an X in the appropriate box to indicate if the Form is being filed on behalf of the UPE by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if the Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the filing person named in Item 1(a) of the Form.

Item 1(f)

For the acquiring person, if an entity other than the UPE listed in Item 1(a) is making the acquisition, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

For the acquired person, if the assets, voting securities or non-corporate interests of an entity other than the UPE listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

Item 1(g)

Provide the name and title, firm name, address, telephone number, and e-mail address of the primary and secondary individuals to contact regarding the Form. A second contact person is required. (See § 803.20(b)(2)(ii)).

Item 1(h)

Foreign filing persons must provide the name, firm name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii)).

Note: The Form has fields for fax numbers in Item 1. Providing fax numbers is no longer necessary. The fields will be deleted during the next update of the HSR Form.

END OF ITEM 1

ITEM 2**Item 2(a)**

Provide the names of all UPEs of acquiring and acquired persons that are parties to the transaction, whether or not they are required to file notification. If a person is not required to file, check the non-reportable box.

Item 2(b)

Put an X in all the boxes that apply to the transaction.

Item 2(c)

This item should only be completed by the acquiring person where voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Put an X in the box to indicate the highest applicable threshold for which notification is being filed: \$50 million (as adjusted), \$100 million (as adjusted), \$500 million (as adjusted), 25% (if the value of voting securities to be held is greater than \$1 billion, as adjusted), or 50%. (See § 801.1(h)).

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer, valued in excess of \$500 million (as adjusted) would cross the 50% notification threshold, not the \$500 million (as adjusted) threshold.

Item 2(d)

Provide the requested information on assets, voting securities and non-corporate interests. If a combination of assets, voting securities and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote.

For determining percentage of voting securities, evaluate total voting power per § 801.12.

For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

Item 2(d)(i)

State the value of voting securities already held. (See § 801.10).

Item 2(d)(ii)

State the percentage of voting securities already held. (See § 801.12).

Item 2(d)(iii)

State the total value of voting securities to be held as a result of the acquisition. (See § 801.10).

Item 2(d)(iv)

State the total percentage of voting securities to be held as a result of the acquisition. (See § 801.12).

Item 2(d)(v)

State the value of non-corporate interests already held. (See § 801.10).

Item 2(d)(vi)

State the percentage of non-corporate interests already held. (See § 801.1(b)(1)(ii)).

Item 2(d)(vii)

State the total value of non-corporate interests to be held as a result of the acquisition. (See § 801.10).

ITEM 2 cont.

Item 2(d)(viii)

State the total percentage of non-corporate interests to be held as a result of the acquisition. (See §§ 801.10 and 801.1(b)(1)(ii)).

Item 2(d)(ix)

State the value of assets to be held as a result of the acquisition. (See § 801.10).

Item 2(d)(x)

State the aggregate total value of assets, voting securities and non-corporate interests of the acquired person to be held as a result of the acquisition. (See §§ 801.10, 801.12, 801.13 and 801.14).

END OF ITEM 2

Most Common Mistakes When Completing the HSR Form

- Noncompliant affidavit
- Missing contact information in Item 1(g)
- Failure to describe target in Item 3(a)
- Incomplete privilege log
- Failure to properly identify authors and recipients of Item 4c/4d documents
- Failure to properly round revenues in Item 5 to nearest tenth of a million and failure to list in ascending order
- Failure to provide required geographic information (e.g., state, county, and city or town) in Item 7(c)(iv)(b)
- Failure to provide the total number of states and territories in response to Item 7(c)

ITEM 3

Item 3(a)

At the top of Item 3(a), list the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned owned by an acquired entity.

In the Transaction Description section, briefly describe the transaction, indicating whether assets, voting securities or non-corporate interests (or some combination) are to be acquired. Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation. Also, indicate what consideration will be received by each party and the scheduled consummation date of the transaction.

If any attached transaction documents use coded names to refer to the parties, please provide an index identifying the codes.

If there are additional filings, such as shareholder backside filings, associated with the transaction, identify those. Also, identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

Item 3(b)

Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired. Also furnish agreements not to compete and other agreements between the parties. Do not submit schedules and the like unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction. For purposes of Item 3(b), responsive documents must be submitted; identifying an internet address or providing a link is not sufficient.

Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while agreements not to compete may be provided in draft form if that is the most recent version.

If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement, if one exists.

Note that transactions subject to [§ 801.30](#) and [bankruptcies](#) under 11 U.S.C. § 363 do not require an executed agreement or letter of intent. For bankruptcies, provide the order from the bankruptcy court.

END OF ITEM 3

ITEM 4

Item 4(a)

Provide the names of all entities within the person filing notification, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

Item 4(b)

Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification.

The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7.

The acquired person should also provide the most recent reports of the acquired entity(s).

Natural persons need only provide the most recent reports for the highest level entity(s) they control. Do not provide personal balance sheets or tax returns.

If the most recent reports do not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Note that the person filing notification may incorporate a document by reference to an internet address directly linking to the document. (See § 803.2(e)).

Items 4(c) and 4(d)

For each document responsive to Items 4(c) and 4(d), provide the:

- 1) document's title;
- 2) date of preparation; and
- 3) name and title of each individual who prepared the document.

If a specific date is not available, indicate the month and year the document was prepared.

If a large group of people prepared the document, list all the authors and their titles, identifying the principal authors.

Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If a third party prepared the document, the date of preparation and the name of the third party will suffice.

Numbering

Number each document provided in response to Items 4(c) and 4(d). Number 4(c) documents 4(c)-1, 4(c)-2, 4(c)-3, etc. Likewise, number 4(d) documents 4(d)-1, 4(d)-2, 4(d)-3, etc., regardless of the three sub-categories within Item 4(d). If providing only one document, identify it as 4(c)-1 or 4(d)-1.

When submitting a document responsive to both 4(c) and 4(d), list it only once, under 4(c) or 4(d). If a document is responsive to both 4(c) and 4(d), do not cross-reference.

Privilege

Note that if the filing person withholds or redacts portions of any document responsive to Items 4(c) and 4(d) based on a claim of privilege, the person must provide a statement of reasons for non-compliance (a "privilege log") detailing the claim of privilege for each withheld or redacted document. (See § 803.3(d)).

For each document, include the:

- 1) title of the document;
- 2) its author;
- 3) author's title/position;
- 4) addressee;
- 5) addressee's title/position;
- 6) date;
- 7) subject matter;
- 8) all recipients of the original and any copies;
- 9) recipients' titles/positions;
- 10) document's present location; and
- 11) who has control over it.

Additionally, the filing person must state the factual basis supporting the privilege claim in sufficient detail to enable staff to assess the validity of the claim for each document without disclosing the protected information.

If a privileged document was circulated to a group, such as the Board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested. If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

When creating a privilege log, use a separate numbering system for withheld documents, such as P-1, P-2, etc. Redacted documents should also be listed in a separate log that complies with § 803.3(d).

Item 4(c)

Provide all studies, surveys, analyses and reports which were prepared by or 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 the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

Item 4(d)

Item 4(d)(i)

Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s)

ITEM 4 cont.

or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii)

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors (“third party advisors”) for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii)

Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or 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 the acquisition. Financial models without stated assumptions need not be provided in response to this item.

END OF ITEM 4

Tip for Item 4

If there is insufficient room on the Form for a response, attach “additional pages” behind that item on the Form. (See Responses on page II).

[Online Tips for Item 4\(c\)](#)

[Online Tips for Item 4\(d\)](#)

ITEMS 5 THROUGH 7

Limited response for acquired person. For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of:

- 1) assets, to the assets to be acquired;
- 2) voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer; and/or
- 3) non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s).

A person filing as both acquiring and acquired persons may be required to provide a separate response to Items 5 through 7 in each capacity so that it can properly limit its response as an acquired person. (See §§ 803.2(b) and (c)).

ITEM 5

This item requests information regarding dollar revenues. (See NAICS and NAPCS Data section on page II). All persons must submit all dollar revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filers must also submit revenue by 10-digit NAPCS code. Concordance tables between 2012 10-digit NAICS codes and 10-digit 2017 NAPCS codes are available at: <https://www.census.gov/programs-surveys/economic-census/guidance/understanding-napcs.html>.

List all NAICS and NAPCS codes in ascending order.

Acquiring persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time the Form is prepared. Acquired persons filing notification should include the total dollar revenues for all entities included within the acquired entity at the time the Form is prepared. If no dollar revenues are reported, check the “None” box and provide a brief explanation.

Item 5(a)

Provide 6-digit NAICS industry data concerning the aggregate U.S. operations of the person filing notification for the most recent year in all NAICS Sectors in which the person engaged. If the dollar revenues for a non-manufacturing NAICS code totaled less than one million dollars in the most recent year, that code may be omitted from Item 5(a).

Additionally, provide 10-digit NAPCS product code data for each product code within all manufacturing NAICS Sectors (31-33) in which the person engaged in the U.S., including dollar revenues for each product manufactured outside the U.S. but sold into the U.S. Sales of any manufactured product should be reported in a manufacturing code, even if sold through a separate warehouse or retail establishment.

If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS codes and 10-digit NAPCS codes may be provided.

Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both parties to the transaction generate dollar revenues.

Item 5(b)

Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity. (See §§ 801.40 and 801.50). If the acquisition is not the formation of a joint venture, check the "Not Applicable" box.

Item 5(b)(i)

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(b)(ii)

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Item 5(b)(iii)

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(b)(iv)

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAPCS product code in which it will derive dollar revenues.

END OF ITEM 5

Tip for Item 5

Remember, all financial information should be expressed in millions of dollars, rounded to the nearest one-tenth of a million dollars.

[Online Tips for Item 5](#)

An acquired person does not complete Item 6 if the

transaction involves only the acquisition of assets. If the transaction involves a mix of assets along with voting securities and/or non-corporate interests, the acquired person must complete Item 6 as related to the voting securities and non-corporate interests.

Item 6(a)

Subsidiaries of filing person. List the name, city and state/country of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Entities with total assets of less than \$10 million may be omitted. Alternatively, the filing person may report all entities within it.

Item 6(b)

Minority shareholders. For the acquired entity(s) and for the acquiring entity(s) and its UPE or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. (See § 801.1(c))

For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.

Item 6(c)

Minority holdings. Item 6(c) requires the disclosure of holdings of 5% or more but less than 50%, of any entity(s) that derives dollar revenues in any 6-digit NAICS code reported by the other person filing notification. Holdings in those entities that have total assets of less than \$10 million may be omitted.

The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, to respond to Items 6(c)(i) and (ii), provided the financials are no more than three months old.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Items 6(c)(i) and 6(c)(ii), it is permissible for the acquiring person to list all entities in which it or its associate(s) holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.

Item 6(c)(i)

Minority holdings of filing person. If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.

The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year.

The acquired person should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the

ITEM 6 cont.

same 6-digit NAICS industry code as the acquiring person.

Item 6(c)(ii)

Minority holdings of associates.

This item should only be completed by the acquiring person.

Based on the knowledge or belief of the acquiring person, for each associate (see § 801.1(d)(2)) of the acquiring person holding:

- 1) 5% or more but less than 50% of the voting securities or non-corporate interests of the acquired entity(s); and/or
- 2) 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year;

list the associate, the issuer or unincorporated entity and the percentage held.

END OF ITEM 6

Tip for Item 6(c)

Remember, if NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed.

[Online Tips for Item 6](#)

ITEM 7

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see § 801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

- 1) in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year; or
- 2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

Also, if the acquiring person reports an associate overlap only, the acquired person does not need to respond to Item 7.

Item 7(a)

Industry Code Overlap Information

Provide the 6-digit NAICS industry code and description for the industry, and indicate whether the overlap is from the person, an associate or both.

Item 7(b)

Item 7(b)(i)

If the UPE of the other person(s) filing notification derived dollar revenues in the same 6-digit industry code(s) listed in Item 7(a), list the name of that UPE and the name of the entity(s) within that UPE that actually derived those dollar revenues, if different from the entity(s) listed in Item 3(a).

Item 7(b)(ii)

This item should only be completed by the acquiring person.

List the name of each associate of the acquiring person that also derived dollar revenues through a controlled operating company(s) in the 6-digit industry and, if different, the name of the entity(s) that actually derived those dollar revenues.

Item 7(c)

Geographic Market Information

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(c)(iv)(b), the person filing notification may respond with the word "national" if business is conducted in all 50 states.

Item 7(c)(i)

NAICS Sectors 31-33

For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered

ITEM 7 cont.

by Item 7(c)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

Item 7(c)(ii)

NAICS Sector 42

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

Item 7(c)(iii)

NAICS Industry Group 5241

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.

