ABA Business Law Section
2005 Annual Meeting

Antitrust for the Transaction Lawyer: From Negotiating Merger Documents to Gun-Jumping;
What the Transaction Lawyer Needs to Know

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Issues

- Due Diligence
- Information Exchange
- Pre-Closing Activities
- The Divestiture Process
Due Diligence & Information Exchange

- **Pre-Signing Due Diligence**
  - Parties may exchange competitively sensitive information *required as part of good-faith* discussions relating to a corporate transaction

- **Principal Antitrust Risks**
  - One or both parties adjust their competitive behavior during the pre-closing period
  - In the event the transaction is not consummated, information exchange could facilitate collusion among the parties

- **Antitrust Issues are Separate from Business Confidentiality Concerns**
Competitively Sensitive Information

- **High Antitrust Risks**
  - Product-specific or customer-specific cost, discount or retail price information
  - R&D or capital investment plans
  - Marketing, business strategy or R&D plans
  - Pricing plans or future terms of sale
  - Profit margins on specific products or services
  - Customer and competitive information
    - Prices, quantities, and special terms regarding individual customers, including status of current contracts, bids or bid opportunities
Competitively Sensitive Information

- **Low Antitrust Risks**
  - Aggregated product and cost information, including top-line budgets, forecasts and revenue and profit data by general product categories
  - Non-product specific data about IP and manufacturing facilities, capacity and utilization
  - General corporate or overhead costs, general G&A or sales expenses
  - Information about non-business line activities, such as human resources, internal IT systems, accounting methods, employee compensation, environmental, real estate, and health and safety
Due Diligence Safeguards

- Confidentiality Agreement
- Record-keeping system
- Limit exchange of sensitive information
- Keep team reviewing sensitive information to a small number of people
  - If practical, exclude employees with day-to-day responsibility for competitive business units and use third parties or corporate development personnel (the “clean team”)
- Conduct due diligence in phases
- Educate the due diligence team
Pre-Closing Activities: Two Related Legal Issues

- **“Gun Jumping” under the HSR Act**
  - Applies to transactions that are reportable under the HSR Act
  - Concerns the period until the parties receive HSR clearance
  - Parties must remain separate and independent until HSR clearance – HSR Act prohibits the parties from integrating and prohibits one party from exercising control

- **Section 1 of the Sherman Act**
  - Applies to all transactions ~ principally relates to transactions with horizontal overlaps
  - Concerns the entire period until the parties have actually closed the transaction
  - Prohibits competitors from coordinating (explicitly or implicitly) their competitive conduct
Pre-Closing Activities: Principal Areas of Risk

• Pre-Closing Covenants
  • Watch for anything beyond “material/consistent with past practice”

• Can Still Do What the Parties Might Have Done Absent the Deal

• Information Exchange After Executing a Contract
  • Exchange of significant amounts of sensitive information may raise gun jumping issues

• Customer Outreach

• Integration Planning
  • Fraught with risk, but almost always possible with appropriate safeguards
  • Keep in mind the significant pressure employees will feel, and avoid problems/find solutions where possible
Divestitures

- **Need to Plan Ahead**
  - Discuss with business people early, often and late
    - Deal breakers?
    - Opportunities?
    - Client buy-in
  - Non-traditional remedies require more time, and a stronger case

- **What Does the Agreement Say?**
  - Hell or High Water clauses
  - How hot and how deep?
  - Substantive impact of clause on the review process
What Makes a Divestiture Acceptable?

- MUST SOLVE THE COMPETITIVE PROBLEM
- Autonomous business (best if already free-standing)
- A competitively and financially viable buyer, with “skin in the game”
- Better to have no continuing entanglements
- If timing constraints exist, raise them early
- Opportunities for Third Parties?
The Divestiture Review Process

- **FTC/DOJ use different approaches**
  - Fix it first/Upfront buyers
  - Approach can differ by industry
  - Formality of the review process

- **Need to take time requirements into account**

- **Involve the Divestiture Buyer**
  - The Staff is going to want to hear from them
  - Recognize that the parties’ and the Divestiture Buyer’s interests may differ

- **Plan ahead for post-closing but pre-divestiture restrictions**
Michael B. Miller is a partner in the New York office of Morrison & Foerster LLP. He regularly represents clients before the Department of Justice’s Antitrust Division, the Federal Trade Commission and the European Commission in connection with mergers and acquisitions, including deals in the pharmaceutical, aluminum, financial services, energy, computer software and consumer electronics industries. Mr. Miller also counsels clients on antitrust and competition law issues, with emphasis on mergers and acquisitions, joint ventures, and other corporate control transactions, and represents clients in civil and commercial litigation, particularly antitrust litigation.

Mr. Miller received his A.B., with honors, from Brown University in 1987, Phi Beta Kappa and Magna Cum Laude, and his J.D. from the University of California, Berkeley (Boalt Hall), in 1990, where he was elected to the Order of the Coif. After graduating from Boalt Hall he served as a law clerk for Judge David Thompson, United States Court of Appeal for the Ninth Circuit. Mr. Miller received his Postgraduate Diploma in EC Competition Law from Kings College, London, in 1997.

Mr. Miller is a Co-Chair of the American Bar Association Antitrust Section’s Corporate Counseling Committee, and speaks and writes frequently on competition law matters.
ANTITRUST GUIDELINES FOR PROJECT Z

Until Project Z closes, X Company and Y Company (collectively, the “Companies”) remain competitors. As a result, the antitrust laws require that the Companies (a) restrict and limit their exchange of competitively sensitive information and (b) continue to compete as two separate companies exercising independent decision making, as they would have in the absence of any agreement, until the proposed deal has been closed.

Violating these rules can have serious consequences, including the imposition of substantial penalties on the Companies and potentially on individuals within the companies, and/or an adverse regulatory ruling on completion of Project Z or other business initiatives. To avoid these negative results, the Companies have decided to implement the following rules. It is important that you follow them.

If you have any questions about these guidelines or about situations not covered by these guidelines, please contact [__________].

INFORMATION SHARING GUIDELINES

Antitrust regulators recognize that parties to a proposed transaction need to share information during the planning, negotiating, due diligence and transition planning processes. However, such information sharing is permitted only where (1) the information sharing is in fact reasonably necessary to legitimate business goal, (2) safeguards are put in place to protect confidential and competitively sensitive information from misuse, and (3) the information shared is not likely facilitate anticompetitive activity by the parties. Accordingly, the following guidelines should be followed:

- The Companies generally should not disclose the following information:
  - Current or future pricing strategies and prices (including discounts, rebates or other competitively sensitive price components) on an individual product or product line basis;
  - Information concerning the terms of agreements with customers, distributors, suppliers or consumers;
  - Detailed information on prices or costs or significant components or prices or costs;
  - Current or future promotion and marketing terms (such as rebates, promotional spending, terms and conditions of sale or sales strategies and tactics);
  - Information concerning pipeline products and detailed information regarding product development, product innovation or other R&D activities;
Non-aggregated customer-specific information that reveals the price of a product to a specific customer or group of customers;

- Profit margins by product;

- Non-aggregated cost of production and product delivery information (including analyses or formulas for determining, or substantial components of, costs or prices); and

- Any other competitively sensitive information that is more detailed or comprehensive than reasonably necessary to satisfy the relevant need.

As a general matter, the Companies should exchange competitively sensitive information only when a strong, legitimate business justification for doing so exists. Even when it is determined to go ahead with the information sharing exercise, certain guidelines should be followed:

- **Limited Access:** Only individuals who need the information should be involved in the information-sharing exercise. Personnel who are involved in day-to-day operations of the receiving company or who are involved in establishing the terms or policies for products or services offered by the Companies should not have access to the information.

- **Timing of Information Exchanges:** Information should not be exchanged until as close to the closing as is possible consistent with other business objectives. The appropriate date will vary depending on the specific information. Receipt of HSR approval is generally considered an important milestone in considering the appropriateness of sharing certain information.

- **Confidentiality:** All individuals who will have access to competitively sensitive information should agree to (i) preserve the confidentiality of the information received; (ii) use the information only in connection with the negotiation or planning of, or due diligence or transition planning relating to, Project Z; (iii) limit disclosure to only individuals who are entitled to receive the information; and (iv) report promptly to designated personnel (usually in-house counsel at the signatory’s company) any disclosure or use of the competitively sensitive information, of either of the other Companies, that is inconsistent with these guidelines.

