INSIDE THE MINDS

Understanding Antitrust Issues in Health Care

Leading Lawyers on Analyzing the Impact of Health Care Reform, Managing Antitrust Enforcement Concerns, and Preparing Clients for Change

ASPATORE
Mergers and Health Care Reform: Federal Antitrust Enforcement Issues and Trends in Health Care

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ASPATORE
Introduction

My practice focuses on all aspects of U.S. antitrust law. I help clients structure their business practices and transactions to minimize antitrust risk, advise them in connection with government investigations, and represent them in litigation. Although I am primarily a defense lawyer, I also advise clients on potential claims of action they may have against other companies and assist them in petitioning the federal antitrust agencies to investigate anti-competitive conduct affecting them.

I have counseled a number of clients in the health care and related industries, including hospitals, pharmaceutical companies, a diagnostic testing provider, and the Foundation for the National Institutes of Health Biomarkers Consortium. These entities face the same antitrust issues all companies face, including challenges to mergers and acquisitions, joint ventures, and standards setting.

I have also been involved with health care-related antitrust issues in the public sector as a deputy assistant attorney general in the Department of Justice (DOJ) Antitrust Division and, before that, as co-chair of the Antitrust Modernization Commission. The Antitrust Modernization Commission was a bipartisan panel of twelve experts appointed by the president and Congress to study antitrust policy and enforcement in the United States, consider the need for reform, and report to the president and Congress on our findings and recommendations. Physician conduct and health care competition advocacy are areas in which both the DOJ and the Federal Trade Commission (FTC) are involved, and they often coordinate on competition advocacy. On the merger front, these days the FTC tends to look at mergers involving hospitals, pharmaceutical companies, and companies selling medical devices or services such as diagnostic testing, while the DOJ looks at mergers between health insurance companies and allegations of criminal price-fixing.

At the DOJ Antitrust Division, I oversaw a section (Litigation I) responsible for reviewing conduct and transactions in the medical and insurance industries. We reviewed health insurance company mergers and transactions, and conduct involving physician organizations. We also
engaged in competition advocacy, urging states not to regulate the health care industry in ways that unreasonably impede competition.¹

**Trends in Health Care Antitrust Issues**

Largely, antitrust enforcement has been guided by certain principles around which substantial consensus has developed within the legal, economic, and academic communities. Case selection is guided largely by these principals, rather than by special-interest politics.

Political rhetoric notwithstanding, actual enforcement differences in Democratic versus Republican administrations have been primarily at the margins, in the most challenging cases, where the calls are closest. In those cases, we might expect to see the Obama administration lean toward enforcement. So far, however, the Obama administration’s DOJ has not brought any cases that were not already in the pipeline or that likely would not also have been brought during the prior administration. Except for the DOJ’s support of the FTC’s position on so-called “pay-for-delay” settlements in litigation between brand name and generic drug manufacturers, the Obama administration has made no pronouncements in the health care area that signal any material change of course.

Assistant Attorney General Christine Varney addressed the Obama administration’s health care antitrust policy in remarks delivered on May 24, 2010. In her remarks, Varney stated that health care reform required “more than ‘business as usual’” and promised to deliver “clear and accessible guidance to healthcare consumers, providers, and payers so that there is the predictability needed for healthcare reform to succeed.” Varney, at 16. In addition to pointing to health care policy statements on the issue of clinical integration published by the FTC and DOJ in 1996, see DOJ and FTC, Statement of Antitrust Enforcement Policy in Health Care, available at www.justice.gov/atr/public/guidelines/1791.pdf), Varney said the DOJ is

in discussions with the FTC on two issues: (1) how the two antitrust enforcement agencies can improve and increase the transparency of their review of integrated provider networks formed to clinically integrate their members’ provision of health care services and jointly contract with health plans, and (2) how they can better communicate to health care providers that it is possible to engage in such clinical integration efforts without running afoul of the antitrust laws.