Item 7(c)(iv)(a)

Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48-49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

Item 7(c)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 2123 nonmetallic mineral mining and quarrying
- 32512 industrial gases
- 32732 concrete
- 32733 concrete products
- 44-45 retail trade, except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries
- 521 monetary authorities - central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, except 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

Item 7(c)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises
- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

Item 7(d)

This item should only be completed by the acquiring person.

Use the geographic markets listed in Items 7(c)(i) through 7(c)(iv) to respond to this item, providing the information for associates of the acquiring person. Provide separate responses for each associate of the acquiring person and, if different, the controlled operating company(s) that actually derived the dollar revenues.

END OF ITEM 7

[Online Tips for Item 7](#)

ITEM 8

This item should only be completed by the acquiring person. Determine each 6-digit NAICS industry code listed in Item 7(a), in which the acquiring person derived dollar revenues of \$1 million or more in the most recent year and in which either:

- 1) the acquired entity derived dollar revenues of \$1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive dollar revenues of \$1 million or more); or
- 2) in the case of acquired assets, to which dollar revenues of \$1 million or more were attributable in the most recent year.

For each such 6-digit NAICS industry code, list all acquisitions of entities or assets deriving dollar revenues in that 6-digit NAICS industry code made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity that had annual net sales or total assets greater than \$10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

This item pertains only to acquisitions of U.S. entities/assets and foreign entities/assets with sales in or into the U.S., i.e., with dollar revenues that would be reported in Item 5.

For each such acquisition, supply:

- 1) the 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;
- 2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;
- 3) the headquarters address of that entity prior to the acquisition;
- 4) whether assets, voting securities or non-corporate interests were acquired; and
- 5) the consummation date of the acquisition.

END OF ITEM 8

CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury.

PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. § 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. § 1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

DISCLOSURE NOTICE

Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission, Room #5301
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

END OF FORM INSTRUCTIONS

PREMERGER NOTIFICATION REPORTING UNDER THE HSR ACT

ITEMS 4(c) AND 4(d) OF THE HSR FORM

Item 4(c)(and 4(d) documents

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), parties submitting premerger notification reports are required to submit so-called “4(c) documents” in response to Item 4(c) of the HSR Form. Item 4(c) requires the filing party to include the following materials with its initial premerger notification filing:

[Any] studies, surveys, analyses and reports prepared by or for an officer or director for the purpose of analyzing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

The documents submitted under this section can include offering memoranda or analyses prepared by investment bankers, capital authorization requests, and board memoranda and slide presentations and other internal analyses,

In addition, effective as of August 18, 2011, the HSR form added a new Item 4(d) requiring reporting parties to submit three other classes of documents:

- **Confidential Information Memoranda (“CIM”)**: Item 4(d)(i) requires a filing party to submit any CIM prepared by or for any officers or directors that specifically relate to the sale of the target. If no CIM exists, the parties have to submit any documents given to officers or directors of the buyer meant to serve the function of a CIM. Only documents prepared within a year of the HSR filing date need to be submitted.
- **Third party advisor documents**: Item 4(d)(ii) requires a filing party to submit all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors for any of its officers or directors for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. Only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement, including unsolicited materials, are required.
- **Synergy and efficiency documents**: Item 4(d)(iii) requires a filing party to submit all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officers or directors for

the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

Many parties were already submitting these documents in response to Item 4(c), but in order to ensure that all parties submitted the documents the FTC made the requirement explicit. Item 4(d).

The content of 4(c) and 4(d) documents can be instrumental in determining whether the U.S. antitrust agencies decide to conduct an in-depth investigation of a transaction, issue a second request for information, or seek to block or restructure a transaction. This is particularly true if the documents provide support for a possible theory of anticompetitive harm.

The following is a non-exhaustive list of topics that are likely to attract the attention of the antitrust agencies and to subject a transaction to closer regulatory scrutiny:

- Documents indicating that the price of some product will increase as a result of the transaction.
- Characterizing the market in which the firms compete (since such comments may be misread to endorse a particular view of the market that overstates the competitive impact of a transaction).
- Exaggerated claims about the extent to which the transaction will enhance the competitive position of the parties or disadvantage competitors.
- Comments minimizing the strength of competitors, including smaller competitors or potential new competitors.
- Referring to the acquisition target as the closest competitor, or suggesting that there are any market segments or niches in which the purchaser and the target are uniquely strong and do not face significant competition from others.
- Suggestions that there are high barriers to entry or expansion in the market.
- Suggestions that following the transaction it will be easier for the parties or anyone else to raise prices or reduce any non-price aspect of competition.
- Suggestions that customers will be harmed or concerned about lack of competition as a result of the transaction.
- Suggestions that few synergies, efficiencies or other cost-savings will be achieved as a result of the transaction.
- Suggestions that the transaction will lessen the pressure on either of the parties to innovate or make quality or other improvements.

Consequences of failing to include all Item 4(c) and 4(d) documents

The agencies consider a filing that does not contain all 4(c) documents to be incomplete and ineffective. When the agencies discover a 4(c) document in a second

request submission that was missing from the original premerger filing, the agencies frequently require the filing party to refile its premerger notification, restart all of the waiting periods, and subject all parties to another (or second) second request and substantial delay. The deficient company can also lose significant credibility and leverage at what is usually the worse possible time in the investigation. The agencies almost certainly will take the same stringent view on failing to comply with Item 4(d).

Moreover, if the waiting period for the filing putatively expired and the missing documents emerge after the transaction closed, the agency can seek civil penalties for consummating the transaction without an effective HSR filing. Civil penalties accrue for each day after a transaction has closed where HSR Act's reporting and waiting requirements were not observed. Currently, the maximum civil penalty for violating the HSR Act is \$16,000 per day.¹

In *ADP/AutoInfo*,² ADP submitted an HSR filing on December 7, 1994, for the acquisition of AutoInfo. ADP's HSR filing contained no 4(c) documents. No second request was issued and the transaction closed on April 1, 1995. Following the closing, however, a number of customers complained about price increases and the FTC to open a non-HSR post-closing investigation into the transaction. In the course of the new investigation, the FTC discovered a number of Item 4(c) documents that were missing from ADP's original filing. One of these documents was a marketing plan that explained how the acquisition would enable ADP to "monopolize the [automobile] salvage [yard information services] industry in an expeditious and timely manner." The FTC concluded that the missing documents made ADP's original filing ineffective and hence the transaction violated the HSR Act because it closed without satisfying the Act's reporting and waiting period requirements. In its complaint seeking civil penalties, the government alleged that ADP made little effort to locate its Item 4(c) documents for inclusion in the filing for the AutoInfo transaction and that it did not search or have searched the files of either its officers or directors or those persons who may have generated documents responsive to Item 4(c) for the officers or directors. ADP's in-house counsel, who had prepared the Notification and Report Form and was responsible for collecting 4(c) documents, at most asked only three persons whether they had documents like those covered by Item 4(c). Those persons did not search or have their files searched for Item 4(c) documents and did not produce 4(c) documents. ADP's in-house counsel was unaware of whether and what potentially responsive 4(c) documents were typically

¹ See Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857 (Jan. 9, 2009) (effective Feb. 9, 2009). Curiously, the Federal Civil Penalties Inflation Adjustment Act of 1990 ("FCPIAA"), 28 U.S.C. § 2461 note, contains specific rules for rounding each increase based on the size of the penalty. Increases in civil penalties of greater than \$10,000 and less than or equal to \$100,000 must be in \$5,000 increments, and the increase in the CPI between June 2009 and June 2013 was not high enough to round up any adjustment to \$5,000. See *Adjustments to Civil Penalty Amounts*, 79 Fed. Reg. 13, 539, 13440 (Mar. 11, 2014) (maintaining the maximum civil penalty for HSR Act violation at \$16,000 per day).

² *United States v. Automatic Data Processing, Inc.*, No. 96 0606, 1996 WL 224758 (D.D.C. Apr. 10, 1996).

created by or for ADP officers during an ADP acquisition. In addition, ADP's Chief Financial Officer, who certified the accuracy and completeness of the Notification and Report Form, did not supervise the preparation of the Notification and Report Form or review the completed Notification and Report Form, did not know what documents were required by Item 4(c), did not read the instructions to the Notification and Report Form, and had no understanding of the statute or rules referred to in the certification. The complaint alleged that ADP was in violation of the HSR from April 1, 1995, the date of the AutoInfo acquisition, to January 23, 1996, when ADP refiled its HSR form. At the time, the maximum penalty for violating the HSR Act was \$10,000 per day for each day the company was in violation. This period comprised 297 calendar days, which would subject ADP to a maximum penalty of \$2,970,000. The FTC obtained this maximum penalty in settlement.³

In *Blackstone Capital/Prime Succession*,⁴ Blackstone Capital Partners II Merchant Banking Fund L.P. and its general partner, Howard A. Lipson, settled an FTC investigation into violations of the HSR Act after the FTC discovered that a filing made by Blackstone and signed by Lipson in 1996 for Blackstone's involvement in the leveraged buyout of Prime Succession, Inc. did not include an important 4(c) document. The omission was discovered when a subsequent filing in 1997 by another party involved in the LBO included a memorandum authored by Lipson describing competitive issues in the 1996 transaction. This was the first time that the agencies sought to impose penalties against an individual. Given Lipson's personal involvement in the Prime transaction and the fact that he authored the Item 4(c) document in question, the agencies concluded that he knew or should have known that the filing was inaccurate when he signed it, and at the least had had "reckless disregard" for his obligations under the HSR Act. Blackstone paid a penalty of \$2,785,000 and Lipson paid \$50,000 in the settlement.

In *Hearst Trust/Medi-Span*,⁵ Hearst Corporation settled charges of making an incomplete HSR filing for its 1998 acquisition of Medi-Span. As in the *ADP* case, in the wake of postmerger customer complaints, the FTC opened an investigation of the transaction. In the course of the investigation, Hearst submitted three documents the FTC concluded were responsive to Item 4(c) at the time of the original filing but were not submitted with the notification. On August 21, 2000, Hearst resubmitted its HSR Notification with the missing Item 4(c) documents, along with a privilege log identifying six other documents that had not been identified in the original filing. The waiting period for the resubmitted filing apparently expired on November 22, 2000. To settle the resulting civil penalties action, Hearst agreed to pay \$4 million, the

³ Separately, at the end of the merits investigation the FTC challenged the acquisition as a violation of Section 7. Ultimately, the parties entered into a consent settlement requiring ADP to divest the computer systems and automobile salvage-yard parts trading network it acquired from AutoInfo. *See In re Automatic Data Processing, Inc.*, 124 F.T.C. 456 (1977).

⁴ *United States v. Blackstone Capital Partners II Merchant Banking Fund L.P. & Howard Andrew Lipson*, 99-CV-0795 R, 1999 WL 34814751 (D.D.C. Mar. 31, 1999).

⁵ *United States v. Hearst Trust*, No. 1:01CV02119, 2001 WL 1478814 (D.D.C. Oct. 15, 2001).

largest penalty ever by a single company for violations of the premerger notification rules.⁶

Most recently, in *Iconix/Rocawear*,⁷ Iconix Brand Group agreed to a \$550,000 fine to settle charges of making an incomplete filing in for its acquisition of Rocawear Brand. Iconix failed to submit any Item 4(c) documents with its filing, prompting the FTC to call the company's counsel to confirm that a thorough search was made. Although the agencies did not have any substantive antitrust concerns with the transaction and granted early termination of the HSR waiting period, the DOJ opened an investigation to determine whether Iconix had really undertaken an acquisition requiring more than \$200 million in financing without its officers or directors having prepared or reviewed a single Item 4(c) document. In response to the DOJ's Civil Investigatory Demand, Iconix produced several documents, including an email between its officers and directors, a presentation reviewed by an Executive Vice President and materials prepared for an Iconix board, all of which evaluated and analyzed the Iconix' proposed acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth or expansion into product or geographic markets.

⁶ Also as in the *ADP* case, the FTC challenged the transaction on the merits and obtained a consent settlement requiring Hearst to divest the former Medi-Span business and to pay \$19 million as disgorgement of unlawful profits. *See* *FTC v. Hearst Trust*, No.1:01CV00734 (TPJ) (D.D.C. Dec. 18, 2001) (consent decree).

⁷ *United States v. Iconix Brand Group, Inc.*, Civ. A. No. 1:07-cv-01852-ESH, 2007-2 Trade Cas. (CCH) ¶ 75,900 (D.D.C. 2007).