If the Companies’ need to exchange certain information as to which access would be restricted (or even prohibited) under these guidelines becomes vital, such that failure to receive the information would prevent the Companies from negotiating the proposed transaction or proceeding with required pre-closing integration planning, the matter should be discussed with the Companies’ legal advisors. The legal advisors will work to identify ways to provide the requested information in a manner consistent with the antitrust laws. For example, certain
competitively sensitive information might be provided under additional confidentiality restrictions, to a more limited number of personnel or to third-party consultants for the Companies. Or it might be possible to aggregate the data in such a way so as to eliminate competitive concerns.

**GENERAL CONDUCT OF THE BUSINESS PRIOR TO CLOSING**

- The Companies must not direct or coordinate each other’s business decisions. Neither company should seek, directly or indirectly, to influence the other company’s decisions.

- The Companies must hold themselves out as competitors. The Companies should not deal jointly with customers, suppliers or any third persons unless they would have done so in the absence of any proposed deal.

- No member of the integration planning team should have access to any information about the other that might affect his or her ordinary, day-to-day business decisions in marketing or selling products or otherwise competing with the other company.

- General rule – the Companies should not exchange data outside of the integration planning process. Outside of the integration planning process, the Companies should not share competitively sensitive or other information that they would not ordinarily disclose to the public or their competitors.
Antitrust For the Transaction Lawyer:
Five Things You Must Know

Marin Michael O. Skubel
Kirkland & Ellis LLP
Presented At
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Chicago, Illinois
August 5, 2005
- Prepare Well in Advance of Announcement
- Contract Terms -- Seller Beware
- Coordinate Communications Strategy
- 4(c) Documents are Key
- Be Realistic
• Why God Wants This Deal
• Anticipate Objections
  ▶ Customers  Labor
  ▶ Suppliers  Local Government
  ▶ Congress  Failed Suitors
• “Bet the Farm” Deals -- Consider Red Team/Blue Team Moot Court Of Antitrust Issues
• Focus on Essential Terms
- Prepare Well in Advance of Announcement

- Contract Terms -- Seller Beware

- Coordinate Communications Strategy

- 4(c) Documents are Key

- Be Realistic
Deal Announcement

- Erosion of employee morale, loss of employees, and difficulty replacing personnel
- Loss of customers and suppliers and increased cost of retaining existing relationships under short term arrangements
- Loss of joint venture partners and licensing opportunities
- Financing difficulties

Deal Closed?
• Buyer assumes all antitrust risk

• Unilateral right to exit, if "second request"

• Commitment from buyer to
  ▶ "Fix" any problems OR
  ▶ Defend litigation through appeal

• Pay costs of investigation and litigation

• Meaningful break-up fee if buyer does not get deal done before drop-dead date

• Use leverage of buyer’s confidence that it can get the deal cleared

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• No agreement to divest assets

• "Commercially best efforts" to achieve clearance
  (make clear does not include divestitures)

• No duty to litigate

• Purchase price adjustment if assets are sold at a loss

• Mutual termination rights with distant termination date

• Each side pays own expenses
● Neither Buyer or Seller will make another acquisition that would hinder antitrust clearance

● Buyer and Seller will cooperate to obtain antitrust clearance
  ▶ Notify each other of government contact
  ▶ Allow each other to attend government meetings
  ▶ Share submissions before filing with government
- Consider all antitrust related deal terms together and trade off to get essential protections
  - Effort required to get the deal done
  - Obligation to litigate
  - Termination date
  - Rights to terminate
  - Extent of cooperation
  - Break-up fees
  - Purchase price adjustments if divestitures are needed
• Prepare Well in Advance of Announcement

• Contract Terms -- Seller Beware

• Coordinate Communications Strategy

• 4(c) Documents are Key

• Be Realistic
• Coordinate with seller's antitrust counsel, economist, to agree on the key themes of why the merger will improve competition

• Once a consistent pro-competitive message has been crafted, work with firms' public relations department to draft press release and other materials for customers, employees, press, and the investment community

• Prepare an presentation for the antitrust agencies incorporating the themes
- Customers reaction to merger is (still) very important to the antitrust agencies

- Prepare a list of customers with assignments for business people to contact immediately after deal is announced

- Identify supportive customers and provide their names to the agencies
  - Obtain affidavits from supportive customers with specifics about why they believe the merger will increase competition

- Work with complaining customers to resolve their concerns

- Monitor customers during the review process to identify and hopefully resolve concerns
• Prepare Well in Advance of Announcement
• Contract Terms -- Seller Beware
• Coordinate Communications Strategy
• 4(c) Documents are Key
• Be Realistic
• Documents submitted with the initial HSR filing
  ▶ Created by or for an officer or director relating to competition, markets

• Staff’s introduction to your merger
  ▶ “Bad” 4(c) documents can kill a deal
  ▶ “Good” 4(c) may help you avoid an investigation -- particularly if no prior merger challenges in that industry

• Control these documents
  ▶ Mark “Draft” “Privileged and Confidential” and have them reviewed by antitrust counsel
Highlight Procompetitive Business Purposes for the Deal

- Cost savings
- Innovation
- Quality improvement
- Output expansion
- Lower prices
- What We Would Be Buying
  - Technology
  - Capacity
  - Product/Market Expansion
  - Market Share
  - Brand Name Acceptance
  - Pricing Stability

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• Prepare Well in Advance of Announcement

• Contract Terms -- Seller Beware

• Coordinate Communications Strategy

• 4(c) Documents are Key

• Be Realistic
• Second requests cost at least $2-$5 million
• You can “pull and re-file” to avoid a second request
• Be prepared to fight
• Be prepared to fix
TERMS FAVORABLE TO SELLER

DaVita/Gambro Merger

Effort Clause

SECTION 5.04. REGULATORY AND OTHER AUTHORIZATIONS; NOTICES AND CONSENTS.

(a) Each of the parties hereto shall use its best efforts to promptly obtain (or, in the case of the Seller, cause the Company and the Subsidiaries to obtain) all authorizations, consents, orders and approvals of all Governmental Authorities and officials that may be or become necessary for its execution and delivery of, and the performance of its obligations pursuant to, this Agreement and the Ancillary Agreements and will cooperate fully with the other party in promptly seeking to obtain all such authorizations, consents, orders and approvals. Each party hereto agrees to make its filing pursuant to the HSR Act with respect to the transactions contemplated by this Agreement within twenty Business Days of the date hereof and to supply as promptly as practicable to the appropriate Governmental Authorities any information and documentary material that may be requested pursuant to the HSR Act.

(b) Without limiting the generality of the Purchaser's undertaking pursuant to Section 5.04(a), the Purchaser agrees to use its best efforts, and to take any and all steps necessary, to avoid or eliminate each and every impediment under any antitrust, competition or trade regulation Law that may be asserted by any United States governmental antitrust authority or any other party so as to enable the parties hereto to close the transactions contemplated hereby as promptly as practicable, and in any event no later than the Termination Date, including negotiating, committing to and effecting as promptly as practicable, by consent decree, hold separate orders, or otherwise, the sale, divestiture or disposition of such of its assets, properties or businesses or of the Assets, properties or businesses to be acquired by it pursuant hereto, and the entrance into such other arrangements, as are necessary or advisable in order to avoid the entry of, and the commencement of litigation seeking the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any suit or proceeding, which would otherwise have the effect of materially delaying or preventing the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements. In addition, the Purchaser shall use its best efforts to defend through litigation on the merits any claim asserted in court by any party in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing from occurring as promptly as practicable.

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EFFORT AND COOPERATION CLAUSES

SECTION 5.12. AGREEMENT TO Cooperate.