Varney also vowed to “carefully scrutinize and continue to challenge” exclusionary practices by “dominant firms” in the insurance industry, such as most-favored nation clauses and exclusive contracts between insurers and significant providers that reduce the ability or incentive of health care providers to negotiate discounts with “aggressive insurance entrants.” Varney, at 11. Under a most-favored nation provision, a provider or provider group agrees with one health care plan either that it will not agree to accept lower reimbursement rates from a competing plan, or that it will provide the first plan with the same, more discounted rates provided to the competing plan. A most-favored nation agreement with a large incumbent plan arguably inhibits entry by new plans by reducing the willingness of providers to offer aggressive discounts to new entrants. While a provider might be willing to encourage new entry by offering discounts on a limited, initial basis to a small plan not covering many patients, it is unlikely to do so if the cost is extending the same discount to the larger incumbent plan. The DOJ prosecuted a number of such cases during the 1990s. See, e.g., U.S. v. Delta Dental of R.I., 1997 WL 527669, (D.R.I. July 2, 1997); U.S. v. Delta Dental Plan of Ariz., 1995 WL 454769 (D. Ariz. May 19, 1995); U.S. v. Vision Serv. Plan, 1996 WL 351147 (D.D.C. Apr. 12, 1996).

Of course, economic conditions facing the health care industry and relevant aspects of health care reform legislation will be considered in any antitrust analysis. For example, the DOJ and the FTC may have to continue considering mergers involving failing, or flailing, hospitals.

**Antitrust Issues for Hospital Mergers and Acquisitions**

In the past, the DOJ and the FTC challenged hospital mergers with mixed success before the courts. In fact, the agencies’ record of enforcement success was markedly worse for hospital mergers than for mergers in other
industries. In some cases, courts rejected the agencies’ alleged geographic market definition as being too narrow. In other cases, courts were convinced that the mergers would lead to cost savings and other efficiencies and improve patient care.

_Evanston Northwestern: Post-Consummation Challenge_

In the past few years, the FTC has made a concerted effort to improve its success rate in hospital merger challenges. First, in 2002, it launched an intensive review of consummated hospital mergers to determine whether any had resulted in demonstrable anti-competitive effects. Economist working papers, some dated as late as December 2009 and January 2010, describe the results of some of the studies and provide insight into the type of economic analysis the FTC staff undertakes in investigating a hospital merger. See FTC, Bureau of Economics: Working Papers, available at www.ftc.gov/be/econwork.shtm. This “retrospective” resulted in the challenge to Evanston Northwestern Healthcare Corporation’s consummated acquisition of Highland Park Hospital, in which the FTC found that the merger resulted in raised prices. More importantly for other hospitals looking to merge in the future, through this retrospective effort, the FTC also developed a model of hospital competition that is the theoretical basis for merger simulation models upon which the FTC staff increasingly relies to predict “directly” the price effects of a proposed merger. The FTC’s decision in the _Evanston_ matter also signaled that the FTC will no longer feel compelled to allege a relevant market in challenging a merger where there is evidence of effect (recall that some prior challenges had been rejected by the courts based on disagreement with the enforcement agency’s alleged market). See FTC, In the Matter of Evanston Northwestern Healthcare Corp. (July 24, 2009), available at www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

_Evanston_ presaged a general, continued movement of the DOJ and FTC away from a structured analysis of mergers driven by market shares and market concentration to a more fluid—in the words of several DOJ officials, “holistic”—analysis that seeks to predict more directly a transaction’s effect on price and other parameters of competition. The agencies’ current approach is reflected in proposed new Horizontal Merger Guidelines that were issued for public comment in early April 2010 and are
expected to be issued this summer in final form with likely little substantive change. See FTC, Horizontal Merger Guidelines for Public Comment: Released on Apr. 20, 2010, available at www.ftc.gov/os/2010/04/100420hmg.pdf.

Inova: Aggressive Use of Part III Procedures

In its challenge to a merger between Inova Health Systems Foundation and Prince William Health System Inc., the FTC used its administrative process in ways that substantially increased both the FTC’s likelihood of obtaining a preliminary injunction blocking the merger and, therefore, its leverage with the merging parties. In the past, the FTC had experienced mixed success in convincing federal courts to enjoin transactions pending the FTC’s administrative proceedings. Because of the length of time involved with the FTC’s administrative proceedings—up to several years, not including any appeals—courts regarded the preliminary injunction ruling as determinative of the transaction’s fate. The courts held the FTC to what the agency considered too high a burden of establishing likely anti-competitive effect.