Voluntary Request Letters



U.S. Department of Justice

Antitrust Division

*[Counsel for the Antitrust Division]
450 5th St., NW, Suite [X]
Washington, DC 20530
[Counsel's e-mail]*

****This Model Voluntary Request Letter is provided as a resource to parties preparing for the review of a proposed transaction by the Antitrust Division. The model is intended to give parties a head start in identifying the kinds of information they should be gathering for the Division, so that parties can be proactive and submit the information as early as possible during the initial waiting period. Parties anticipating a potential investigation by the Division should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing. The model specifications below are examples. The circumstances of a particular investigation will dictate whether any or some of these model specifications may be appropriate for a particular investigation. Based on the unique facts and circumstances of a transaction, the Antitrust Division may seek different or additional information on a voluntary basis.*

[DATE]

Via e-mail
[COUNSEL]

Re: Proposed Merger of [PARTY A] and [PARTY B]
DOJ File No. [XX]

Dear [COUNSEL]:

The Antitrust Division is requesting voluntary information from [Party] (“the company”) regarding the proposed merger between [Party A] and [Party B] (the “transaction”). This request is not to be construed as a “request for additional information or documentary materials” under the Hart–Scott–Rodino Antitrust Improvements Act (“HSR”).

You should be prepared to submit this key information within a few days of receipt of this letter. The earlier the Division receives this information, the sooner and more effectively the Division can determine whether a competitive concern exists, whether the Division can narrow the areas of inquiry, or whether the investigation can be closed.

Unless specifically noted otherwise, this letter seeks information relating only to products or services sold, purchased, or used in the United States. Where the specification

calls for data, please provide the data in an electronic form that is both searchable and sortable, such as an Excel spreadsheet.

1. Identify as narrowly as practical (for example, with the names used by the company and others in the industry to describe the products or services, such as brand names) each product or service, or category of products or services, manufactured, offered, or sold by the company for which there is a competing product or service manufactured, offered, or sold by [Party] (“overlap products”).
2. For each overlap product:
 - (a) identify each area (e.g., U.S., region, county, metropolitan statistical area (MSA)) in which the company and [Party] offer each overlap product;
 - (b) provide lists of the company’s 20 largest U.S. customers (in dollars and by units/volume) during the last [X] year(s) and the company’s 20 most recent customers during the last [X] year(s), and, for each customer, identify a contact person, physical address, e-mail address, phone number, and the units/volume and dollar value of the customer’s purchases during the last [X] year(s);
 - (c) provide the company’s actual and estimated [world, U.S., MSA, other area] sales by [units, dollars, and revenues] for the current and past [X] year(s), any projections of future sales, and any estimated market shares for the company and other significant competitors;
 - (d) identify all other significant competitors (including entrants or potential entrants) and competing products; and
 - (e) [*Where applicable*] identify each facility that produces an overlap product, and state the capacity utilization for each facility for the current year and past [X] years(s).
3. Submit all surveys, win-loss reports, and other documents or data showing the competitors from or to which the company won or lost sales/customers of overlap products for the past [X] year(s).
4. Submit a copy of all presentations and accompanying materials relating to the transaction that were provided to industry analysts, investors, or government or regulatory agencies, including transcripts of any investor calls.
5. Submit documents analyzing, describing, or quantifying the efficiencies or synergies that the company believes will be generated by the transaction.
6. Submit a copy of the company’s current organization chart and personnel directory for the company as a whole and for each of the company’s facilities or divisions that manufactures, offers, or sells an overlap product.

7. Provide a list of all the company's agents and representatives, including investment bankers and third-party consultants, retained in relation to the transaction, and produce all draft or final Confidential Information Memoranda (or documents meant to serve the function of a Confidential Offering Memoranda), bankers' books, and other third-party consultants' materials relating to the transaction. This includes any ordinary course of business documents and financial data shared in the course of due diligence that describe or reflect competition or the competitive position of the company in the business relating to the overlap products.
8. *[For Non-Reportable Transactions]* Submit all agreements, including any side agreements, between the company and [Party] relating to the transaction.
9. *[For Non-Reportable Transactions]* Submit all studies, surveys, forecasts, analyses, business plans, and reports which were prepared by or for any officer or director of the company for the purpose of evaluating or analyzing the transaction with respect to market shares, competition, competitors, markets, cost reductions, potential for sales growth or expansion, synergies and efficiencies, and indicate (if not contained in the document itself) the date prepared, and the name and title of each individual who prepared each document.

Please provide a rolling production of the requested information, prioritizing your responses to Specifications [###]. Please also send all information to us in electronic form either by e-mail to [email address] or by overnight delivery to [address, using 20001 zip code, not 20530].

Documents and information submitted in response to this request are subject to 28 C.F.R. §16. As appropriate, please designate any "confidential commercial information" under 28 C.F.R. §16.7.

Please do not hesitate to call me at [number] with any questions or to discuss this matter further. Thank you for your cooperation with this request.

Sincerely,

[NAME]
Attorney
 Section

Second Requests

REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [WEEBYWE CORPORATION]

Unless otherwise indicated or modified by the Department of Justice, each specification of this Request requires a complete search of the Company. In the Department's experience, modifications to the Request may reduce the burden of searching for responsive documents and information in a way that is consistent with the Department's needs. The Company is encouraged to propose such modifications, but all modifications must be agreed to in writing by the Department.

Submit the information requested in Specification 1 promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search.

INFORMATION REQUESTED

The Company & This Request

1. Submit:
 - a. one copy of each organization chart and personnel directory for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product;
 - b. for each Relevant Product sold, for each Relevant Area, a list that identifies the persons responsible for establishing the Company's policies, practices, and procedures, or for approving any exceptions thereto, including for (1) pricing (including list prices, discounts, or final/negotiated prices); (2) sales or marketing; (3) research and development; and [(4) manufacturing or output], and include a brief description of the role and responsibility of each person listed;
 - c. a list that identifies the persons responsible for (1) negotiating the Transaction; (2) analyzing the Transaction; (3) recommending that the Transaction be approved; (4) approving the Transaction; and (5) integration planning and implementation for the Transaction, and include a brief description of the role and responsibility of each person listed;
 - d. a list that identifies all the Company's agents and representatives, including investment bankers, retained in relation to the Transaction or to the development, production, marketing, or sales of any Relevant Product;
 - e. a list that identifies the persons most knowledgeable about the Company's electronic data systems and policies or practices regarding responsive electronically stored information, including each database or data set responsive to Specification 2;
 - f. a description of each database or data set responsive to Specification 2, including: (1) its software platform; (2) its type (e.g., flat, relational, or enterprise); (3) the sources (e.g., other databases or individuals) used to populate the database; (4) a

Data Dictionary and any other keys that decode or interpret the data; (5) for relational or enterprise databases, documents specifying the relationships among tables (e.g., an entity relationship diagram); (6) any query forms; (7) any regularly prepared reports produced from that database; (8) the entity within the Company that maintains and updates the data; and (9) the entity within the Company that is the primary user of the data;

- g. for each Collaborative Work Environment maintained by the Company that contains responsive documents or information, a description of the environment, including a description of the environment's structure, and a list that identifies the persons who have access to the environment; and
 - h. for each Messaging Application maintained by the Company, a description of the application, its intended use, its use in practice, how messages are stored and can be recovered or produced, and the categories of employees able or authorized to use it.
2. Submit each database or data set relating to each Relevant Product used or maintained by the Company at any time after January 1, [Yr-3] that contains information relating to the Company's:
- a. products;
 - b. facilities;
 - c. shipments;
 - d. purchases;
 - e. bids, estimates, quotes, proposals, or responses to requests for information, submission, or proposal;
 - f. prices, costs, or margins;
 - g. discounts or rebates;
 - h. sales;
 - i. sales call reports or win/loss reports;
 - j. intellectual property;
 - k. research and development projects;
 - l. marketing, promotions, or advertising;
 - m. customers or customer relationships; or
 - n. competitors.

3. Submit all minutes (including attachments) of meetings of the Company's Board of Directors or any committees thereof and all materials submitted to the Board or any committees thereof.
4. List, separately for each subpart below, each federal judicial district in which the Company:
 - a. has an agent to receive service of process (include each agent's name, current business and home addresses, and telephone numbers);
 - b. has an office or a facility; for each office or facility, list the address and identify the individual in charge (with his or her title), and if the office or facility is in the District of Columbia, indicate whether the office or facility's sole purpose is to contact federal governmental agencies; and
 - c. inhabits, is found, or transacts business, and is incorporated or licensed.

The Company may respond to this Specification by agreeing to personal jurisdiction and to accept service of process in all federal judicial districts.

5. Submit documents sufficient to show (and to the extent not reflected in such documents, describe) the Company's policies and practices relating to (a) the retention and destruction of documents, and the retention, storage, deletion, and archiving of electronically stored information, including e-mail, text messages, voice mails, or other communications, and (b) the use of personal electronic devices and Messaging Applications for work purposes.
6. Identify the persons responsible for preparing the response to this Request and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the person who gave the instructions and describe the content of the instructions and the persons to whom the instructions were given. For each specification, identify the persons who assisted in the preparation of the response and identify, by name and corporate title or job description, the persons whose files were searched.

Products & Facilities

7. List each Relevant Product sold in any Relevant Area by the Company, and for each:
 - a. describe any identifying information such as brand name or catalog number, and end uses; and
 - b. identify the business unit of the Company that provides or has provided it.
8. List each facility the Company owns or operates that produces or has been used to produce any Relevant Product in any Relevant Area and state for each:
 - a. its address;

- b. the date it began operation;
 - c. whether it was leased, acquired, or built by or for the Company;
 - d. the current estimated replacement cost and time necessary to replace it;
 - e. the number of production lines of the facility;
 - f. the current nameplate and practical capacity, and the annual capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate [nameplate or practical] capacity, the number of shifts normally used at the facility, and the feasibility of increasing capacity, including the costs and time required; and
 - g. if the facility was built within the last 10 years, the length of time and cost in dollars required to open the facility from initial plan to full production.
9. List each facility the Company is building or planning to build that could produce any Relevant Product in any Relevant Area within the next [X] years, and identify all such planned facilities for which the Company has begun the process to obtain zoning, environmental, or other government permits.

Customers & Sales

10. For each Relevant Product sold in each Relevant Area, for each year of the last three calendar years, state, separately in units and dollars:
- a. the Company's sales;
 - b. that portion of the Company's sales that was of products purchased from sources outside the Company and later resold; and
 - c. [that portion of the Company's sales that was of products manufactured outside the United States.]
11. For each Relevant Product sold in each Relevant Area, list, separately in units and dollars, each of the Company's 20 largest customers. For each customer listed, identify a contact person.

Competitors & Entry

12. Identify the Company's competitors (including any person that has competed or has attempted to compete with the Company for the past ten years) for the provision of each Relevant Product in each Relevant Area, and for each such competitor, submit all documents relating to that competitor's efforts to compete in the provision of each Relevant Product, including:
- a. pricing;

- b. sales;
 - c. features or quality;
 - d. expansion or retrenchment plans;
 - e. plans to introduce a new Relevant Product;
 - f. plans to construct, modify, change the output of, or close any facility producing a Relevant Product;
 - g. plans to exit (or actual exit of) the provision of any Relevant Product in any Relevant Area;
 - h. market shares; and
 - i. relative strengths and weaknesses.
13. Identify each person that has plans to enter or expand output of, has entered or expanded output of, or has attempted to enter or expand output of the provision of any Relevant Product [in any Relevant Area] in the last 10 years, and for each such plan, entry, expansion, or attempt:
- a. describe the plan, entry, or attempt, including listing any Relevant Products sold by that person; and
 - b. describe the Company's estimate of costs and time to enter, steps necessary to enter, and any entry barriers (including any necessary regulatory approvals and the minimum viable scale required for entry).
- Submit all documents from the last 10 years relating to the plans to enter or expand by any person, or for any actual or attempted entry or expansion by any person, into any Relevant Product.
14. **[Optional]** Submit all documents relating to the minimum viable scale; the minimum and optimum plant size, production line size, capacity utilization rate, and production volume; requirements for multi-area, multi-plant, multi-product, or vertically integrated operations; and other factors required to attain any available cost savings, economies of scale or scope, or other efficiencies necessary to compete profitably in the provision of each Relevant Product in each Relevant Area.
15. **[Optional]** Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each Relevant Area for each Relevant Product.
16. **[Optional]** Submit all documents relating to actual and potential imports into, or exports from, each Relevant Area for each Relevant Product.