(a) Subject to the terms and conditions of this Agreement, including Section 5.03 and this Section 5.12, each of the Parties hereto shall use all reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable law and regulations (including the HSR Act and the Gaming Laws) to consummate and make effective the transactions contemplated by this Agreement, including using its reasonable best efforts to obtain all necessary or appropriate waivers, consents or approvals of third parties required in order to preserve material contractual relationships of Parent and the Company and their respective subsidiaries, all necessary or appropriate waivers, consents and approvals to effect all necessary registrations, filings and submissions and to lift any injunction or other legal bar to the consummation of the Merger by the Outside Date (and, in such case, to proceed with the Merger as expeditiously as possible). In addition, subject to the terms and conditions herein provided and subject to the fiduciary duties of the respective boards of directors of the Company and Parent, none of the parties hereto shall knowingly take or cause to be taken any action which would reasonably be expected to materially delay or prevent consummation of the Merger. Each of Parent and the Company undertakes and agrees to file as soon as practicable a Notification and Report Form under the HSR Act with the United States Federal Trade Commission (the "FTC") and the Antitrust Division of the United States Department of Justice (the "Antitrust Division") and to make such filings and apply for such approvals and consents as are required under the Gaming Laws.

(b) Each of Parent and the Company shall (i) respond as promptly as practicable under the circumstances to any inquiries received from the FTC or the Antitrust Division or any authority enforcing applicable Gaming Laws for additional information or documentation and to all inquiries and requests received from any State Attorney General or other governmental authority in connection with antitrust matters or Gaming Laws, and (ii) not extend any waiting period under the HSR Act or enter into any agreement with the FTC or the Antitrust Division not to consummate the transactions contemplated by this Agreement, except with the prior written consent of the other Parties hereto, which consent shall not be unreasonably withheld or delayed.

(c) Parent and the Company shall, from the date hereof until the Outside Date, use their respective reasonable best efforts to avoid the entry of, or to have vacated or terminated, any decree, order, or judgment that would restrain, prevent or delay the Closing. Notwithstanding the foregoing, Parent shall have the sole and exclusive right to determine, at its option, whether to contest through litigation on the merits, negotiation or other action any position or claim, including any demands for sale, divestiture or disposition of assets or business of Parent or, effective as of the Effective Time, the Surviving Corporation or their respective subsidiaries, asserted by the FTC, the Antitrust Division or other governmental authority in

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connection with antitrust matters or Gaming Laws which would operate to hinder or delay the Effective Time. Parent shall have the sole and exclusive right to direct and control any such litigation, negotiation or other action, with counsel of its own choosing, and the Company agrees to reasonably cooperate with Parent with respect thereto. Notwithstanding the foregoing, in the event any such litigation, negotiation or other action is not reasonably capable of being resolved by the Outside Date, Parent shall propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect), by consent decree, hold separate order, or otherwise, the sale, divestiture or disposition of such assets or businesses of Parent or, effective as of the Effective Time, the Surviving Corporation, or their respective subsidiaries or otherwise offer to take or offer to commit to take any action which it is capable of taking and if the offer is accepted, take or commit to take such action that limits its freedom of action with respect to, or its ability to retain, any of the businesses, services or assets of Parent, the Surviving Corporation or their respective subsidiaries, in order to avoid the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order in any suit or proceeding, which would have the effect of preventing or delaying the Effective Time beyond the Outside Date. For the avoidance of doubt, Parent shall take any and all actions necessary in order to ensure that (x) no requirement for a waiver, consent or approval of the FTC, the Antitrust Division, any authority enforcing applicable Gaming Laws, any State Attorney General or other governmental authority, (y) no decree, judgment, injunction, temporary restraining order or any other order in any suit or proceeding, and (z) no other matter relating to any antitrust or competition law or regulation or relating to any Gaming Law, would preclude consummation of the Merger by the Outside Date.

(d) The Company shall agree if, but solely if, requested by Parent to divest, hold separate or otherwise take or commit to take any action that limits Parent's freedom of action with respect to, or its ability to retain, any of the businesses, services, or assets of the Company or any of its subsidiaries, provided that any such action may be conditioned upon the consummation of the Merger and the transactions contemplated hereby.

(e) In addition, each Party shall, subject to applicable law and the limitations set forth in Section 5.04 and except as prohibited by any applicable representative of any applicable governmental entity, (i) promptly notify the other Party of any written communication to that Party from the FTC, the Antitrust Division, any State Attorney General or any other governmental entity, including Gaming Authorities, and, permit the other Party to review in advance any proposed written communication to any of the foregoing; (ii) not agree to participate in any substantive meeting or discussion with any governmental authority in respect of any filings, investigation or inquiry concerning this Agreement or the Merger unless it consults with the other Party in advance and, to the extent permitted by such governmental authority, gives the other Party the opportunity to attend and participate thereat; and (iii) furnish the other Party with copies of all correspondence, filings, and written communications (and memoranda setting forth the substance thereof) between them and its affiliates and their respective representatives on the one hand, and any government or regulatory authority or members or their respective staffs on the other hand, with respect to this Agreement and the Merger.

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COST REIMBURSEMENT

Buyer shall indemnify Seller for any legal fees and costs, expert fees and costs, and any other costs incurred in responding to any government investigation of the proposed merger. Buyer shall indemnify Seller from any and all fines, penalties, damages or awards of any kind to which Seller may be subject in any antitrust litigation challenging the transaction. Buyer shall further compensate Seller for all legal fees incurred by Seller's counsel in defending such litigation.

Terms Favorable To Buyer

Quest/Unilab Merger

Effort Clause

SECTION 8.09 Further Action; Reasonable Best Efforts. (a) Upon the terms and subject to the conditions of this Agreement, each of the parties hereto shall promptly after the date of this Agreement (i) make its respective filings, and thereafter make any other required submissions, under the HSR Act with respect to the Transaction and (ii) use its reasonable best efforts to take, or cause to be taken, all appropriate action, and to do, or cause to be done, all things necessary, proper or advisable under applicable Laws or otherwise to consummate and make effective the Transaction, including, without limitation, using its reasonable best efforts to obtain all permits, consents, approvals, authorizations, qualifications and orders of Governmental Authorities and parties to contracts with the Company and the Subsidiaries as are necessary for the consummation of the Transaction and to fulfill the conditions to the Offer and the Merger; provided that neither Merger Sub nor Parent will be required by this Section 8.09 to take any action, including entering into any consent decree, hold separate orders or other arrangements, that (A) requires the divestiture of any assets of any of Merger Sub, Parent, the Company or any of their respective subsidiaries or (B) limits Parent's freedom of action with respect to, or its ability to retain, the Company and the Subsidiaries or any portion thereof or any of Parent's or its affiliates' other assets or businesses.

Terms That Help Buyer And Seller

DAVITA/GAMBRO MERGER

COOPERATION CLAUSE

(c) Each party to this Agreement shall promptly notify the other party of any communication it or any of its Affiliates receives from any Governmental Authority relating to the matters that are the subject of this Agreement or the Settlement Agreements and permit the other party to review in advance any proposed communication by such party to any Governmental Authority. Neither party to this Agreement shall agree to participate in any
meeting with any Governmental Authority in respect of any filings, investigation or other inquiry unless it consults with the other party in advance and, to the extent permitted by such Governmental Authority, gives the other party the opportunity to attend and participate at such meeting. The parties to this Agreement will coordinate and cooperate fully with each other in exchanging such information and providing such assistance as the other party may reasonably request in connection with the foregoing and in seeking early termination of any applicable waiting periods, including under the HSR Act. The parties to this Agreement will provide each other with copies of all correspondence, filings or communications between them or any of their representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, with respect to this Agreement and the transactions contemplated by this Agreement.

**RELATED TRANSACTIONS DURING HSR REVIEW**

(d) Neither party shall enter into any transaction, or any agreement to effect any transaction (including any merger or acquisition) that might reasonably be expected to make it more difficult, or to increase the time required, to: (i) obtain the expiration or termination of the waiting period under the HSR Act applicable to the transactions contemplated by this Agreement and the Ancillary Agreements, (ii) avoid the entry of, the commencement of litigation seeking the entry of, or to effect the dissolution of, any injunction, temporary restraining order or other order that would materially delay or prevent the completion of the transaction contemplated hereby, or (iii) obtain all authorizations, consents, orders and approvals of Governmental Authorities necessary for the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements.
CONFIDENTIAL MEMORANDUM

To: THE COMPANY Sales Managers

From:

cc:

Date:

RE: Project Widget: Customer Communications

DO NOT COPY OR DISTRIBUTE THESE COMMUNICATION GUIDELINES

Terms used in business often can be misinterpreted by competition authorities. We want to be particularly careful in our word choice when communicating with customers. Customers may repeat verbatim what you say to competition authorities. The following are guidelines to help you understand what to say and what not to say when you are talking to customers. Many of the items listed below under the “don’t” category are obvious and not what you would be inclined to say, but, in an abundance of caution, we list them.