The FTC took a number of steps to meet these challenges in Inova. First, it filed an administrative complaint around the same time as it moved for a temporary restraining order and preliminary injunction and offered the parties a “fast-track” administrative process, which would proceed contemporaneously with the federal court action. See Administrative Complaint, In re Inova Health Sys. Found. & Prince William Health Sys., Inc., 2008 WL 2307157 (F.T.C. May 27, 2008), available at www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf; Complaint for Preliminary Injunction, FTC v. Inova Health Sys. Found., No. 1:08-cv-460 (E.D. Va. May 12, 2008), available at www.ftc.gov/os/caselist/0610166/080513complaint.pdf; Press Release, FTC, FTC and Virginia Attorney General Seek to Block Inova Health System Foundation’s Acquisition of Prince William Health System, Inc. (May 9, 2008), available at www.ftc.gov/opa/2008/05/inova.shtm. An administrative hearing would have occurred within approximately five months, only about two months after the anticipated preliminary injunction hearing. Prior to Inova, the administrative proceeding would typically be held in abeyance pending the outcome of the federal court proceeding. In addition, FTC policy had been not to pursue an administrative complaint after losing a motion for

In addition, the FTC decided to appoint Commissioner J. Thomas Rosch as the administrative law judge, instead of one of the career administrative law judges. Commissioner Rosch promised to issue his opinion quickly after the administrative hearing concluded, and the FTC committed to issuing a commission opinion within ninety days after commissioner/administrative law judge Rosch issued his opinion.

The FTC also successfully opposed the hospitals’ request for discovery and the three-day evidentiary hearing on the FTC’s motion for preliminary injunction. The court denied the request, ruling that it would decide the FTC’s motion on the papers with limited oral argument. The decision dealt a blow to the merging hospitals and awarded a strategic victory to the FTC.

Citing the FTC’s “unusual” process changes, the hospitals abandoned their transaction. *See* Press Release, Statement from Inova Health System and Prince William Health System about the Proposed Merger (June 6, 2008), available at www.newsroom.inova.org/article_display.cfm?article_id=5135. Even if the FTC lost its preliminary injunction motion, the parties would be facing an intense and costly period of additional discovery and an administrative trial, followed by what they apparently presumed would be an adverse opinion from Rosch and the commission’s affirmation of that conclusion. Even with the FTC’s expedited scheduling, it would take more than an additional year to get through the administrative process plus an appeal. It is a rare deal that can be held together that long.

*Inova* likely set the pattern for subsequent FTC challenges to hospital mergers. Following *Inova*, the FTC amended its administrative rules to codify much of its procedural approach. The commission’s apparent goal is
to either stop transactions in their tracks or, where the parties choose to litigate, have an opportunity to develop merger law using specialist judges (including even commissioners designated as administrative law judges) through its administrative process.

Carilion: Hospital/Outpatient Provider Merger Challenge

There have been three reported FTC actions on health care provider mergers in the last twelve months. In November 2009, the FTC challenged an un-reportable, consummated acquisition by Carilion Clinic, the largest hospital in the Roanoke, Virginia, area (controlling about 80 percent of the beds), of two competing independent providers of outpatient advanced imaging and ambulatory surgery services. See F.T.C., F.T.C. Challenges Acquisition of Outpatient Medical Clinics (July 24, 2009), available at www.ftc.gov/opa/2009/07/carilion.shtml. The FTC alleged that the two independent outpatient service providers charged less for their services than Carilion and offered procedures on a more convenient basis. This spurred Carilion to compete by improving the accessibility of its services and reducing wait times for scheduling services. Notably, Carilion had vigorously opposed one of the acquired outpatient provider’s applications for a certificate of convenience, arguing that it was seeking to provide “the very same services offered at Carilion.” In re Carilion Clinic, Administrative Complaint, 2010 WL 2143903 (F.T.C. July 23, 2009), available at www.ftc.gov/os/adjpro/d9338/090724carilioncompt.pdf. Carilion settled the FTC’s complaint by agreeing to divest all the acquired assets within three months to a buyer approved by the FTC. Although this challenge has been described by some commentators as an example of heightened enforcement under the Obama administration, on the face of the complaint, it appears likely that it would have been challenged under the prior administration as well.