Marketing & Competition

17. *Submit all documents relating to any actual or potential changes in the supply, demand, cost, price, or output of any Relevant Product as a result of competition.
18. *Submit, for each Relevant Product, all documents relating to the Company's:
 - a. prices, terms of sale, pricing plans, pricing strategies, or profitability;
 - b. business plans or short-term or long-term strategies or objectives;
 - c. advertising, marketing, and promotional plans, including selling aids;
 - d. annual budgets, financial projections, and forecasts;
 - e. expansion or retrenchment plans;
 - f. research and development efforts;
 - g. plans to reduce costs, improve products, introduce new products, or otherwise become more competitive; and
 - h. plans to construct or to change the use or output of any facility.
19. Describe how the Company prices each Relevant Product in each Relevant Area, including all factors considered, the extent to which prices are set through individualized negotiations, and the type of discounts offered by the Company.
20. List by title and submit copies of all market studies, forecasts, surveys, and regularly produced reports relating to output levels, pricing, sales, or marketing of each Relevant Product in any Relevant Area.
21. Submit, for each Relevant Product, all documents relating to:
 - a. discount requests or approvals (including rebates and other promotions);
 - b. sales call reports;
 - c. meeting competition requests or approvals;
 - d. win/loss reports;
 - e. prices, quotes, estimates, or bids submitted to any customer; and
 - f. the results of any price, quote, estimate, or bid submitted to any customer or prospective customer.
22. *Submit all documents relating to any allegation that the Company, its employees, or any of its current or potential competitors is behaving, or has behaved, in an anticompetitive

manner, including customer and competitor complaints; threatened, pending, or completed lawsuits; or federal or state investigations.

23. [OPTIONAL List all employees, officers, or directors who have discussed prices, terms of sale, production or sales volumes, or the quality and feature sets of any Relevant Product sold in any Relevant Area with any employee, officer, director, or agent of any other company that competes with the Company to provide any Relevant Product; identify the persons with whom they discussed these topics; and submit all documents relating to these discussions.]

The Transaction & Its Potential Efficiencies

24. Describe the reasons for the Transaction and the costs to complete it; all plans for any change in the Company's or [Beeside]'s business as a result of the Transaction, the rationales for any such changes, and the costs to achieve them; and all risks associated with the Transaction.
25. Describe the timetable for the Transaction and submit documents sufficient to show:
- a. all actions that must be taken before its completion, including each domestic or foreign regulatory, competition, or antitrust authority that the Company has notified (or expects to notify) of the Transaction;
 - b. the timing for each such action, including for each authority notified, the dates (or expected dates) the authority was (or is expected to be) notified and did or will complete its review;
 - c. any harm that would result if the Transaction is delayed or not completed; and
 - d. any terms or conditions of the Transaction that are not reflected in the merger or sale agreement between the parties.
26. *Submit all documents relating to the Transaction, including:
- a. documents relating to all statements or actions by any person in support of or in opposition to the Transaction, or otherwise expressing any view about the Transaction or its likely effects;
 - b. documents submitted or to be submitted (whether in draft or final form) to any domestic or foreign regulatory, competition, or antitrust authority in connection with its review of the Transaction, including notifications and appendices, actual or potential remedies submitted to a reviewing authority, white papers, responses to requests for information, and competitive impact submissions;
 - c. draft or final orders, decisions, or other statements or formal objections (whether public or nonpublic, final or interim) by any domestic or foreign regulatory, competition, or antitrust authority in connection with its review of the

Transaction, including any decision to enter a new phase of investigation or request additional information; and

- d. communications between the Company and any agency or representative of the U.S. government other than the Antitrust Division, or between the Company and any agent or representative of any federal, state, or local government agency.
27. **[OPTIONAL]** *For each undocumented communication relating to the Transaction made between the Company and any agency or representative of the U.S. government, except the Antitrust Division, [or between the Company and any agent or representative of any state or local government agency]:
- a. state the date and time of the communication;
 - b. if the communication occurred in person, state the location(s) where the communication occurred;
 - c. describe the subject matter and substance of the communication, including each product, program, and project mentioned in the communication; and
 - d. identify all participants in and witnesses to the communication and each participant's or witness's employer.
28. *Describe any benefits that the Company anticipates will result from the Transaction (including all costs savings, economies, new products, product improvements, or other efficiencies or synergies) relating to any Relevant Product in any Relevant Area or which are inextricably linked to any Relevant Product in any Relevant Area, including:
- a. all steps the Company expects to take in achieving each benefit, the risks involved in achieving each benefit, and the time and costs required to achieve each benefit;
 - b. a quantification of each benefit and of the costs to achieve each benefit, an explanation of how the quantification was calculated, the source and identity of all assumptions and inputs to the calculation of the quantification, and separate quantifications of the one-time fixed cost savings, recurring fixed cost savings, and variable costs savings (in dollars per unit and dollars per year) of each benefit;
 - c. how the Transaction would allow the Company to achieve each benefit, each alternative to the Transaction by which the Company could achieve each benefit, and why the Company could not achieve each benefit without the Transaction;
 - d. how each benefit would accrue to consumers or customers; and
 - e. the identity of each person (including title and contact information) employed or retained by the Company with any responsibility for achieving, analyzing, or quantifying each benefit.

Submit all documents relating to any benefit, risk, quantification, timing, cost, or alternative identified or described in response to this Specification or any other efficiency or synergy that will or is expected to arise from the Transaction.

29. **[Optional]** Submit all documents relating to any plans by the Company or any other person, other than plans for the Transaction, for any acquisition, sale, investment, joint venture, or merger involving the provision of any Relevant Product that were:
- a. reviewed or prepared by or for any officer, director, shareholder, or debtholder of the Company, or reviewed by or prepared for any management, executive, or board committee of the Company; or
 - b. submitted to any domestic or foreign regulatory, competition, or antitrust authority.

Only one copy of documents responsive to subpart (b) need to be submitted.

Trade Associations [Optional]

30. List each trade association, information service, or other organization relating to the provision of any Relevant Product of which the Company is a member, in which the Company participates, or to which the Company subscribes, and identify any representative of the Company that represents the Company in that association, service, or organization.
31. Submit one copy of all documents or data relating to production, shipments, sales, prices, competition, or entry conditions of any Relevant Product that the Company or any other person has submitted to or received (including via subscription) from any trade association, information service, or other organization, or any agent of any such association, service, or organization.

Products of Discovery [Optional]

32. Submit all products of discovery the Company or its agents produced or received by any means of discovery, regardless of date, in the suit captioned **[full case name]**.
33. Submit all pleadings, filings, motions, transcripts, rulings, and orders from any proceeding or hearing in the suit captioned **[full case name]**.

Failing Firm/Bankruptcy Sale [Optional]

34. Describe:
- a. if applicable, the reasons why the Company, or any division thereof, considers itself to be “failing” as the term is used in Section 11 of the Department of Justice & Federal Trade Commission’s *Horizontal Merger Guidelines*;

- b. any considerations by the Company at any time to cease provision of any Relevant Product in any Relevant Area, including the persons involved and each step taken as a result of those considerations;
 - c. each actual, proposed, possible, or suggested plan by the Company for the closing or sale of any of its facilities, including any computation of valuations; and
 - d. the process the Company undertook to find a buyer.
35. Identify each person the Company or any of its agents has contacted in an attempt to sell any facilities or other assets used to provide any Relevant Product.
36. State whether the Company believes that the Company's current share of the market for any Relevant Product (based upon sales or installed base) accurately reflects the Company's current or future competitive position in the market for that product, and, if not, describe the Company's reasons for that belief, and submit all documents relied on in support of that belief.
37. Submit all documents relating to:
- a. any actual or potential bankruptcy proceedings involving the Company and relating to any plan to cease provision of any Relevant Product in any Relevant Area;
 - b. reports to or prepared by the Company relating to periodic financial statements, aging of receivables and payables, and cash flow relating to claims of a failing firm, plans to cease provision of any Relevant Product, or bankruptcy or insolvency of the Company;
 - c. each actual, proposed, possible, or suggested plan by the Company for the closing or sale of any of its facilities, including any computation of valuations of the Company;
 - d. contacts the Company has made in an attempt to sell any facilities or other assets used to provide any Relevant Product, including any bids or offers the Company has received to purchase any of the facilities or other assets used to provide any Relevant Product; and
 - e. the process the Company undertook to find a potential buyer.

Transportation Costs [Optional]

38. For each Relevant Product sold in any Relevant Area, describe:
- a. the cost of transporting each Relevant Product by (1) rail; (2) truck; and (3) any other method, including multi-modal forms of transportation;
 - b. the extent to which the cost varies with distance of shipment;

- c. the extent to which the Company assumes the transportation costs of each Relevant Product;
- d. the significance of transportation costs to the Company's ability to compete for sales of each Relevant Product; and
- e. the transportation costs per unit of shipments made to any customer in any Relevant Area since January 1, 20[**] by any method of delivery.

Submit all documents relating to studies, surveys or analyses of the transportation costs for each Relevant Product.

Bids [Optional]

39. Describe each bid (including any estimate, quote, proposal, or response to any request for information, submission, or proposal) the Company has drafted or submitted or considered drafting or submitting since [YR – 3] to supply any Relevant Product in any Relevant Area, and for each such bid list:
- a. the potential customer and that customer's contact information;
 - b. the date the bid was submitted;
 - c. each Relevant Product for which the bid was submitted;
 - d. the request for bid;
 - e. the total amount, in units and in dollars, of the Company's bid;
 - f. any additional terms in the bid relating to price or quantity (e.g., incentives; discounts, rebates, pre-bates, cash awards; the products covered; the geography covered);
 - g. if the Company declined to bid, an explanation for that decision, including each Relevant Product for which the Company considered bidding;
 - h. the incumbent provider, if any, of any Relevant Product at the time of the request for bid;
 - i. the ranking of any bids received, which person or persons were selected as finalists for each bid and which were awarded all or part of the business, the date of the award of the bid, the price and terms of the winning bid or bids, and any Relevant Products included in the award of the bid;
 - j. whether the potential customer requested any rebids, and if so, the identities of each person that rebid, and the terms (including those described in subparts (e) and (f) of this Specification) and date of such person's rebid; and

- k. whether any bids were rejected for failing to meet the purchaser’s technical, product support, or other specifications, and a description of each such rejection.

Submit all documents relating to the bids described in response to this Specification, including all proposed, draft, or submitted contracts.

DEFINITIONS

The following definitions apply for the purposes of this Request:

2. The terms “**the Company**” or “[**Weebyewe**]” mean [Weebyewe Ltd., plc], its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “parent,” “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.
3. The term “[**Beeside**]” means [Beeside Corporation, Inc.], its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms “parent,” “subsidiary,” “affiliate,” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between [Beeside] and any other person.
4. The term “**Collaborative Work Environment**” means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each one of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems (“CMS”) (e.g., Drupal), wikis, and blogs.
5. The term “**Data Dictionary**” means documentation of the organization and structure of the databases or data sets that is sufficient to allow their reasonable use by the Department, including, for each table of information: (a) the name of the table; (b) a general description of the information contained; (c) the size in both number of records and megabytes; (d) a list of fields; (e) the format, including variable type and length, of each field; (f) a definition for each field as it used by the Company, including the meanings of all codes that can appear as field values; (g) the fields that are primary keys for the purpose of identifying a unique observation; (h) the fields that are foreign keys for the purpose of joining tables; and (i) an indication of which fields are populated.
6. The term “**documents**” means all written, printed, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on social media accounts like Twitter or Facebook, chats, instant messages, text messages, other Messaging Applications, and documents contained in

Collaborative Work Environments and other document databases. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, “documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

7. The terms “**identify**” or “**identifies**” mean to state:
 - a. in the case of a person other than a natural person: name, principal address, and telephone number;
 - b. in the case of a natural person other than a former employee of the Company: name, employer, business address, business telephone number, business email, and title or position; and
 - c. in the case of a former employee of the Company: name, current address, telephone number and email address, and the date that the employment with the Company ended.
8. The term “**Messaging Application**” refers to any electronic method used by the Company and its employees to communicate with each other or entities outside the Company for business purposes. “Messaging Application” include platforms for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). “Messaging Application” may overlap with “Collaborative Work Environment.”
9. The term “**person**” includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
10. The term “**plans**” includes proposals, recommendations, or considerations, whether finalized or adopted.
11. The term “**Relevant Area**” means, *and submit information separately for*, (a) the United States and (b) worldwide [**or regional or local markets**].
12. The term “**Relevant Product**” means, *and submit information separately for*, each [**list products or services**].
13. The term “**sales**” means net sales, i.e., total sales after deducting discounts, returns, allowances, and excise taxes. “Sales” includes sales of the Relevant Product whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company.
14. The terms “**Sensitive Personally Identifiable Information**” or “**Sensitive PII**” mean information or data that would identify an individual, including a person’s Social Security Number; or a person’s name, address, or phone number in combination with one

or more of their (a) date of birth; (b) driver's license number or other state identification number, or a foreign country equivalent; (c) passport number; (d) financial account number; or (e) credit or debit card number.