DON’T MISCHARACTERIZE THE BUSINESS

- DON’T suggest The Company will have market leverage or power over customers post-acquisition or any power to raise prices. The widget categories are and will remain fiercely competitive, and The Company will not have any ability to raise price because of the acquisition.

- DON’T suggest any product lines or SKUs will be dropped or any options (deals, promotions, etc.) currently offered the customer will be discontinued or changed in a way unfavorable to the customer or consumer.

- DON’T disparage the quality of any target widget products. You may confirm that The Company is more committed to growing and supporting the category than target and that overall service, distribution, and R & D efforts will improve, with The Company becoming more efficient because of the greater sales platform and geographic scope of its widget products operations.

- DON’T suggest other household widget competitors will be disadvantaged because of the deal. Rather, tell the customers that The Company believes that its competitors should see

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this transaction as likely to drive greater awareness of and demand for widget products. This should increase competition, demanding the best from everyone. The Company knows it needs to remain fiercely competitive (as it is today).

- **DON’T** suggest the deal raises antitrust concerns over price increases or exclusion of competitors. Regulatory authorities will review the deal as part of the ordinary course of looking at transactions between competitors, but we expect that they will readily recognize the procompetitive benefits of the transaction.

**DO COMMUNICATE THE KEY MESSAGES**

- **A Win-Win Transaction.** The Company’s acquisition of the target widget business is good for retailers and consumers.

- **Procompetitive Benefits.** The transaction will result in The Company providing better products, better service, and better marketing support more cost effectively. The result will be increased sales from enhanced awareness of and demand for widgets.

- **Complementary Assets.** The Company’s acquisition of target’s widget business will allow The Company to grow in key areas (e.g., Asia) where The Company currently has limited presence. It provides The Company with the essential revenue base and global coverage to support the category expansion, product innovation, improved distribution systems and service programs that The Company is committed to implementing.

- **Global Strategy.** The Company’s overall business strategy is to have a large, multi-product portfolio of widget products available in all of the world’s major markets in order to service and support its customers efficiently. That global customer support strategy will be materially advanced by the added product revenues and geographic coverage provided by the acquisition of the target assets.

- **Increased Competitiveness.** The widget category is already fiercely competitive. It will become more so as a consequence of the opportunities provided by The Company’s commitment to enhancing category growth by building awareness of and demand for these products. The Company will support all of the existing widget brands [insert local brands] and will vigorously compete to increase The Company’s importance and value to its customers and consumers.

**OTHER INFORMATION THAT SHOULD BE COMMUNICATED**

- During the next several months, you may be contacted by any of various competition authorities as part of their standard review. These interviews are routine and part of the regulators’ job. It does not mean that they believe the deal will adversely affect anyone. We hope that you voice your support for this important win/win opportunity. Please keep us informed as it will help us to better answer the regulators’ questions.
• During the acquisition process, our customers will continue to receive the high level of service they have come to expect. Until the deal closes, it will be business as usual for customers. Questions about The Company’s products, promotions, prices, etc. should be directed to The Company and questions about target’s business to target.

• Transition plans are being developed on a country-by-country basis to ensure a smooth and seamless transition following closing. The acquisition will not disrupt or otherwise adversely affect your business.

• Following the acquisition, premier customer service for all customers will continue to be a top priority for The Company. All ongoing contracts and deals will be honored.
CUSTOMER LETTER TEMPLATE
(To be sent at your discretion.)

Dear [insert customer contact]:

Attached is a press release announcing The Company’s plans to acquire target’s worldwide widget businesses. I would like to take this opportunity to explain how this acquisition benefits you -- our valued customer -- as well as your customers.

First, we want to assure you that, during the acquisition process, you will continue to receive the premier level of service that you have come to expect from The Company. Until the acquisition is completed, it will be business as usual for you and all other customers. You should continue to direct all questions related to The Company’s products to us and those about target’s products to your target representatives. The Company is developing country-by-country transition plans to ensure a smooth and seamless transition following closing. Following the acquisition, The Company will be in a position to offer you even better service and support for your sales efforts. This is The Company’s top priority. The Company will honor all existing contracts and deals.

The acquisition will significantly benefit you and your customers. The expanded business will have the resources and sales platform to pursue more product innovations, additional marketing programs, improvements in product presentation and packaging and to increase consumer advertising and educational programs. The combined business will allow an even more efficient distribution network. The Company will be better positioned to anticipate and meet your needs.

The Company is very excited about this transaction. We believe that our competitors will see this transaction as one that will drive greater awareness of and demand for widget products. This should increase competition, demanding the best from everyone.

The Company has a long and proud history of delivering high-quality, cost-competitive products and providing services at the highest levels. Our commitment to these principles will not change. We appreciate your support of this transaction. We guarantee that it will make The Company an even better company.

Please feel free to call me. I will be more than happy to discuss these benefits in detail and address any questions you may have.

Sincerely,
LOCAL COUNSEL CONTACT LIST

<table>
<thead>
<tr>
<th>Country</th>
<th>Contact</th>
</tr>
</thead>
</table>

PROCESS CHECKLIST

DAY ONE

1. Read entire package.

2. Call your identified local legal counsel.

3. Call Mary Smith, if you have any questions.

4. Develop your plan for and arrange to contact key customers.

DAY TWO

5. Contact key customers.

6. Draft summary of contacts and send to Mary Smith, with cc to local counsel, all marked “Privileged and Confidential.”

DAY THREE UNTIL CLEARANCE IS RECEIVED IN YOUR COUNTRY

7. Complete customer contacts and make any necessary follow-ups.

8. Begin customer presentations for key customers.

9. Draft summary of any issues that come up during customer presentations and send to Mary Smith and local counsel, all marked “Privileged and Confidential.”

10. Once press release has been issued, send letter to other customers, as appropriate.

11. Check in periodically with key customers to update with information, gather information from them, and answer any questions -- repeat key messages -- why deal is good for them.

12. Update Mary and local counsel as information comes in, marking each communication “Privileged and Confidential.”
PROJECT WIDGET

BACKGROUND INFORMATION

1. How long have you been in negotiations with target?

Target announced its intention to sell its Widgets Business Unit on February 14, 2005. The Company submitted the winning bid as part of an auction process conducted by target, concluding in November 2004. A Letter of Intent was signed on December 15, 2004. The Company and target expect to sign the Master Agreement and ancillary agreements by the end of January 2005.

2. I’m ordering next season’s widgets now. Who do I place my order with?

Until the deal closes it is business as usual for both companies. To place an order before the deal occurs, simply purchase target brands through target, and The Company brands through The Company.

3. Can you assure me my order will be filled, and at the same price quoted me?

Yes. It’s business as usual until the deal closes for both companies, and we are committed to making sure there is no disruption in customer service during the transition. The Company will honor all ongoing deals and contracts once it acquires target’s widget business.

4. How will The Company become identified with the target brand?

Consumers buy brands, not companies. The widget category will grow because The Company will invest in new innovative products and increased consumer advertising and educational programs. The Company has purchased and grown some very well-known brands over the past decade, X, Y, and Z for example. As stewards of those brands, we have strengthened their equity through continuous innovation. We will do the same with the target brands we are buying.

5. Will you be making any divestitures or licensing agreements?

We expect that the regulators will approve the transaction as currently structured. We will be working with them in the next few months to educate them about the procompetitive benefits of this transaction.

6. Did you consider acquiring any other widget businesses?

I’m sorry, our company policy is to only discuss confirmed business decisions.

7. Is The Company planning to buy the Widgets R Us assets for sale in Indonesia?

I’m sorry, our company policy is to only discuss confirmed business decisions.
8. **Why did you acquire target’s widget business?**

The Company is strong in R&D and a leader in the manufacture and marketing of widgets. The target business will allow The Company to grow in key areas where it currently has limited presence. It provides The Company with the essential revenue base and global coverage to support the category expansion, product innovation, improved distribution systems and service programs that The Company is committed to implementing. The Company believes that the target business provides a unique opportunity for The Company to have a large, multi-product portfolio of widgets available in all of the world’s major markets and to enable it to service and support its customers efficiently.