Scott & White/King’s Daughters: Failing Firm Defense

In December 2009, the FTC closed its investigation of a consummated merger between Scott & White Healthcare and King’s Daughters Hospital in Temple, Texas. See Richard Feinstein, Dir., F.T.C., Bureau of Competition Director, Statement on the F.T.C.’s Closure of Its Investigation of Consummated Hospital Merger (Dec. 23, 2009), available at

King’s Daughters was in financial distress but was also the only significant competitor to Scott & White in Bell County, Texas. Scott & White planned to convert King’s Daughters from a general acute care hospital into a freestanding children’s hospital. Employing the merger guidelines policy for failing firms, the FTC considered whether an alternative purchaser existed that would have maintained King’s Daughters as a general acute care hospital. In particular, before the Scott & White deal, the Seton Family of Hospitals had expressed an interest in acquiring King’s Daughters.

Without filing a complaint, the FTC secured a written agreement from Scott & White to offer King’s Daughters “on specific terms related to the continued operation of King’s Daughters as a general acute care hospital.” Id. Seton ultimately had no interest in acquiring King’s Daughters, due to that hospital’s continued financial deterioration since the announcement of the merger and the loss of key personnel. In explaining its action, the FTC highlighted that because there was one determinative issue—whether there was an alternative buyer—it pursued that issue as expeditiously as possible without the time that would have been involved with the filing of a formal complaint seeking a hold separate order and allowing King’s Daughters to deteriorate further.

Abandonment of Merger after FTC Second Request Issued

In December 2009, two hospitals in Maine—Goodall Hospital and MaineHealth—abandoned their proposed merger in the face of a burdensome “second request” for information from the FTC. The hospitals expressed surprise both at receiving the request and at its burdensomeness, and said they could not afford the expense of complying with it. In fact, the FTC actually challenges a relatively small percentage of the mergers it investigates, and it can sometimes resolve issues far short of the parties substantially complying with a full second request, as illustrated by the Scott & White/King’s Daughters matter. Nevertheless, hospital merger analysis in particular involves the “crunching” of enormous amounts of detailed data from hospitals and their providers, and it can require hospitals to retain
both experienced counsel and economic experts. This can be particularly daunting for small hospitals and economically distressed hospitals.²

**Merger Takeaways**

There are certain “takeaways” for hospitals considering mergers:

- Do not assume that a transaction will escape substantive review just because it falls below the thresholds for pre-merger notification under the Hart-Scott-Rodino Act. The FTC is likely to continue aggressively pursuing consummated transactions it suspects are anti-competitive, irrespective of size. Actual evidence of the exercise of market power following the merger will be a compelling factor in encouraging the FTC to sue. However, the proposed new Horizontal Merger Guidelines make clear that the fact that the merged entity has not actually raised prices or otherwise behaved anti-competitively will not necessarily control the exercise of its enforcement discretion if other data suggest the company has an incentive and ability to raise prices.

- It pays to get good legal advice up front to avoid surprise. Having to abandon a deal or divest assets is often damaging to a business, particularly the target in an acquisition. Where assets have to be divested, there typically is no floor to the price below which they need no longer be sold—and prospective buyers are well aware of this.

- In a failing firm situation, establishing the elements of the failing firm defense up front will expedite antitrust review. Those elements include evidence that the failing firm has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose less of a threat to competition. In the case of hospital mergers, if the competitive concern is the provision of general acute care, the defense focuses on buyers who would continue to operate the hospital as a general acute care provider.