15. The terms “**Sensitive Health Information**” or “**SHI**” mean information or data about an individual's health, including medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
16. The term “**Transaction**” means [description of the proposed transaction].

[OPTIONAL DEFINITIONS]

17. The term “**agreement**” means any understanding, formal or informal, written or unwritten.
18. The term “**documents sufficient to show**” means documents sufficient to provide the Department with a true and correct disclosure of the factual matter requested.
19. The term “**Senior Management**” means any Company officer or employee above the level of vice president or general manager, and board members, and [specify additional titles].
20. The term “**sunk costs**” means the acquisition costs of tangible and intangible assets necessary to provide or sell the Relevant Product that cannot be recovered through the sale or redeployment of these assets for other uses.

INSTRUCTIONS

Timing

1. All references to year refer to calendar year. Unless otherwise specified, this Request calls for documents, data, and other information created, altered, or received by the Company within two years of the date on which this Request was issued. For interrogatory responses, submit a separate response for each year or year-to-date unless otherwise specified. If calendar-year data are not available, supply the Company's fiscal-year data indicating the twelve-month period covered, and submit the Company's best estimate of calendar-year data.
2. Unless otherwise specified, this Request requires the production of all responsive documents, data, and other information in the possession, custody, or control of the Company on the date that this Request was issued.
 - a. If the Company complies fully with this Request within 90 days of issuance, then only specifications marked with an asterisk (i.e., *) are continuing in nature. If the

Company complies fully with this Request more than 90 days after it was issued, then all of the specifications in this Request are continuing in nature.

- b. Specifications that are continuing in nature require production of documents, data, and information created or obtained by the Company up to 30 calendar days before the Company complies fully with this Request, except for materials that require translation into English. Materials that must be translated into English, as described in Instruction 6 below, must be produced if they are created, altered, or received by the Company up to 45 calendar days before the Company complies fully.

Production Format

3. Department representatives must approve the format and production method of any documents, data, or other information before the Company makes an electronic production in response to this Request. Before preparing its production, the Company must contact the Department to explain what materials are available and how they are stored. This discussion must include Company personnel who are familiar with its electronically stored information and databases/data sets.
4. Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Company must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and company terminology. For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically-significant samples of documents categorized as non-responsive documents by the algorithm.
5. If the Department agrees to narrow the scope of this Request to a limited group of custodians, a search of each custodian's files must include files of their predecessors; files maintained by their assistants or under their control; and common or shared databases or data sources maintained by the Company that are accessible by each custodian, their predecessors, or assistants.
6. Submit responses to this Request in a reasonably usable format as required by the Department in the letter sent in connection with the investigation of the Transaction. Documents must be complete and unredacted, except for privilege and for any Sensitive PII or SHI redacted pursuant to Instruction 7. Documents must be submitted as found and ordered in the Company's files and must not be shuffled or otherwise rearranged. Documents written in a language other than English must be translated into English, and

the foreign-language document must be submitted with the English translation. The Company is encouraged to submit copies of hard-copy documents electronically (with color hard copies where necessary to interpret the document) in lieu of producing original hard-copy documents. Unless otherwise agreed to by the Department, produce electronic documents in electronic form only. Electronic productions must be free of viruses. The Department will return any infected media for replacement, which may delay the Company's date of compliance with this Request.

7. Do not produce any Sensitive PII or SHI before discussing the information with Department representatives. If any document responsive to a particular specification contains Sensitive PII or SHI that is not responsive to that specification, redact the unresponsive Sensitive PII or SHI before producing the document. To avoid any confusion about the reason for the redaction, produce an electronic, searchable, and sortable list of such redacted documents by document control number.
8. Provide a master list in sortable and searchable electronic form showing: each custodian's name and the corresponding consecutive document control number(s) used to identify that custodian's documents. Department representatives will provide a sample master list upon request.
9. **[OPTIONAL – If the production from the prior CID is identified and available to the team]** If the Company previously produced a document responsive to this Request to the Department pursuant to Civil Investigative Demand Number [], it is not required to produce that document again; however, for any such documents, the Company must submit the document control numbers.
10. Data called for by this Request must be submitted electronically in a reasonably useable compilation that will allow the Department to access the information it contains. Producing a database or data set in its entirety often does not satisfy this requirement. For the Department to be able to access and interpret data, the Company must respond to Specification 1(f) including, for each database, a Data Dictionary that includes, for each table in the database:
 - a. the name of the table;
 - b. a general description of the information contained;
 - c. the size in both number of records and megabytes;
 - d. a list of fields;
 - e. the format, including variable type and length, of each field;
 - f. a definition for each field as it is used by the Company, including the meanings of all codes that can appear as field values;
 - g. the fields that are primary keys for the purpose of identifying a unique observation;

- h. the fields that are foreign keys for the purpose of joining tables; and
- i. an indication of which fields are populated.

It is likely that only a subset or compilation of the contents of any particular database or data set will need to be produced. After providing the information above, counsel and knowledgeable personnel from the Company should discuss with Department representatives what constitutes a sufficient production from the database or data set in a reasonably useable format.

- 11. The Company must continue to preserve documents and data contained in disaster recovery systems or backup media that may contain information responsive to this Request even if the Company contends that the system or media or the information contained on the media is not reasonably accessible. The Department retains sole discretion to determine whether a search of any backup tapes or media is necessary to respond fully to this Request. If you have any questions, please contact the Department representative identified below to discuss your obligation to preserve backup media.
- 12. Produce all non-privileged portions of any responsive document (including non-privileged or redacted attachments) for which a privilege claim is asserted. Each document withheld in whole or in part from production based on a claim of privilege must be assigned a unique privilege identification number and separate fields representing the beginning and ending document control numbers and logged as follows:
 - a. Each log entry must contain, in separate fields: privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; date of the document; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the anticipated litigation for any work-product claim and the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter sufficiently detailed to enable the Department to assess the privilege claim and the facts relied upon to support that claim.
 - b. Include a separate legend containing an alphabetical list (by last name) of each name on the privilege log, identifying titles, company affiliations, the members of any group or email list on the log (e.g., the Board of Directors), and any name variations used for the same individual.
 - c. On the log and the legend, list all attorneys acting in a legal capacity with the designation ESQ after their name (include a space before and after the "ESQ").
 - d. Produce the log and legend in electronic form that is both searchable and sortable. Upon request, the Company must submit a hard copy of the log and legend.
 - e. Department representatives will provide an exemplar and template for the log and legend upon request.

- f. Any document created by the Company's in-house counsel or the Company's outside counsel that has not been distributed outside the Company's in-house counsel's office or the Company's outside counsel's law firm does not have to be logged. But if the document was distributed to any attorney who does not work exclusively in the Company's in-house counsel's office or who has any business responsibilities, it must be logged. Unlogged documents are subject to any preservation obligations the Company or counsel may have.
13. If the Company is unable to answer a question fully, it must supply all available information; explain why such answer is incomplete; describe the efforts made by the Company to obtain the information; and list the sources from which the complete answer may be obtained. If the information that allows for accurate answers is not available, submit best estimates and describe how the estimates were derived. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to estimate, provide an explanation.
14. If documents, data, or other information responsive to a particular specification no longer exists for reasons other than the Company's document retention policy, describe the circumstances under which it was lost or destroyed, describe the information lost, list the specifications to which it was responsive, and identify the persons with knowledge of such documents, data, or other information.
15. To complete this Request, the Company must submit the attached certification form, executed by the official supervising compliance with this Request, and notarized.

Direct any questions the Company has relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto to **[staff members]** at **[telephone numbers]**. The response to this Request must be addressed to the attention of Ms. **[***staff person***]** and delivered between 8:30 a.m. and 5:00 p.m. on any business day to 450 Fifth Street, NW, Suite **[***]**, Washington, DC 20001. If the Company wishes to submit its response by U.S. mail, please call **[***staff person***]** for mailing instructions.

CERTIFICATION

As required by § 803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Department of Justice. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Department uses such copies in any court or administrative proceeding, the Company will not object based on the Department not offering the original document.

Option 1:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____

| | |
|---------------------------------------|--------------------|
| _____ Type or print name and title | _____ Signature |
|---------------------------------------|--------------------|

Option 2, notarized signature:

| | |
|---------------------------------------|--------------------|
| _____ Type or print name and title | _____ Signature |
|---------------------------------------|--------------------|

Subscribed and sworn to before me at the City of _____, State of _____,

this _____ day of _____, 20__.

(Notary Public)

My Commission Expires: _____

Gun Jumping



Department of Justice

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FLAKEBOARD ABANDONS ITS PROPOSED ACQUISITION OF SIERRAPINE

Decision to Abandon Deal Preserves Competition in the MDF Industry

WASHINGTON, D.C. — Flakeboard America Ltd. abandoned its plan to acquire one medium-density fiberboard (MDF) and two particleboard mills from SierraPine, after the Department of Justice expressed concerns about the transaction’s likely anticompetitive effects in MDF. The department said that the transaction likely would have substantially lessened competition in the market for the production of MDF sold to customers in the West Coast states of California, Oregon, and Washington.

MDF is a manufactured wood product widely used in furniture, kitchen cabinets, and decorative mouldings. An increase in the price of MDF would likely result in significant harm to MDF consumers on the West Coast, the department said.

“This deal threatened to weaken competition and raise MDF prices for customers on the West Coast,” said Bill Baer, Assistant Attorney General of the Department of Justice’s Antitrust Division. “The companies’ decision to abandon the deal is a victory for consumers, who will continue to enjoy the benefits of MDF competition between Flakeboard and SierraPine.”

Flakeboard and SierraPine are two of only four significant suppliers of MDF to the West Coast. Both companies operate MDF mills in Oregon—Flakeboard in Eugene; SierraPine in Medford—and the nearest competing mill is several hundred miles away. For many customers, Flakeboard and SierraPine are the two closest sellers of MDF. The proposed merger would have given the combined firm a 58 percent market share for the thicker and denser grades of MDF that Flakeboard and SierraPine sell on the West Coast.

According to the department, the acquisition would have eliminated significant head-to-head competition between Flakeboard and SierraPine. In addition, by gaining control over SierraPine’s MDF mill, the department said that Flakeboard would have been in a better position to raise prices by restricting the amount of MDF available to the West Coast. The acquisition also would have enhanced the risk of coordination between Flakeboard and its few remaining rivals on output and prices, the department said.

Flakeboard is a Delaware corporation headquartered in Ontario, Canada. Flakeboard’s parent company is Celulosa Arauco y Constitución (Arauco), which is held by Inversiones

Angelini y Compañía Limitada, a Chilean corporation headquartered in Santiago, Chile. In 2013, Flakeboard's annual revenues from its MDF business were approximately \$380 million. SierraPine is a California limited partnership headquartered in Roseville, California. In 2013, SierraPine's annual revenues from its MDF business were approximately \$70 million.

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14-1071



Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 7, 2014
WWW.JUSTICE.GOV TTY (866) 544-5309

AT
(202) 514-2007

JUSTICE DEPARTMENT REACHES \$5 MILLION SETTLEMENT WITH FLAKEBOARD, ARAUCO, INVERSIONES ANGELINI AND SIERRAPINE FOR ILLEGAL PREMERGER COORDINATION

Department Obtains Civil Penalties of \$3.8 Million and Disgorgement of \$1.15 Million

WASHINGTON —The department today announced a settlement with Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución S.A. and Inversiones Angelini y Compañía Limitada; and SierraPine. The settlement requires the companies to pay a combined \$3.8 million in civil penalties for violating the Hart–Scott–Rodino (HSR) Act of 1976. In addition, for violating Section 1 of the Sherman Act, Flakeboard must disgorge \$1.15 million in illegally obtained profits and both Flakeboard and SierraPine must establish antitrust compliance programs and agree to certain restrictions.

The settlement resolves the department’s allegations that Flakeboard, Arauco and SierraPine engaged in illegal premerger coordination while Flakeboard’s proposed acquisition of three SierraPine mills was under antitrust review by the Department of Justice.

Flakeboard and SierraPine abandoned the proposed acquisition on Sept. 30, 2014, after the department expressed concerns about the transaction’s likely anticompetitive effects in the production of medium-density fiberboard (MDF). MDF is a manufactured wood product widely used in furniture, kitchen cabinets, and decorative mouldings.