9. **Under what circumstances could this transaction be terminated or fall through? Are there any breakup fees associated with termination?**

The Company is confident that it will complete this deal. We have taken the first steps in the acquisition process. We will provide you with updates of our progress.

10. **When do you expect the transaction to close?**

Although it is difficult to predict, we are hopeful that the transaction will be completed in most markets by June, 2005.

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13. **Where will you need to obtain regulatory clearance of the acquisition?**

No formal regulatory clearance is needed in the majority of countries in which The Company and/or target have widget sales. We are required to seek clearance in approximately one dozen countries world-wide. We have chosen voluntarily to seek clearance in several additional countries. We are working closely with competition authorities to ensure the matter moves to clearance as soon as possible.

14. **What competition authorities will be reviewing the deal?**

The acquisition will be brought to the attention of competition authorities in fifteen countries primarily in the United States, Europe, and Latin America. Both companies will cooperate fully with any regulatory reviews.

15. **Have representatives of The Company and target met with competition authorities yet? If not, when will the first meetings take place?**

In countries that welcome informal inquiries, some informal discussions have occurred. Further discussions will take place as authorities review the transaction. Both companies are cooperating fully with competition authorities.
16. Will The Company be a dominant firm and be able to raise prices after it acquires target’s widget businesses.

No. The combined company will be a strong competitor, but we will not have a dominant market share, nor will we be able to raise prices. The Company will face continued and increasing competitive pressure in every area it serves from the strong local, regional, and international market players. Moreover, the widget categories have huge opportunities for growth as awareness of the benefits of their use grows. This growth in demand will spur even more competition, and it will be easy for competitors to expand their sales.

17. Does review by regulatory authorities mean that The Company is violating the antitrust laws?

No. Regulatory authorities review all transactions of this size. We believe that the transaction is in the best interest of our customers and consumers, and we expect the competition authorities in each country will approve the transaction.

18. What will the size of The Company’s next (one, two, three) biggest competitors be following the completion of the acquisition?

The widget category is very competitive — customers and consumers already have many choices. The Company will face stiff competition from dozens of other well-established rivals at the national levels. Major global competitors such as Widgets R Us, Widget Maker, Widgets Inc. will continue to provide rigorous competition, along with other strong regional and local players in various countries [name specific ones in your country]. There will be vigorous competition in every area where we will operate.

19. What does this transaction mean for the future of competition in the widget industry?

There will continue to be vigorous competition from other established competitors everywhere The Company sells widgets.

We believe that awareness of demand for widgets will grow as a result of The Company increasing consumer advertising and education programs. As a result, this transaction will spur more competition as competitors fight to increase sales. The Company knows it needs to remain fiercely competitive (as it is today).

20. How will customers be affected by this acquisition? How do you plan to manage new customer expectations?

This transaction is a win-win for customers, The Company, and the industry. We expect customers to appreciate the better products, better service, and better
marketing support that this transaction will allow. Our customers’ sales will increase as we grow the widget categories and improve The Company’s products and packaging.

21. **What will be the impact on widget prices – will they go up or down?**

   Prices will not be affected by this transaction. Our prices to our customers will continue to be competitive and geared toward growing the business and expanding the demand for widgets and repellents.

22. **How will The Company and target operations be integrated? What will be the new structure?**

   Until the deal closes, it will be business as usual for both companies. The integration of target’s business will improve our overall operation.

23. **Will the combined company continue to market products under brand names purchased from target?**

   Yes. The Company is acquiring the world-wide rights to these brands. The Company will continue to support all of target’s brands.

24. **How do you plan to rationalize product offerings where there are conflicts?**

   The Company plans to sell widget products that meet retailers’ demands and those of their customers. The Company looks forward to expanding its product line wherever possible, developing new and innovative products based on its own R&D and input from its customers.

25. **Will the current The Company distribution network carry any target products and vice versa?**

   Yes. After the acquisition, we intend to use our distribution networks wherever it makes good business sense to do so. Our goal is to create the most efficient distribution system in each country where we do business. Until the deal closes, or course, The Company and target will each continue to use its respective distribution network.
CONFIDENTIAL COMMUNICATION

To: X Sales Personnel

From:

Re: Communications With Customers

Date:

It is important that our customers understand how the transaction with Y will benefit them in the future and why there is no risk that prices will increase or services will decline as a result of the transaction.

You will be asked to contact certain customers to explain the transaction. The following “talking points” have been developed to assist you in this regard and should be carefully followed. It is our intention through these customer contacts to identify both the customers who support the transaction and those that oppose it. Of course, we hope the communication with you will help overcome customer opposition to the transaction.

It is likely that the FTC will contact some of our key customers regarding the transaction and we want to ensure the best possible result from those contacts by enlisting the support of those customers who support the transaction and neutralizing the opposition of those customers who have concern with the transaction. Therefore, please keep a record of each customer contact with specifics of the contact, including whether the customer supports or opposes the transaction. This record should be marked “Privileged and Confidential/Prepared at the Request of Counsel.”

Please contact me directly if you have any questions about this matter.
TALKING POINTS WITH CUSTOMERS

- X has decided to exit the X sub business to concentrate on its core business.

- X is selling its X sub business ("Sub") to Y. Y should realize and achieve efficiencies in manufacturing, purchasing and distribution from this transaction that should allow them to serve customers better and more efficiently than before the transaction.

- There will be no disruption in service. At an appropriate time, X will work with Y to ensure that the transition will be seamless. Until the transaction closes, it will be business as usual and any questions that customers have about their accounts should be directed to their current suppliers.

- X and Y are complying with all relevant regulatory requirements associated with the transaction. One such requirement is that they file for antitrust approval with the Federal Trade Commission ("FTC"). During the acquisition process, customers may be contacted by the FTC as part of its "due diligence process." Talking to customers is routine for the FTC and we are confident that once the FTC understands the transaction, it will not have any concerns.

- We are asking our customers to express support for this transaction. We will appreciate feedback from customer conversations with the FTC so we can better address any questions the FTC may have. (if the customer reacts positively, tell the customer that FTC has requested that X provide customer contacts and that we would like to submit customer’s name as a contact because of customer’s knowledge of the industry). Customer may be contacted directly by the FTC in its due diligence process even if Customer’s name is not provided by X.

- The FTC routinely asks hypothetical questions regarding prices. Y has no plans to raise prices after the transaction closes and both companies are aware of the highly competitive marketplace and know they have to continue to earn the business of their customers.

- We hope you agree that this transaction is of great benefit to our customers and consumers and we ask that you support this transaction as we move forward. We will be pleased to answer any questions you may have.

MARIMICHAEL O. SKUBEL
KIRKLAND & ELLIS LLP
DO NOT MISSTATE THE FACTS

Imprecise or careless language can be misinterpreted by customers and, if it is repeated, by the FTC. The following are guidelines to help you understand what to say and what not to say when you are talking to customers.

- **DON'T** suggest Y will be dominant or have market leverage or power over customers post-transaction of have any power to raise prices.

- **DON'T** suggest any product lines or SKU's will be dropped or any options (deals, promotions, etc) currently offered the customer will be discontinued or changed in a way that is unfavorable to the customer or consumer.

- **DON'T** suggest Sub’s business needs improving. Rather, stress that Y will become more efficient after this transaction.

- **DON'T** suggest other competitors will be disadvantaged because of the transaction. Tell the customer that Y recognizes that their competitors will see the transaction as a great opportunity for them, an entrée to expand their sales, and that Y knows that it needs to remain competitive.

- **DON'T** suggest the transaction has antitrust risk. Rather, indicate that regulatory authorities may take a look at the transaction, but that we are confident that the benefits of the transaction and the strong actual and potential competition the market place will face will mean ultimate clearance by the FTC.
American Bar Association – 2005 Annual Meeting
Section of Business Law

Antitrust for the Transaction Lawyer:
What You Need to Know, From Due Diligence to Closing

August 5, 2005

Merger Notification Issues in International Transactions

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Introduction

Cross-border mergers frequently trigger a multitude of pre-closing antitrust reviews. Reviewing jurisdictions include those with well-developed competition laws such as Canada and the United States, as well as an ever-expanding roster of newcomers. Different substantive and procedural regimes can make a multi-jurisdictional transaction a complex, expensive and time-consuming process.