² A copy of a general sample second request published by the FTC is included as an Appendix. A second request issued in a hospital merger would be modified to reflect the industry and the facts of the transaction.
• Analysis of hospital mergers is data-intensive. But the fundamental question is whether the merged entity would be able to exercise market power vis-à-vis insurers as a result of the merger. This is most likely to be so where the merging hospitals are close substitutes, so that in putting its network together, insurance plans need to have one or the other hospital in their networks. In that event, by merging, the hospitals will eliminate competition between them and be able unilaterally to impose higher reimbursement rates than before the merger.

• The FTC is highly skeptical of most claimed efficiencies. According to the proposed new Horizontal Merger Guidelines: “Efficiencies are difficult to verify and quantify… Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent on the merging firms to substantiate efficiency claims so that the agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.” F.T.C., Horizontal Merger Guidelines for Public Comment: Released on April 20, 2010, available at www.ftc.gov/os/2010/04/100420hmg.pdf. Efficiency projections and plans created in the normal course of business to support the decision to engage in the transaction comprise the most compelling evidence, along with evidence that similar efficiencies have been obtained in other similar transactions.

• Hospitals should try to build support for the transaction within the community, including among employers and physician groups, as well as insurers.

The Impact of Health Care Reform

The debate over health care reform has focused attention on competition in the health insurance industry and on two issues in particular: (1) concentration in health insurance markets, and (2) whether to end antitrust immunity for the health insurance industry.
Concentration in Health Insurance Markets

In the course of the health care reform debate, some asserted that many state health insurance markets are highly concentrated (i.e., that only a few insurers compete to provide coverage, resulting in higher premiums to consumers and lower reimbursement rates to hospitals and doctors). In his speech to Congress on health care in September 2009, President Obama observed that in many states, the insurance health care market is controlled by just a few companies: “Unfortunately, in thirty-four states, 75 percent of the insurance market is controlled by five or fewer companies. In Alabama, almost 90 percent is controlled by just one company.” See Government Accountability Office, Private Health Insurance: 2008 Survey Results on Number and Market Share of Carriers in the Small Group Health Insurance Market, GAO-09-363R (Washington, D.C., Feb. 27, 2009), available at www.gao.gov/new.items/d09363r.pdf. This concentration was said by critics to have resulted in part from mergers not blocked by the prior administration. Persons and organizations making such assertions (including the American Medical Association) urged both stricter merger enforcement and even the break-up of larger insurance companies. They also used this asserted concentration as justification for the creation of a public insurance provider, to provide more competition in the marketplace.

Of course, statistics are subject to manipulation, particularly in high-stakes situations like health care reform and merger control. It is therefore important to understand the precise nature of the statistics in order to make wise policy and enforcement decisions based on them. For example, the statistics cited by the president and others appear to relate to one particular segment of the health insurance industry, fee-for-service plans for small businesses and individuals. They do not describe concentration and competitive alternatives available to larger employers or other insurance products such as preferred provider organizations and health maintenance organizations, or consider the ability and likelihood of large group providers to expand into the provision of insurance to smaller groups in response to anti-competitive pricing. Other studies show that, while concentration in some states is high (typically the less populous and more rural states), in other states the market is only moderately concentrated, suggesting some scope for further efficient consolidations, particularly of smaller providers. See, e.g., K. Davenport and S. Sekhar, Insurance Market Concentration Creates...
Fewer Choices: A Look at Health Care Competition in the States, Center for American Progress (Nov. 2009), available at www.americanprogress.org/issues/2009/11/pdf. And finally, while public statistics are most readily available on a statewide basis, the geographic scope for certain kinds of insurance products may be broader or narrower than a state.