The department today filed, in U.S. District Court for the Northern District of California, a civil antitrust complaint alleging violations of the HSR Act (Section 7A of the Clayton Act) and Section 1 of the Sherman Act. At the same time, the department filed an agreement that, if approved by the court, would resolve the lawsuit.

“Companies proposing to merge must remain separate and independent during the government’s investigation,” said Bill Baer, Assistant Attorney General of the Department of Justice’s Antitrust Division. “These two competitors did not. Instead they closed a plant and allocated customers when they should have been competing vigorously. As a result both companies are paying substantial civil penalties and Flakeboard is being forced to surrender the ill-gotten profit it gained from violating the antitrust laws.”

According to the complaint, before the proposed acquisition, SierraPine operated particleboard mills in Springfield, Oregon, and Martell, California, that competed directly with Flakeboard’s particleboard mill in Albany, Oregon. Particleboard is an unfinished wood product that is widely used in countertops, shelving, low-end furniture, and other finished products. The Springfield and Martell mills were included in the proposed acquisition along with a third SierraPine mill that produced MDF. The

complaint alleges that after announcing the proposed acquisition on Jan. 14, 2014, and before the expiration of the HSR Act's mandatory premerger waiting period, Flakeboard, Arauco, and SierraPine illegally coordinated to close SierraPine's particleboard mill in Springfield, Oregon, and move the mill's customers to Flakeboard. This unlawful coordination led to the permanent shutdown of the Springfield mill on March 13, 2014, and enabled Flakeboard to secure a significant number of Springfield's customers for its Albany mill. The defendants' conduct constituted an illegal agreement to restrain trade in violation of Section 1 of the Sherman Act, and prematurely transferred operational control, and therefore beneficial ownership, of SierraPine's business to Flakeboard in violation of the HSR Act.

The HSR Act requires companies planning acquisitions or mergers that meet certain thresholds to file premerger notification documents with the department and the Federal Trade Commission. The HSR Act also requires that the merging parties observe a mandatory waiting period before proceeding with the transaction. If the government determines that a transaction violates the antitrust laws, it may seek to block that transaction before the waiting period expires. Each party is subject to a maximum civil penalty of \$16,000 per day for each day they violate the HSR Act.

The complaint alleges that the defendants' HSR Act violation occurred from January 17, 2014, when Flakeboard and SierraPine began coordinating on the closure of the Springfield mill, until the expiration of the waiting period on Aug. 27, 2014. The companies cooperated with the investigation by voluntarily providing the department with evidence of their unlawful premerger conduct, which was a significant factor in the department's decision to reduce the maximum HSR penalty. The \$1.15 million in disgorgement under the Sherman Act represents a reasonable approximation of the ill-gotten profit Flakeboard received as a result of the parties' coordination to close Springfield and move the mill's customers to Flakeboard.

Flakeboard is a Delaware corporation with its U.S. headquarters in Fort Mill, South Carolina. Flakeboard's parent company is Celulosa Arauco y Constitución (Arauco), which is held by Inversiones Angelini y Compañía Limitada, a Chilean corporation headquartered in Santiago, Chile, and the ultimate parent entity named on the HSR filing.

SierraPine is a California limited partnership headquartered in Roseville, California.

As required by the Tunney Act, the proposed settlement, along with the department's competitive impact statement, will be published in the Federal Register. Any person may submit written comments concerning the proposed settlement during a 60-day comment period to Peter Mucchetti, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, N.W., Suite 4100, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the District of Columbia may enter the proposed final judgment upon finding that it is in the public interest.

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14-1246

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**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

| | |
|---|------------------------------|
| <p>15 UNITED STATES OF AMERICA,</p> <p style="text-align: center;">16 <i>Plaintiff,</i></p> <p style="text-align: center;">17 v.</p> <p>18 FLAKEBOARD AMERICA LIMITED,</p> <p>19 CELULOSA ARAUCO Y CONSTITUCIÓN,</p> <p>20 S.A.,</p> <p>21 INVERSIONES ANGELINI Y COMPAÑÍA</p> <p>22 LIMITADA,</p> <p>23 and</p> <p>24 SIERRAPINE,</p> <p style="text-align: center;">25 <i>Defendants.</i></p> | <p>Case No. 3:14-cv-4949</p> |
|---|------------------------------|

COMPLAINT

1
2 The United States of America brings this civil antitrust action to challenge unlawful
3 conduct by Flakeboard America Limited; its parent companies, Celulosa Arauco y Constitución,
4 S.A., and Inversiones Angelini y Compañía Limitada; and SierraPine that occurred while the
5 U.S. Department of Justice was reviewing Flakeboard's proposed acquisition of certain assets
6 from SierraPine.

I. NATURE OF THE ACTION

7
8
9 1. On January 13, 2014, Flakeboard and SierraPine executed an asset purchase
10 agreement in which Flakeboard agreed to acquire SierraPine's particleboard mills in Springfield,
11 Oregon, and Martell, California, and a medium-density fiberboard (MDF) mill in Medford,
12 Oregon. The total value of the proposed transaction was approximately \$107 million, plus a
13 variable amount for inventory.

14 2. SierraPine's Springfield and Martell particleboard mills competed directly with
15 Flakeboard's particleboard mill in Albany, Oregon. Particleboard is an unfinished wood product
16 that is widely used in countertops, shelving, low-end furniture, and other finished products. Both
17 companies also compete in the sale of MDF, a higher-end wood product that is widely used in
18 furniture, kitchen cabinets, and decorative mouldings.

19 3. The transaction exceeded thresholds established by Section 7A of the Clayton Act,
20 15 U.S.C. § 18a, also commonly known as the Hart-Scott-Rodino Antitrust Improvements Act
21 of 1976, as amended ("Section 7A" or "HSR Act"). Consequently, the HSR Act required that the
22 defendants make premerger notification filings with the Federal Trade Commission and
23 Department of Justice and observe a waiting period before Flakeboard obtained beneficial
24 ownership of SierraPine's business. The waiting period seeks to ensure that the parties to a
25 proposed transaction are preserved as independent entities while the reviewing agency—here, the
26 Department of Justice—investigates the transaction and determines whether to challenge it.

1 4. Instead of preserving SierraPine as an independent business, however,
2 Flakeboard, Arauco, and SierraPine coordinated during the HSR waiting period to close
3 SierraPine's Springfield mill and move the mill's customers to Flakeboard. The mill was
4 permanently shut down on March 13, 2014, months before the HSR waiting period expired. On
5 September 30, 2014, Flakeboard and SierraPine abandoned their proposed transaction in
6 response to concerns expressed by the Department of Justice about the transaction's likely
7 anticompetitive effects in the sale of MDF.

8 5. The defendants' coordination to close Springfield and move the mill's customers
9 to Flakeboard constituted a per se unlawful agreement between competitors to reduce output and
10 allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and prematurely
11 transferred operational control of SierraPine's business to Flakeboard during the HSR waiting
12 period in violation of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

13

14 **II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE**

15 6. The United States brings this action under Section 4 of the Sherman Act, 15
16 U.S.C. § 4, seeking relief for the violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and
17 under Section 7A of the Clayton Act, 15 U.S.C. § 18a, to recover civil penalties for the violation
18 of the HSR Act. This Court has jurisdiction over this action and the defendants under Section
19 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

20 7. The defendants are engaged in, and their activities substantially affect, interstate
21 commerce.

22 8. The defendants have stipulated to venue and personal jurisdiction in this District.

23

24 **III. THE DEFENDANTS**

25 9. Flakeboard America Limited is a Delaware corporation with its U.S. headquarters
26 in Fort Mill, South Carolina. Flakeboard and its related entities own numerous mills in North
27 America that produce particleboard and MDF, including a particleboard mill in Albany, Oregon.

1 10. Flakeboard’s parent company is Celulosa Arauco y Constitución, S.A., a Chilean
2 company headquartered in Santiago, Chile, that also produces particleboard and other products.
3 Arauco oversees Flakeboard’s operations in North America.

4 11. Inversiones Angelini y Compañía Limitada is a Chilean corporation
5 headquartered in Santiago, Chile. Inversiones Angelini is a holding company and Flakeboard’s
6 ultimate parent entity, as defined by the Premerger Notification Rules, 16 C.F.R. § 800 *et seq.*
7 Inversiones Angelini is also the ultimate parent entity of Arauco.

8 12. SierraPine is a California limited partnership with its headquarters in Roseville,
9 California. SierraPine owns an operating particleboard mill in Martell, California; the closed
10 particleboard mill in Springfield, Oregon; a closed particleboard mill in Adel, Georgia; and an
11 operating MDF mill in Medford, Oregon.

12 13 **IV. THE HSR ACT AND THE ASSET PURCHASE AGREEMENT**

14 13. The HSR Act imposes notification and waiting-period requirements on certain
15 transactions that result in an acquiring person holding assets or voting securities valued above
16 certain thresholds. Section 801(c)(1) of the Premerger Notification Rules, 16 C.F.R. § 800 *et*
17 *seq.*, defines “hold” to mean to have “beneficial ownership.” One way that an acquiring person
18 may prematurely obtain beneficial ownership of assets or voting securities it plans to acquire is
19 by obtaining operational control of the acquired person’s business before the end of the HSR
20 waiting period. This conduct, sometimes referred to as “gun jumping,” violates Section 7A.

21 14. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), states that any person,
22 or any officer, director, or partner thereof, who fails to comply with any provision of the HSR
23 Act is liable to the United States for a civil penalty for each day during which the person is in
24 violation. For the period relevant to the Complaint, the maximum civil penalty was \$16,000 per
25 defendant, per day, according to the Debt Collection Improvement Act of 1996, Pub. L. 104-134,
26 § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.

1 § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548
2 (Oct. 21, 1996).

3 15. Flakeboard's proposed acquisition of SierraPine's mills was subject to the HSR
4 Act. On January 22, 2014, Flakeboard's ultimate parent entity, Inversiones Angelini, and
5 SierraPine submitted premerger notification filings to the antitrust agencies as required by
6 Section 7A. The HSR waiting period expired on August 27, 2014, 30 days after Flakeboard and
7 SierraPine certified compliance with the Antitrust Division's requests for additional information.

8 16. Before negotiating the proposed acquisition, SierraPine had no plans to shut down
9 the Springfield mill. But during negotiations, Flakeboard made clear that it did not intend to
10 operate Springfield after the transaction closed. Flakeboard insisted that SierraPine close the
11 mill because Flakeboard did not want to manage the shutdown, and its parent company, Arauco,
12 was concerned that its reputation might be harmed if it announced the closure.

13 17. Accordingly, SierraPine agreed in the asset purchase agreement (APA) to "take
14 such actions as are reasonably necessary to shut down and close all business operations at its
15 Springfield, Oregon facility five (5) days prior to the Closing." The APA further provided that
16 "in no event shall [SierraPine] be required to shut down or close its business operations at its
17 Springfield, Oregon facility" until "[a]ny required waiting periods and approvals...under
18 applicable Antitrust Law shall have expired or been terminated." Consistent with these
19 provisions, when Flakeboard and SierraPine executed the APA, they anticipated that SierraPine
20 would announce and implement the Springfield closure immediately after the HSR waiting
21 period expired, but before the transaction was consummated.

22 23 **V. THE DEFENDANTS' UNLAWFUL CONDUCT**

24 18. Despite the defendants' intentions under the APA, they subsequently entered into
25 a series of agreements and took other actions during the HSR waiting period to close SierraPine's
26 Springfield mill and move the mill's customers to Flakeboard—conduct that together constituted
27

1 an unlawful agreement between competitors and prematurely transferred operational control of
2 SierraPine's business to Flakeboard.

3 19. On January 14, 2014, the day after executing the APA, the defendants announced
4 Flakeboard's proposed acquisition of SierraPine's mills. SierraPine did not announce the
5 Springfield closure at that time because it intended to continue operating Springfield if the
6 acquisition was not consummated and knew that employees and customers would start leaving
7 the mill as soon as news of the planned closure became public.

8 20. Within two days of the transaction's announcement, however, a labor issue arose
9 that SierraPine believed would likely require it to publicly disclose the Springfield closure earlier
10 than planned, while the transaction was still being reviewed by the Department of Justice.
11 SierraPine immediately informed Flakeboard that the labor issue would require them to "share
12 the pending news on Springfield...before we have early determination on [the] HSR." The
13 following week, SierraPine and Flakeboard discussed the Springfield closure announcement, its
14 timing, and its ramifications. During these discussions, the companies considered the possibility
15 that Flakeboard might waive the provision requiring SierraPine to close the mill, which they
16 expected would avert the need to announce the Springfield closure during the HSR waiting
17 period.