The economic liberalisation and technological change of the last 10 to 15 years have profoundly altered the global economy. In the words of one commentator, “[m]arkets have overtaken the strong and insular economic authority of the nation state.” With economic liberalisation, nations have come to recognise the importance of competition “as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world” and the importance of antitrust laws to safeguard competition in market economies. As a consequence, competition laws are being enacted rapidly, with most of these incorporating some form of voluntary or mandatory pre- or post-merger notification and review. Today nearly 70 jurisdictions have merger notification regimes — as recently as 1990 there were closer to a dozen. The proliferation of reporting regimes can present a serious challenge to the business community and their counsel. The pace of change and the lack of reliable sources of information in some jurisdictions compound the problem.

In presenting this paper, our goal is to highlight some of the process issues that attorneys must grapple with when managing international transactions, all of which can impact the time and cost to complete the transaction; the paper is not intended to catalogue comprehensively the differences in the world’s merger control regimes (or address substantive competition issues of any kind). We hope that after a review of the paper, transaction attorneys will appreciate the need to seek antitrust advice, and seek it early, on their multi-jurisdictional deals.

1 The authors are grateful to David G. Anderson, Allen & Overy LLP, for his comments on an earlier draft of this paper.
4 ICPAC Report supra note 2 at 33.

Jurisdictions with merger control / notification regimes include: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Portugal, Romania, Russia, Slovak Republic, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia.
Merger Notification Threshold Tests Which Are Difficult to Apply

Although no two jurisdictions have precisely the same merger notification threshold test, most base their thresholds on some measure of assets and/or revenues. The thresholds in the EC Merger Regulation have been adopted in many countries, but revised to suit local needs. But even with the popularity of the European approach, there remain a remarkable variety of threshold tests based on local or worldwide assets/revenues and/or market shares.

Market share tests

A number of countries (for example, Brazil, Greece, Latvia, Portugal, Russia, Slovenia, Spain, Taiwan and Turkey) employ mandatory reporting regimes based at least in part on market share tests. For example, in Slovenia notification may be required if the “companies involved in the concentration, including affiliated companies, jointly achieve more than 40 percent of sales, purchases or other transactions on a significant part of the Slovenian market.” In this and other cases, share thresholds can be triggered and merger notification required regardless of whether there is any competitive overlap between the parties. In other words, although the merger could have no effect on competition, the fact that one party has a high share (even if the other party’s share is 0%) could trigger a notification obligation. Although initially it is up to the parties to determine whether a market share threshold test has been crossed, it remains open to the regulatory agency to second guess.

It is no surprise that thresholds such as these generate considerable uncertainty because market definition is such a subjective, fact-intensive and economics-intensive process—the absolute opposite of what business needs to ascertain legal obligations in time-constrained situations.

Low financial thresholds

Some countries, like Estonia, have merger notification thresholds based on worldwide assets or turnover. In Brazil, notification was until very recently required if merger parties had worldwide sales in excess of R400 million (approximately US$130 million). Other countries, like Germany, Norway and Russia, have thresholds based on very low local turnover. German notification may be required if low worldwide turnover threshold are met and only one party has €25 million (approximately US$33 million) in German turnover. Similarly, merger parties may have a notification obligation in Norway if their Norwegian revenues exceed NOK 20 million (just over US$3 million). Russia’s threshold varies (see below), but, at the moment, the prior approval of the Ministry of Antimonopoly Policy may required in connection with mergers involving “commercial organisations with an aggregate balance-sheet value” of a remarkably low US$350,000.


7 An approximate estimate; the legislation requires notification if the parties’ assets exceed 100,000 times the minimum monthly salary.
Legislation in several jurisdictions does not explicitly state whether the relevant thresholds apply to the merger parties’ local or global assets and/or turnovers. Although the extremely low levels of some of these thresholds suggest that legislators had local mergers in mind when setting the values, the relevant agencies often take a different view. One would assume a merger in any jurisdiction would require at least local effects to trigger the application of the legislation, but where there is no specific reference, the nexus between merger and market may be minimal (e.g., modest export sales).

**Unclear thresholds**

Yet other jurisdictions have thresholds based on references to opaque, non-monetary values such as “economic units” or monthly minimum wages. For example, Russian legislation requires notification if the worldwide assets of the merger parties are in excess of 100,000 times the minimum monthly salary. Although ultimately referable to objectively established values, such thresholds do not allow non-local counsel to establish readily whether there may be a notification obligation.

At the extreme, even lawyers in jurisdictions with well-developed merger notification regimes such as the United States and Canada encounter tricky issues that may make it difficult to determine easily whether merger parties have pre-(or post) closing notification obligations. (All of these uncertainties can add time and expense to the merger process.) For instance, the Canadian *Competition Act* does not require pre-merger notification in connection with the acquisition of non-voting shares. However, where shares are acquired that can convert to voting shares or have limited voting rights triggered on the occurrence of certain circumstances, those shares may (later) be considered voting shares the acquisition of which may require pre-merger notification. In such circumstances, the pre-merger notification obligation would only arise when the right to vote arises (e.g., upon conversion to voting shares) and not on the initial acquisition of the shares. This can create considerable uncertainty, as there may be a notification obligation at some point in the future, perhaps well after the initial acquisition of shares, and perhaps well after transaction and antitrust lawyers have completed their work on the acquisition.\(^8\)

**Opaque Triggering Events**

In many jurisdictions the filing timeframe, or triggering event, is also far from clear. To illustrate, Brazilian legislation stipulates that notification is required within 15 business days from the date that the transaction was “realized.” Initially, most practitioners took the view that the realization date equated with the transaction closing date. However, the antitrust authorities consider that any agreement signed by the parties that could affect

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\(^8\) This uncertainty is compounded by further uncertainty as to what sorts of voting rights may trigger the merger notification obligation. Full conversion to voting shares clearly would trigger a notification obligation; but what about the occurrence of an event that might give rise to a more limited voting right such as the right to vote only on a particular issue? The *Competition Act* defines “voting share” as “any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing” but the phrase “is continuing” has not been interpreted by the Canadian Competition Bureau, Competition Tribunal or courts.
competition—potentially even a Memorandum of Understanding—may trigger the notification requirement. Fines for failing to file (or filing late) range from approximately US$22,000 to US$2.2 million, and the authorities have historically been aggressive in enforcing violations of these vague laws.

**Early Filing Deadlines**

Many countries require that filings be submitted very quickly after a transaction emerges. For example, in Argentina notification of a public tender bid must be made within seven days of announcement. All other transactions are notifiable following closing. And although the European Commission has recently relaxed its rules, the national rules of nearly half—11 of 25—member states of the European Union theoretically require filings to be made within 7-30 days of signing or announcing a merger agreement.

Although deadlines are in practice sometimes flexible, the statutory requirements may be difficult to meet for transactions that emerge quickly (even if closing may be far in the distance) unless early work is done on relevant filings. Such timeframes compound the other uncertainties, complications and costs of doing global deals. In both hostile and confidential situations, the problem is exacerbated. Confidentiality requirements of public market transactions often hinder the ability to get the deep enough into an organisation to get the information needed to complete worldwide filings.

**Burdensome Filing Requirements**

America’s straightforward HSR filing has not been the model followed in most of the world’s jurisdictions. Many regimes call for notifications that require detailed substantive analyses to be made at an early stage of the transaction. Part of the distinction reflects a theoretical divide between jurisdictions with “clearance” statutes and those with “notification” laws. In Europe, for instance, the huge amount of information required by the Form CO is arguably justified as the review process results in a clearance decision. The light US and Canadian filing requirements reflect the fact that notification is designed (merely) to put agencies on alert and to give them an opportunity to seek additional information and / or challenge a merger; most cases do not result in a formal decision.

However, the fact remains that completing merger review process can be burdensome. This is true not only of the EU, but also Brazil, China, South Africa, Turkey and every European jurisdiction that has modelled reporting requirements on the EU model. (Indeed, some notification regimes require a detailed substantive analysis just to determine whether a filing is required!) Numerous jurisdictions also require merger parties to supply quantities of data that are often difficult and time-consuming to obtain yet add little real insight into the relevant substantive issues. For instance, Argentina requires that sales be broken down by local customs code categorization and Mexico “requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the
competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to make its judgments”.