Further, industry concentration is only one potential clue to the competitiveness of an industry and the likely effect of further consolidation. Additional analysis is needed on a case-by-case basis to make a reasonable prediction of the likely net competitive effects of a particular proposed merger in relevant markets for the sale of insurance and purchase of provider services. Given the nature of insurance, we would not necessarily expect to see an atomistic market structure. Some mergers may enable the companies to achieve significant cost savings and other efficiencies that benefit consumers, and there is no reliable data connecting price or other effects to particular levels of concentration. A 2009 Government Accountability Office study of whether there is a correlation between mergers and premiums and the quality of care found that premiums did not rise for a sustained period, and the affect on quality of care was at best inconclusive. See, e.g., Government Accountability Office, Private Health Insurance: Research on Competition in the Insurance Industry, GAO-09-864R (Washington, D.C., July 31, 2009), available at www.gao.gov/products/GAO-09-864R. The point thus is not to dispute that some markets may be highly concentrated, but that sweeping generalizations cannot be the basis for individual enforcement decisions. For instance, increased concentration is not necessarily due to mergers alone. In some cases, regional health plans and provider-owned plans have simply exited the market. There certainly appears to be little, if any, evidence of the kind of durable monopoly power that could justify the imposition of an extreme antitrust remedy like the breakup of existing firms.

Obama Administration Insurance Merger Enforcement Policy

Since the beginning of the Obama administration, one proposed insurance company merger has been abandoned in the face of threat to challenge from the DOJ. According to a press release issued by the DOJ on March 8, 2010, Blue Care Networks of Michigan (a subsidiary of Blue Cross Blue Shield of Michigan) abandoned its attempt to purchase Physicians Health
Plan of Mid-Michigan. See Press Release, U.S. D.O.J., Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans (Mar. 8, 2010), available at www.justice.gov/atr/public/press_releases/2010/256259.htm; see also Varney, at 5. According to the DOJ, Blue Care and Physicians Health Plan are the top two commercial insurers in the Lansing, Michigan, area. Together they account for almost 90 percent of the market, and there was evidence that competition between Blue Care and Physicians Health Plan, which is owned by the largest hospital system in Lansing, had led them to offer better prices to insureds. On the face of the transaction, it appears that it would also have been challenged by the prior administration. Accordingly, actions taken on this merger, alone, do not signal a material change in how the DOJ will evaluate insurance industry mergers.

In her May 24 remarks, Assistant Attorney General Varney announced that the DOJ Antitrust Division had undertaken an extensive review of its merger investigations since 1996 where the issue of new entry and/or expansion by competitors was a significant factor in the DOJ’s enforcement decision. Based on interviews with state officials, economists, insurance brokers, and health plans, the Antitrust Division concluded that, in general, competitively significant entry and expansion is unlikely to occur in markets to provide insurance to small and medium-sized businesses that are dominated by one or two insurers. The Antitrust Division concluded that smaller insurers and new entrants are unable to obtain the kinds of discounts from providers that larger, incumbent insurers enjoy based on their ability to deliver patients. This prevents smaller plans from becoming viable competitive alternatives. In addition, the Antitrust Division concluded that, even if a new entrant were to obtain comparable or better discounts from providers, brokers do not like to sell new health plans not having an established presence and reputation. Accordingly, “entry defenses in the health insurance industry generally will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.” Varney, at 10.

This approach to entry in health insurance mergers appears to be generally consistent with the DOJ’s practice over the last several years. Merger enforcement is highly fact-specific. Arguments that entry or expansion would counteract competitive effects of a merger have always been tested
by the facts and economic reality, including the ability to obtain distribution and the need for economies of scale. In the area of health insurance, for example, preferred provider organizations and health maintenance organizations need to have competitive access to providers and provider networks. They also generally need to have sufficient reputation to induce brokers to sell them and consumers to subscribe. Varney’s speech, however, fails to mention circumstances in which entry may be viable. For example, it may be possible to access providers through rental networks (i.e., networks that rent doctors and hospitals to health plans). Rental networks can provide smaller, less established health plans with the benefits of scale available to larger, more established plans. See American Association of Preferred Provider Organizations, AAPPO Silent PPO White Paper (Jan. 2010), available at www.aapo.org/UserFiles/File/white%20paper%20Series/Silent_White_Paper_sm.pdf. It is not clear how the DOJ evaluated the availability of such networks, given that Varney does not mention them in her speech and the Antitrust Division has not published details of its study. Varney also does not mention the possibility that well-established insurers serving large employers in a particular geographic market, who already possess access to provider and broker networks, scale-based provider discounts, and national reputations, would expand their business to provide insurance to small and medium-sized businesses.