18 21. After consulting with Arauco, however, Flakeboard informed SierraPine that it
19 would not waive the Springfield closure provision. As a result, the companies understood that
20 SierraPine would announce the Springfield closure during the HSR waiting period and that the
21 mill would close within weeks of that announcement, without regard to whether the HSR waiting
22 period had expired and regardless of whether the underlying transaction was ultimately
23 consummated. Consistent with this understanding, at the end of January, Flakeboard and
24 SierraPine agreed on the content and timing of a press release announcing that Springfield would
25 "cease operations in an orderly manner over the next few weeks" and that the mill would be
26 "permanent[ly] clos[ed]." SierraPine issued the press release on February 4, 2014, and ceased
27 production at Springfield on March 13, 2014, months before the HSR waiting period expired.

1 22. Flakeboard and SierraPine also agreed to transition Springfield’s customers to
2 Flakeboard’s competing mill in Albany, Oregon. In the period leading up to the Springfield
3 closure announcement, SierraPine gave Flakeboard competitively sensitive information about
4 Springfield’s customers—including the name, contact information, and types and volume of
5 products purchased by each Springfield customer—and Flakeboard distributed this information
6 to its sales employees. SierraPine also agreed to Flakeboard’s request to delay the issuance of
7 the press release from February 3 to February 4 so that Flakeboard could better position its sales
8 personnel to contact Springfield’s customers.

9 23. In addition, at Flakeboard’s request, SierraPine instructed its own sales employees
10 to inform Springfield customers following the Springfield closure announcement that Flakeboard
11 wanted to serve their business and would match SierraPine’s prices. Also at Flakeboard’s
12 request, SierraPine relayed assurances of future employment with Flakeboard to key SierraPine
13 sales employees so that they would direct SierraPine’s Springfield customers to Flakeboard. A
14 top Flakeboard sales manager underscored the purpose of these employment assurances: “Once
15 that [Springfield closure] announcement is made the 74 [million square feet of particleboard]
16 from Springfield becomes fair game. I...want to make sure that the SierraPine sales group will
17 be trying to direct the business to their new employer and to [Flakeboard’s Albany mill].”

18 24. After the Springfield closure announcement, SierraPine did not compete for most
19 of Springfield’s customers from its remaining particleboard mill in Martell, California, but
20 instead directed these customers to Flakeboard, telling them that Flakeboard could meet their
21 needs and would honor SierraPine’s prices. As SierraPine informed one Springfield customer,
22 “We will try and transition all business to [Flakeboard’s] Albany [mill].”

23 25. With SierraPine’s assistance, Flakeboard successfully secured a substantial
24 amount of Springfield’s business, including a significant number of new customers that
25 Flakeboard had not previously served and additional business from customers that Springfield
26 and Flakeboard’s Albany mill both previously served. The increased sales volumes from
27 SierraPine’s Springfield customers significantly increased Flakeboard’s profits.

1 26. Although Flakeboard and SierraPine subsequently abandoned their transaction on
2 September 30, 2014, SierraPine’s Springfield mill remains closed. Virtually all of its employees
3 have voluntarily left or been terminated. Reopening the Springfield mill would be costly and
4 time-consuming, and SierraPine has no plans to do so.

5
6 **VI. VIOLATIONS ALLEGED**

7 **FIRST CAUSE OF ACTION**
8 **(Violation of Section 1 of the Sherman Act)**

9 27. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of
10 this Complaint.

11 28. Flakeboard and SierraPine are horizontal competitors in the sale of particleboard.

12 29. Flakeboard, Arauco, and SierraPine’s coordination to close SierraPine’s
13 particleboard mill in Springfield, Oregon, and to move the mill’s customers to Flakeboard
14 constituted a contract, combination, or conspiracy in restraint of trade that was unlawful under
15 Section 1 of the Sherman Act, 15 U.S.C. § 1. Their unlawful agreement was not reasonably
16 necessary to achieve the procompetitive benefits of any legitimate business collaboration.

17 30. Flakeboard, Arauco, and SierraPine’s actions to close the Springfield mill and
18 move its customers to Flakeboard were undertaken without any assurance that their transaction
19 would be consummated and constituted an agreement between competitors to reduce output and
20 allocate customers that is per se unlawful under Section 1 of the Sherman Act.

21 **SECOND CAUSE OF ACTION**
22 **(Violation of Section 7A of the Clayton Act)**

23 31. Plaintiff realleges and incorporates the allegations in paragraphs 1 through 26 of
24 this Complaint.

25 32. Flakeboard’s acquisition of SierraPine’s mills was subject to Section 7A’s
26 premerger notification and waiting-period requirements.

1 33. Flakeboard, after contracting to acquire SierraPine’s assets under the APA,
2 exercised operational control, and therefore obtained beneficial ownership, over SierraPine’s
3 business in violation of the HSR Act by:

- 4 (a) Coordinating with SierraPine to close the Springfield mill without regard
5 to the HSR waiting period;
- 6 (b) Coordinating with SierraPine to move Springfield’s customers to
7 Flakeboard during the HSR waiting period, by, among other things:
- 8 (i) obtaining competitively sensitive information from SierraPine,
9 including a customer list with the name, contact information, and
10 types and volume of products purchased by each Springfield
11 customer, and distributing this confidential information to
12 Flakeboard sales employees;
- 13 (ii) delaying the Springfield closure announcement so that Flakeboard
14 could better position its sales team to contact Springfield’s
15 customers;
- 16 (iii) directing SierraPine sales employees to inform Springfield
17 customers that Flakeboard sought their business and would match
18 SierraPine’s prices; and
- 19 (iv) coordinating with SierraPine to offer assurances of future
20 employment with Flakeboard to key SierraPine sales employees so
21 that they would direct Springfield’s customers to Flakeboard.

22 34. Through these actions, Flakeboard exercised operational control, and therefore
23 obtained beneficial ownership, of SierraPine’s business before the HSR waiting period expired.

24 35. The defendants were continuously in violation of Section 7A from on or about
25 January 17, 2014, until the HSR waiting period expired on August 27, 2014. Thus, Inversiones
26 Angelini, as Flakeboard’s ultimate parent entity (together with Arauco and Flakeboard) and
27 SierraPine are each liable to the United States for a maximum civil penalty of \$16,000 per day.

1 **VII. REQUEST FOR RELIEF**

2 36. The United States requests that this Court:

3 (a) adjudge and decree that Flakeboard, Arauco, and SierraPine engaged in an
4 agreement, combination, or conspiracy that was unlawful under Section 1
5 of the Sherman Act;

6 (b) award the United States such other relief, including equitable monetary
7 relief, as the nature of this case may require and as is just and proper to
8 prevent the recurrence of the alleged violation of Section 1 of the Sherman
9 Act and to dissipate the anticompetitive effects of the violation;

10 (c) adjudge and decree that the defendants violated the HSR Act and were in
11 violation of the HSR Act during the period beginning on or about January
12 17, 2014, and ending on August 27, 2014;

13 (d) order that Inversiones Angelini (together with Arauco and Flakeboard) and
14 SierraPine each pay to the United States an appropriate civil penalty as
15 provided under Section 7A(g)(1) of the Clayton Act, 15 U.S.C.

16 § 18(a)(g)(1), and 16 C.F.R. § 1.98(a); and

17 (e) award the United States the costs of this action.
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1 Dated: November 7, 2014

2 Respectfully Submitted,

3 FOR PLAINTIFF UNITED STATES OF AMERICA:
4
5

6 /s/ William J. Baer
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Attorneys for the United States

* Attorney of Record

CERTIFICATE OF SERVICE

I certify that on November 7, 2014, I electronically filed this Complaint with the Clerk of Court using the CM/ECF system. A copy has also been sent via e-mail to:

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Celulosa Arauco y Constitución, S.A., and
Inversiones Angelini y Compañía Limitada:

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8 Attorney for Plaintiff United States of America

9
10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 UNITED STATES OF AMERICA,

14 *Plaintiff,*

15 v.

16 Case No. 3:14-cv-4949

17 FLAKEBOARD AMERICA LIMITED,

18 CELULOSA ARAUCO Y CONSTITUCIÓN,
19 S.A.,

20 INVERSIONES ANGELINI Y COMPAÑÍA
21 LIMITADA,

22 and

23 SIERRAPINE,

24 *Defendants.*

25 **STIPULATION**

26 The undersigned parties hereby stipulate and agree, subject to approval and entry by the
27 Court, that:

1 1. For the purposes of this action, the Court has jurisdiction over each of the parties and
2 venue of this action is proper in the United States District Court for the Northern District of
3 California. The Defendants also waive service of summons on the Complaint.

4 2. The parties stipulate that a proposed Final Judgment in the form attached as Exhibit A
5 may be filed with and entered by the Court, upon the motion of any party or upon the Court's
6 own motion, at any time after compliance with the requirements of the Antitrust Procedures and
7 Penalties Act ("APPA"), 15 U.S.C. § 16, and without further notice to any party or other
8 proceedings, provided that the United States has not withdrawn its consent, which it may do at
9 any time before the entry of the proposed Final Judgment by serving notice thereof on the
10 Defendant and by filing that notice with the Court.

11 3. The Defendants agree to arrange, at their expense, publication as quickly as possible of
12 the newspaper notices required by the APPA, which shall be drafted by the United States in its
13 sole discretion. The publication shall be arranged no later than three business days after the
14 Defendants' receipt from the United States of the text of the notice and the identity of the
15 newspapers within which the publication shall be made. The Defendants shall promptly send to
16 the United States (1) confirmation that publication of the newspaper notices has been arranged,
17 and (2) the certification of the publication prepared by the newspapers within which the notice
18 was published.

19 4. The Defendants shall abide by and comply with the provisions of the proposed Final
20 Judgment, pending the proposed Final Judgment's entry by the Court, or until expiration of time
21 for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall,
22 from the date of the signing of this Stipulation by the parties, comply with all the terms and
23 provisions of the proposed Final Judgment as though the same were in full force and effect as an
24 order of the Court.

25 5. This Stipulation will apply with equal force and effect to any amended proposed Final
26 Judgment agreed upon in writing by the parties and submitted to the Court.

1 6. In the event (1) the United States has withdrawn its consent, as provided in Paragraph 2
2 above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has
3 expired for all appeals of any court ruling declining entry of the proposed Final Judgment, and
4 the Court has not otherwise ordered continued compliance with the terms and provisions of the
5 proposed Final Judgment, then the parties are released from all further obligations under this
6 Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or
7 any other proceeding.

8 7. The Defendants represent that the actions they are required to perform and the payments
9 they are required to make pursuant to the proposed Final Judgment can and will be
10 accomplished, and that the Defendants will later raise no claim of mistake, hardship or difficulty
11 of compliance as grounds for asking the Court to modify any of the provisions contained therein.

1 Dated: November 7, 2014

2
3 Respectfully submitted,

4 FOR PLAINTIFF
5 UNITED STATES OF AMERICA

6 /s/ Amy R. Fitzpatrick
7 Amy R. Fitzpatrick
8 Antitrust Division
9 U.S. Department of Justice
10 450 Fifth Street, N.W., Suite 4100
11 Washington, D.C. 20530
12 Phone: (202) 532-4558
13 Facsimile: (202) 307-5802
14 E-mail: amy.fitzpatrick@usdoj.gov

FOR DEFENDANTS FLAKEBOARD
AMERICA LIMITED, CELULOSA
ARAUCO Y CONSTITUCIÓN, S.A.,
AND INVERSIONES ANGELINI Y
COMPAÑÍA LIMITADA

/s/ Andrew M. Lacy
Andrew M. Lacy
Simpson, Thacher & Bartlett LLP
1155 F Street, N.W.
Washington, D.C. 20004
Phone: (202) 636-5505
Facsimile: (202) 636-5502
E-mail: alacy@stblaw.com

FOR DEFENDANT SIERRAPINE

/s/ Amanda P. Reeves
Amanda P. Reeves
Latham & Watkins LLP
555 Eleventh Street N.W., Suite 1000
Washington, D.C. 20004
Phone: (202) 637-2183
Facsimile: (202) 637-2201
E-mail: amanda.reeves@lw.com

ORDER

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IT IS SO ORDERED by the Court, this ____ day of _____.