**Unsolicited Bids**

Unsolicited takeover-bid transactions give rise to a unique set of issues. The law of many jurisdictions does not contemplate transactions other than negotiated, consensual deals. This is reflected in their antitrust notification rules that require the submission of a single filing with detailed information about both parties before the notification will be considered complete. In a hostile bid situation, the target may be unwilling to provide the detailed information required by antitrust authorities and thus make it difficult for the bidder to make the filings and obtain the clearances it requires (or desires) before closing the bid, potential giving the target a strategic advantage. And, the antitrust agency may have no effective way to compel the target to provide the required information.

**The Costs of Multi-jurisdictional Deals**

Transaction lawyers and their clients also should be prepared to incur significant expenses if multiple merger notifications are necessary, regardless of whether the transaction raises substantive issues. The most obvious costs are merger notification filing fees. In the US, a filing fee of US$20,000 per acquiring person per transaction was introduced in 1990; today it ranges from US$45,000 to US$280,000 depending upon the size of the transaction. Canada, Germany, Hungary, Spain, South Africa, the UK and 20 other jurisdictions have filing fees. (They are important—some may say crucial—sources of agency funding in a number of counties and because of that there is a real likelihood that more and more jurisdictions will implement them over time.)

Other costs include out-of-pocket costs (e.g., lawyers’ and economists’ fees and document production / translation costs); regulatory delay (i.e., lost savings, efficiencies and synergies due to the running of a statutory waiting period or full-blown investigation); lost employee time and management attention; and excessive relief (i.e., remedies intended to solve a non-existent or unlikely competitive problem or relief in which the costs outweigh the competitive benefits). The ABA and International Bar Association recently commissioned PriceWaterhouseCoopers to carry out a study of merger review costs. Amongst other things, A

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10 For example, Argentina, Czech Republic, Poland and South Africa.

11 In Canada, the target has a statutory obligation to provide the information required to complete its portion of a notification filing within 10 days (or 20 days, if the bidder files a long form filing) of being notified by the Commissioner of Competition: Competition Act, s. 114(3). Similar rules exist in the US.

12 Translation costs can be significant. Jurisdictions such as Czech Republic, Russia and Slovenia may require deal documents to be translated before certifying a notification as complete.

tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews\(^\text{14}\) estimates that the average multi-jurisdictional transaction involved eight completed or considered filings and that the external costs of merger reviews averaged €3.3 million (approximately US$3.7 million using June 2003 exchange rates). The study also found that the internal and external costs of merger review represented, on average, 42% of transaction costs.

Some years ago Jacques Bougie, then President and Chief Executive Officer of Alcan, summarised some of the issues Alcan faced in connection with the review of the proposed Alcan-Pechinney-Alusuisse merger\(^\text{15}\):

- There were over 40 countries in which the parties had assets and / or revenues that may have triggered merger notification thresholds.
- More than 35 law firms provided antitrust advice.
- Two new merger control regimes entered into force between the initial public announcement of the transaction and its completion.
- Sixteen merger notification filings were ultimately made (not counting one post-completion merger filing and two foreign investment filings).
- Over US$100,000 in merger notification filing fees were paid.
- Notifications were ultimately submitted in eight different languages: Czech, English, German, Polish, Portuguese, Russian, Spanish, and Turkish.
- It took almost half a year to comply with the US Justice Department’s “second request” for documents; Alcan’s Montreal office alone generated 400 boxes of printed material, and one million pages of e-mails and thousands of Pechinney and Alusuisse documents had to be translated from French and German into English.

To make matters worse, much of this work had to be duplicated as the three-way transaction failed to proceed in the face of concerns expressed by the European Commission; the parties later completed two, two-way transactions in 2000 (Alcan-Alusuisse\(^\text{16}\)) and 2004 (Alcan-Pechinney\(^\text{17}\)).\(^\text{18}\)

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\(^{14}\) See A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews (June 2003) <www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf> (dated accessed: 3 February 2005).


Conclusion

The moral from all of this? As noted at the outset: seek antitrust advice and seek it early. Many international transactions can and often are small enough to avoid mandatory pre-merger notification, and many others require only two or three notifications. However, transaction lawyers and the business people who hire them should not be caught off guard by the potential costs and complexities of multi-jurisdictional merger reviews. At the extreme, competition concerns in a major foreign jurisdiction may bring the entire transaction into question. The transaction lawyer should therefore consult antitrust counsel early in the transaction process. The initial size-up of potential foreign filings and substantive risk often can be completed quickly and without the assistance of foreign counsel, but consulting and perhaps retaining foreign antitrust lawyers will be necessary in other cases. If filings are necessary, foreign counsel will almost certainly be required, and ought to be engaged early enough to ensure that foreign merger filings and reviews are completed as expeditiously as possible. The goal of all involved can and should be the same: minimise the risk that the antitrust process will delay or stymie completion of the proposed transaction.

18 The authors represented Alcan in connection with its multi-jurisdictional merger filings on the proposed three way Alcan-Pechiney-Alusuisse merger and the subsequent Alcan-Alusuisse and Alcan-Pechiney mergers.
About the authors

**John Clifford** is a partner in the Corporate and Antitrust / Competition Law Groups of McMillan Binch Mendelsohn LLP. John’s corporate/commercial experience is diverse. He has extensive experience on negotiated acquisition and divestiture transactions (on both the buy and sell side), debt financings and corporate re-organizations. He works closely with in-house counsel and senior executives to provide advice and guidance on the management of legal issues that arise as part of the day-to-day operation of business, including review/preparation of contracts, corporate governance, privacy and legal compliance, responding to litigation threats, contract terminations and employment issues.

John’s antitrust practice is focused on merger clearances and assisting clients to respond to Competition Bureau investigations into matters such as unlawful conspiracies and abuse of dominance. This includes responding to so-called “Section 11 Orders”, making submissions to the Competition Bureau and co-ordinating client-Competition Bureau interactions. He also regularly provides advice on strategic alliances and other joint ventures, grey marketing, pricing and distribution practices, advertising issues and compliance programs.


John is vice-chair of the Canadian Chamber of Commerce, Competition Law Task Force. He is the past-Chair of the Canadian Bar Association’s Competition Law Section’s Reviewable Matters and Private Action Committee and co-chaired the CBA’s Section 45 Task Force (which considered proposals to amend the Competition Act conspiracy offence).

**Omar Wakil** is an antitrust specialist at McMillan Binch Mendelsohn LLP. His practice covers all areas of antitrust / competition law and foreign investment review. He works with clients involved in a wide range of businesses, including beverage alcohol; chemicals; confectionery; financial services; fine art auctions; health care; and mining, metals and packaging. In addition to handling domestic merger reviews, he has been responsible for the coordination of worldwide antitrust and foreign investment clearances on a number of multi-jurisdictional transactions. He also assists clients with a variety of criminal and civil competition law investigations.

Qualified as a solicitor in Ontario and England and a member of the Brussels Bar, in 2003 Omar was seconded to a leading international law firm in Brussels where he advised clients on antitrust issues arising under European law.

Omar speaks frequently on antitrust issues at professional conferences and universities in Canada and Europe. He has also written extensively in the area and is also co-ordinating editor of the loose-leaf service *International Mergers: The Antitrust Process* (3rd edition: Sweet & Maxwell, London).
Michael B. Miller is a partner in the New York office of Morrison & Foerster. His practice includes the representation of clients in complex litigation in federal and state courts and in investigations before federal and state regulatory agencies. Mr. Miller regularly represents clients before both the Department of Justice's Antitrust Division and the Federal Trade Commission in connection with mergers and acquisitions, including deals in the pharmaceutical, aluminum, financial services, energy, computer software and consumer electronics industries.

Mr. Miller also represents clients in civil and commercial matters at both the trial and appellate levels. His cases have included representation of a publicly traded English investment trust in the New York Commercial Division, a large U.S. bank in U.S. antitrust litigation arising out of credit card operations, a trade association as amicus curiae in significant pending antitrust litigation action in the federal courts, a major health care provider in shareholder class actions in the Southern District of New York, the independent directors of a mutual fund group with respect to market timing cases and investigations, a large UK bank in US antitrust litigation, and an individual involved in the Arthur Andersen/Enron matter.

Mr. Miller is the Co-chair of the Corporate Counseling Committee of the ABA Antitrust Section, the Editor of The Antitrust Counselor, and speaks and writes frequently on a range of litigation and competition law matters.