United States District Judge

1 **ATTESTATION**

2 This Stipulation is being filed through the Electronic Case Filing (ECF) system by attorney
3 Amy R. Fitzpatrick of the U.S. Department of Justice, Antitrust Division. By her signature, she
4 attests that the United States has obtained concurrence in the filing of this document from
5 Andrew M. Lacy and Amanda P. Reeves, as required by Civil L.R. 5-1(i)(3).
6

7 Dated: November 7, 2014
8

9 By: /s/ Amy R. Fitzpatrick
10 AMY R. FITZPATRICK
11 Antitrust Division
12 U.S. Department of Justice
13 450 Fifth Street, N.W., Suite 4100
14 Washington, D.C. 20530
15 Phone: (202) 532-4558
16 Facsimile: (202) 307-5802
17 E-mail: amy.fitzpatrick@usdoj.gov
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CERTIFICATE OF SERVICE

I certify that on November 7, 2014, I electronically filed this Complaint with the Clerk of Court using the CM/ECF system. A copy has also been sent via e-mail to:

Counsel for Flakeboard America Limited,
Celulosa Arauco y Constitución, S.A., and
Inversiones Angelini y Compañía Limitada:

Andrew M. Lacy
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Counsel for SierraPine:

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/s/ Amy R. Fitzpatrick
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EXHIBIT A

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 3:14-cv-4949

FLAKEBOARD AMERICA LIMITED,

CELULOSA ARAUCO Y CONSTITUCIÓN,
S.A.,

INVERSIONES ANGELINI Y COMPAÑÍA
LIMITADA,

and

SIERRAPINE,

Defendants.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on November 7, 2014, alleging that Defendants violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, and that Flakeboard America Limited, Celulosa Arauco y Constitución, S.A., and SierraPine violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants, without admitting any wrongdoing, agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions required below can and will be made and that Defendants will later raise no

1 claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions
2 contained below;

3 NOW THEREFORE, before any testimony is taken, and without trial or adjudication of
4 any issue of fact or law, and upon the consent of the parties, it is ORDERED, ADJUDGED,
5 AND DECREED:

6
7 **I. JURISDICTION**

8 This Court has jurisdiction over the subject matter of and each of the parties to this
9 action. The Complaint states claims upon which relief may be granted against Flakeboard,
10 Arauco, and SierraPine under Section 1 of the Sherman Act, 15 U.S.C. § 1, and against all
11 Defendants under Section 7A of the Clayton Act, 15 U.S.C. § 18a.

12 **II. DEFINITIONS**

13 A. “Arauco” means Defendant Celulosa Arauco y Constitución, S.A., a Chilean
14 company; its successors and assigns; and its subsidiaries, divisions, groups, affiliates,
15 partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

16 B. “Agreement” means any contract, agreement, or understanding, formal or
17 informal, written or unwritten.

18 C. “Competing Product” means any product that any Defendant offers for sale in the
19 United States that is primarily used for the same purpose as any product that any other party to a
20 proposed Transaction with any Defendant offers for sale in the United States.

21 D. “Defendants” mean Flakeboard America Limited, Celulosa Arauco y
22 Constitución, S.A., the Ultimate Parent Entity, and SierraPine.

23 E. “Flakeboard” means Defendant Flakeboard America Limited, a Delaware
24 corporation with its headquarters in Fort Mill, South Carolina; its successors and assigns; and its
25 subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors,
26 officers, managers, agents, and employees.

1 F. “SierraPine” means Defendant SierraPine, a California limited partnership with its
2 headquarters in Roseville, California; its successors and assigns; and its subsidiaries, divisions,
3 groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents,
4 and employees.

5 G. “Negotiation and Interim Period” means the period between the commencement
6 of negotiations with respect to an offer to enter into a Transaction, and the date when
7 negotiations are abandoned or when any resulting Transaction is consummated or abandoned.

8 H. “Person” means any individual, partnership, firm, corporation, association, or
9 other legal or business entity.

10 I. “Production Facility” means any mill, plant, or other asset that manufactures
11 products.

12 J. “Transaction” means any Agreement to acquire any voting securities, assets, or
13 non-corporate interests, form a joint venture, settle litigation, or license intellectual property with
14 any person offering a Competing Product.

15 K. “Ultimate Parent Entity” means Defendant Inversiones Angelini y Compañía
16 Limitada, a holding company with its headquarters in Santiago, Chile, and its successors and
17 assigns.

18 **III. APPLICABILITY**

19 This Final Judgment applies to Flakeboard, Arauco, the Ultimate Parent Entity, and
20 SierraPine as defined above, and all other persons in active concert or participation with any of
21 them who receive actual notice of this Final Judgment by personal service or otherwise. This
22 Court orders the relief in Section IV of this Final Judgment under Section 7A of the Clayton Act,
23 15 U.S.C. § 18a. All other relief in this Final Judgment is to remedy the violation of Section 1 of
24 the Sherman Act, 15 U.S.C. § 1.
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IV. CIVIL PENALTY UNDER SECTION 7A OF THE CLAYTON ACT

Within 30 days of the entry of this Final Judgment, Flakeboard, Arauco, and the Ultimate Parent Entity must pay \$1.9 million to the United States, and within 60 days of the entry of this Final Judgment, SierraPine must pay \$1.9 million to the United States, for a total of \$3.8 million.

V. DISGORGEMENT TO REMEDY THE VIOLATION OF SECTION 1 OF THE SHERMAN ACT

Within 30 days of the entry of this Final Judgment, Flakeboard must pay \$1.15 million in disgorgement to the United States.

VI. PAYMENT OF CIVIL PENALTY AND DISGORGEMENT

A. The payments specified in this Final Judgment must be made by wire transfer. Before making any transfers a Defendant must contact Janie Ingalls of the Antitrust Division's Antitrust Documents Group, at (202) 514-2481, for wire-transfer instructions.

B. In the event of a default in payment, interest at the rate of 18 percent per annum will accrue thereon from the date of default to the date of payment.

VII. PROHIBITED CONDUCT

A. Flakeboard, Arauco, and SierraPine may not enter into, maintain, or enforce any Agreement with an acquiring or to-be-acquired Person that, during the Negotiation and Interim Period of a Transaction:

1. fixes, raises, sets, stabilizes, or otherwise establishes price or output for any Competing Product;
2. moves, migrates, or otherwise allocates customers for any Competing Product;
3. discloses or seeks the disclosure of information about customers, prices, or output for any Competing Product, except as such disclosures may be permitted in subsection VIII.C or to the extent that such information is publicly available at the time disclosure occurs; or

1 4. closes a Production Facility that produces a Competing Product without
2 prior written notice to and written approval from the United States.

3
4 **VIII. PERMITTED CONDUCT**

5 Nothing in this Final Judgment prohibits Defendants from:

6 A. entering into an Agreement that a party to a Transaction must continue operating
7 in the ordinary course of business;

8 B. entering into an Agreement that a party to a Transaction forego conduct that
9 would cause a material adverse change in the value of to-be-acquired assets;

10 C. before closing or abandoning a Transaction, conducting or participating in
11 reasonable and customary due diligence, though no disclosure covered by this section is
12 permitted unless (1) the information is reasonably related to a party's understanding of future
13 earnings and prospects; and (2) the disclosure occurs under a non-disclosure agreement that
14 (a) limits use of the information to conducting due diligence and (b) prohibits disclosure of the
15 information to any employee of the Person receiving the information who is directly responsible
16 for the marketing, pricing, or sales of the Competing Products;

17 D. disclosing confidential business information related to Competing Products,
18 subject to a protective order, in the context of litigation or settlement discussions; or

19 E. entering into an Agreement where either one of the Defendants and the other party
20 to the Transaction are or would be in a buyer/seller relationship and the Agreement would be
21 lawful in the absence of the planned acquisition.

22 **IX. ANTITRUST COMPLIANCE PROGRAM**

23 A. Flakeboard and SierraPine must each maintain an antitrust compliance program
24 that designates, within 30 days of entry of this order, an Antitrust Compliance Officer with
25 responsibility for achieving compliance with this Final Judgment. The Antitrust Compliance
26 Officer must, on a continuing basis, supervise the review of current and proposed activities to
27

1 ensure compliance with this Final Judgment. The Antitrust Compliance Officer must also do the
2 following:

- 3 1. Distribute within 45 days of entry of this Final Judgment, a copy of this
4 Final Judgment to each current officer and director, all sales managers and
5 supervisors, and each employee, agent, or other person who, in each case,
6 has responsibility for or authority over mergers and acquisitions; and for
7 Flakeboard's Antitrust Compliance Officer, a copy of this Final Judgment
8 to each current officer and director of Arauco;
- 9 2. distribute in a timely manner a copy of this Final Judgment to any officer,
10 director, employee, or agent who succeeds to a position described in
11 Section IX.A.1;
- 12 3. obtain within 60 days from the entry of this Final Judgment, and annually
13 thereafter, and retain for the duration of this Final Judgment, a written
14 certification from each person designated in Sections IX.A.1 & 2 that he
15 or she (a) has received, read, understands, and agrees to abide by the terms
16 of this Final Judgment; (b) understands that failure to comply with this
17 Final Judgment may result in conviction for criminal contempt of court;
18 and (c) is not aware of any violation of the Final Judgment; and
- 19 4. provide a copy of this Final Judgment to each potential partner to a merger
20 or acquisition before the initial exchange of a letter of intent, definitive
21 agreement, or other agreement of merger.

22 B. Within 60 days of entry Flakeboard and SierraPine must each certify to Plaintiff
23 that it has (1) designated an Antitrust Compliance Officer, specifying his or her name, business
24 address, and telephone number; and (2) distributed the Final Judgment in accordance with
25 Section IX.A.1.

1 C. For the term of this Final Judgment, on or before its anniversary date, Flakeboard
2 and SierraPine must each file with Plaintiff an annual statement as to the fact and manner of its
3 compliance with the provisions of Sections VII and IX.

4 D. Within 45 days of entry of this Final Judgment, Arauco must distribute a copy of
5 this Final Judgment to each current officer and director, sales manager and supervisor, and
6 employee, agent, or other person who, in each case, has responsibility for any business in the
7 United States.

8 E. If any director, officer, or Antitrust Compliance Officer of any of the Defendants
9 learns of a violation of this Final Judgment, that Defendant must within three business days take
10 appropriate action to terminate or modify the activity so as to assure compliance with this Final
11 Judgment, and must notify the Plaintiff of the violation within 10 business days.

12 **X. RIGHT TO INSPECTION**

13 A. For the purpose of determining or securing compliance with this Final Judgment,
14 any related orders, or determining whether the Final Judgment should be modified or vacated,
15 and subject to any legally recognized privilege, authorized representatives of the United States
16 Department of Justice, including consultants and other persons retained by the United States,
17 shall, upon written request of an authorized representative of the Assistant Attorney General in
18 charge of the Antitrust Division, and on reasonable notice to the Defendants, be permitted:

- 19 1. access during Defendants' office hours to inspect and copy or at Plaintiff's
20 option, to require Defendants to provide hard copy or electronic copies of,
21 all books, ledgers, accounts, records, data, and documents in the
22 possession, custody, or control of Defendants, relating to any matters
23 contained in this Final Judgment; and
24 2. to interview, either informally or on the record, Defendants' officers,
25 employees, or agents, who may have their individual counsel present,
26 regarding such matters. The interviews are subject to the reasonable
27

1 convenience of the interviewee and without restraint or interference by
2 Defendants.

3 B. Upon written request of an authorized representative of the Assistant Attorney
4 General in charge of the Antitrust Division, Defendants must submit written reports or responses
5 to written interrogatories, under oath if requested, relating to any of the matters contained in this
6 Final Judgment as may be requested.

7 C. No information or documents obtained by the means provided in this section may
8 be divulged by the Plaintiff to any person other than an authorized representative of the executive
9 branch of the United States, except in the course of legal proceedings to which the United States
10 is a party (including grand jury proceedings), or for the purpose of securing compliance with this
11 Final Judgment, or as otherwise required by law.

12 D. If, at the time a Defendant furnishes information or documents to Plaintiff, the
13 Defendant represents and identifies in writing the material in any such information or documents
14 to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of
15 Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim
16 of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United
17 States shall give 10 calendar days' notice before divulging that material in any legal proceeding
18 (other than a grand jury proceeding) to which the Defendant is not a party.

19
20 **XI. RETENTION OF JURISDICTION**

21 This Court retains jurisdiction to enable any party to this Final Judgment to apply to this
22 Court at any time for further orders and directions as may be necessary or appropriate to carry
23 out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and
24 to punish any violations of its provisions.
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XII. EXPIRATION OF FINAL JUDGMENT

Unless extended by this Court, this Final Judgment expires ten years from the date of its entry.

XIII. COSTS

Each party must bear its own costs of this action.

XIV. PUBLIC-INTEREST DETERMINATION

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any public comments thereon and Plaintiff’s responses to those comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: _____

UNITED STATES DISTRICT JUDGE