Representative Matters
• Representing Bank of America in action brought by American Express against Visa, MasterCard, and several major card-issuing banks. American Express alleges that defendants violated the Sherman Act by conspiring to exclude American Express from the card-issuing and network services markets, as well as the debit card network services market.

• Representing Lord Jacob Rothschild and RIT Capital Partners PLC in connection with litigation pending in the New York Commercial Division.

• Obtained U.S. antitrust approval for Alcan Inc., in connection with its successful takeover of Pechiney SA

• Obtained U.S. antitrust approval for Aventis in connection with its merger with Sanofi-Synthelabo.
Marimichael O. Skubel  Partner  
mskubel@kirkland.com

Practice Areas
• Antitrust & Competition

Professional Profile
Marimichael Skubel joined Kirkland & Ellis as a partner in February 2001, after holding various senior positions at the Federal Trade Commission’s Bureau of Competition. At the FTC, Marimichael supervised the antitrust work of the FTC’s regional offices and coordinated the FTC’s antitrust efforts with those of the state antitrust agencies. Some of the major matters that she coordinated include BP-Amoco/ARCO, Exxon/Mobil, and Mylan Laboratories, Inc. Ms. Skubel also worked with the States and the Department of Justice to draft the Protocol for Federal/State Investigations that the agencies use to conduct joint investigations. Before taking on these responsibilities, Ms. Skubel was a senior litigation attorney, focusing on mergers, where she led investigations of mergers in the supermarket, oil and gas, chemical, and food products industries. As a staff attorney Ms. Skubel was also involved in many FTC antitrust investigations and litigations. Since joining the Firm’s Washington office, Ms. Skubel has focused on antitrust and competition matters and has advised clients on mergers and investigations conducted by federal agencies and state antitrust enforcers. Ms. Skubel is a frequent lecturer on current antitrust issues including federal and state antitrust enforcement, mergers, B2B ventures, the Competitor Collaboration Guidelines, and mergers in the electrical utility and other de-regulated industries.

Education
Catholic University of America (J.D., 1979)
Indiana University of Pennsylvania (B.A., Criminology, 1976) summa cum laude

Representative Matters
Alpharma: Negotiated favorable consent with the Federal Trade Commission and State Attorneys General settling charges of anticompetitive conduct.

Nestlé/Dreyer’s: Represented CoolBrands, the buyer of divested assets, in obtaining Federal Trade Commission approval.

Chiquita/Seneca: Represented Chiquita in sale of private label canned vegetable business to its competitor.

LabCorp/Dynacare: Represented Dynacare in sale of medical laboratory business to LabCorp, combining first and third largest firms in the industry.

Suiza/Dean Foods: Represented Dean in merger of first and second largest dairies.

Bally/IGT: Represented IGT on antitrust claims in patent litigation.

MSC.Software: Represented MSC in FTC administrative litigation.

Admissions & Qualifications
1979, District of Columbia

Memberships & Affiliations
Vice Chair, ABA State Antitrust Enforcement Committee (2001-2004)
Editor, Newsletter, Antitrust Subcommittee of ABA Business Law Section

Other Distinctions
FTC Award for Meritorious Service: 1995 and 1996
FTC Award for Superior Service: 2001

Seminars
Moderator, ABA Brown Bag – September 14, 2004
State Attorneys General Speak on Consumer Protection Enforcement in the Pharmaceutical Industry

Moderator, George Mason University Law Review 2004 Antitrust and Consumer Protection Symposium
20 Years Later: Is it Time for New Vertical Guidelines?

Panelist, ABA Spring 2003 Antitrust Meeting and Article in ABA Newsletter
Litigating Against the Federal Trade Commission -- A Practical Guide

Panelist, ABA Spring 2003 Business Law Meeting
International Merger Clearance: Filing Your Joint Venture Transaction

Panelist, ABA 2002 Fall Forum
Eight Simple Rules for Dealing with the States

Panelist, KPMG/University of Chicago Business School's 2002 Mergers and Acquisitions Forum
How To Clear Your Merger Through the Antitrust Agencies

Prior Experience
Federal Trade Commission, Bureau of Competition, Washington, D.C.

Coordinator, Regional Offices and Federal State Relations, 1996-2001
Attorney, Bureau of Competition, 1979-1996

FEDERAL/STATE ATTORNEYS GENERAL
Developed and maintained strong, cooperative relationships with state attorney general's antitrust offices throughout the country. Responsible for ensuring that federal and state antitrust enforcement efforts were harmonized to the greatest extent possible. Involved substantial and regular contact, including negotiations with state enforcement officials and giving presentations at conferences on federal/state cooperation.

REGIONAL OFFICES
Supervised all aspects of the antitrust work of FTC regional offices, including staffing, casework, and liaison with other government antitrust enforcers and the private bar. These offices investigate mergers and potentially anticompetitive business practices in a multitude of industries nationwide, including health care, consumer products, supermarkets, Internet commerce, oil and gasoline, natural gas transportation, and agricultural products. Responsible for guiding investigations and litigation strategy; presenting regional office cases to Commissioners and their staff; and briefing Congressional Committees on regional office matters.

ATTORNEY, BUREAU OF COMPETITION
Senior attorney managing and conducting investigations and administrative and judicial litigation involving both mergers and conduct violations. Industries investigated include: supermarket, automotive, food manufacturing, pharmacy, flour milling, chemicals, and gas pipelines. Litigated matters include: Red Food Stores, Inc (supermarket merger in Tennessee); FTC v. Questar Corp. (transaction abandoned).
**Professional Experience:**

John is a partner in the firm’s Corporate and Competition Law Groups.

John’s corporate/commercial experience is diverse. He has extensive experience on domestic and cross-border negotiated acquisition and divestiture transactions (on both the buy and sell side), debt financings and corporate re-organizations. He also works closely with in-house counsel and senior executives to provide advice and guidance on the management of legal issues that arise as part of the day-to-day operation of business, including review/preparation of contracts, corporate governance, privacy and legal compliance, responding to litigation threats, contract terminations and employment issues.

John has advised clients on the *Competition Act* implications of hundreds of merger transactions and regularly assists clients to respond to Competition Bureau investigations into matters such as alleged unlawful conspiracies and abuse of dominance. This includes responding to so-called “Section 11 Orders”, making submissions to the Competition Bureau and co-ordinating client-Competition Bureau interactions. He also regularly provides advice on strategic alliances and other joint ventures, grey marketing, pricing and distribution practices, advertising issues and compliance programs.


**Professional Associations/Memberships:**

John is Vice-Chair of the Canadian Chamber of Commerce, Competition Law and Policy Committee. He is an active member of the Canadian Bar Association (Competition Law Section) and the American Bar Association (Antitrust Section and Business Law Section). He is the past-Chair of the CBA, Competition Law Section’s Reviewable Matters and Private Action Committee and co-chaired the CBA’s Section 45 Task Force (which considered proposals to amend the Competition Act conspiracy offence).

John is a member of the Chicago Bar Association, the Canadian Club of Chicago and is a Director, Honorary Counsel and Secretary of the MS Society (Ontario Division).
Publications and Presentations:


Education and Year of Call:

- Osgoode Hall Law School (York University), LL.M. – Specializing in Competition and International Trade - 2005
- Called to the Ontario Bar – 1989
- University of Ottawa, LL.B. – 1987 (John received the Faculty of Law Silver Medal and the Carleton County Law Association graduation scholarship for academic excellence.)
- University of Western Ontario, B.A. – 1984
Kathleen A. O'Connor is Senior Counsel of Zebra Technologies Corporation and has served in this capacity since 2003. Prior to Zebra, she was Senior Counsel with Dean Foods Company and Legal Counsel with Whirlpool Financial Corporation. She began her legal career with two Chicago-based law firms, Winston & Strawn and Wildman, Harrold, Allen & Dixon. In her twenty years practicing both in law firms and corporations, she has dealt with a broad range of matters including securities and corporate compliance, mergers and acquisitions, financing, environmental compliance and litigation, products liability, litigation management, international issues, real estate, antitrust, intellectual property, commercial contracts, and counseling management on a wide variety of issues. Ms. O'Connor obtained her J.D. degree from Loyola University of Chicago School of Law and her B.S. in Management from Purdue University.