McCarran-Ferguson Immunity

Congress lacked the political will to repeal the McCarran-Ferguson Act’s antitrust immunity for insurance companies, which would have subjected insurance companies to the same antitrust rules that govern all industries. The McCarran-Ferguson Act grants an antitrust exemption to “the business of insurance” to the extent it is regulated by state law, unless the conduct involves an agreement or act to “boycott, coerce or intimidate.” 15 U.S.C. §§ 1012(b), 1013(b) (2006).

Some opponents of repeal argue that immunity is necessary to enable smaller insurers to, among other things, collect, aggregate, and review historical and projected data on losses so they are better able to set rates to cover their likely costs. They argue that although such arrangements would be assessed under a
rule of reason and condemned only if unreasonably anti-competitive, the risk of an investigation or suit would chill collaboration.

People who favor repealing the immunity counter that the legal risk of crossing the line under the rule of reason is faced by all kinds of businesses when they engage in collaboration. They contend that McCarran-Ferguson immunity also shields insurance companies from clearly anti-competitive behavior. See, e.g., Statement of Administration Policy on H.R. 4626 (Feb. 23, 2010), available at www.whitehouse.gov/omb/assets/sap_111/saphr4626r_20100223.pdf; Varney, at 1–2 (A more complete discussion of the complex issues involved can be found in the April 2007 Report and Recommendations of the Antitrust Modernization Commission, the accompanying submissions to the commission, and the transcript of the commission’s hearing on McCarran-Ferguson immunity at www.govinfo.library.unt.edu/amc).

The House bill contained a provision for repeal, but the Senate bill did not. There has been talk of stand-alone legislation to repeal the immunity, but this seems like an unlikely prospect, until and unless a proposal is developed that wins the support of the insurance industry.

Health Care Reform and Competition Issues

There may be other aspects of the new health care reform legislation that will raise competition issues. For example, Section 3022 of the Patient Protection and Affordable Care Act calls for the creation of an accountable care organization (ACO) program by January 2012. An ACO is a group of health care providers, including physicians and hospitals, formed to provide integrated care to Medicare patients. An ACO contracts directly with Medicare, rather than through an insurance company intermediary, and is compensated in a way that is intended to encourage the efficient provision of high-quality care at lower cost. The Department of Health and Human Services is to establish rules for ACOs.

Although the ACO program would initially be a feature of Medicare, it is currently anticipated that the model will spread to private payers. Private payers, however, lack Medicare’s ability to set prices derived from its dominance as a payer for health care delivered to the elderly and disabled. In the private payer environment, ACOs conceivably could amass market
power that would counteract the intention of health care reform to lower premiums through increased efficiency in the delivery of services. That is, a given ACO might represent “must-have” hospital and physician providers that can demand higher reimbursement rates based on their size or position. I would expect the FTC and DOJ to be involved in advising on the competition aspects of any rules considered by Health and Human Services as part of normal inter-agency dealings on such rule-makings, particularly to the extent that the ACO model were sought to be extended to the non-Medicare sector. In her recent speech, Assistant Attorney General Varney in fact stated that the DOJ “will work closely with HHS and providers to offer whatever guidance may be needed to ensure that providers pursue beneficial integrated ACOs without running afoul of the antitrust laws.” Varney, at 15.

Key Takeaways

- The DOJ is committed to working with providers to facilitate efficient clinical integration efforts, including the joint negotiations of reimbursement rates with health care payers that pass muster under the antitrust laws.

- Providers involved in clinical integration efforts, or the ACO program, should consider seeking informal and formal guidance from the DOJ (in the form of a business review letter) and the FTC (in the form of an advisory opinion) to provide certainty and reduce the risk of private antitrust challenge.

Related Resources


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Ms. Garza is a frequent commentator and testifier on antitrust issues. She practices in all areas of antitrust law, counseling clients on mergers and acquisitions, joint ventures,
distribution practices, and representing them in government investigations and before the courts.

Acknowledgment: I would like to acknowledge the assistance of Covington & Burling associate Anne Lee.
**APPENDIX**

**HART-SCOTT-RODINO MODEL SECOND REQUEST**

HART-SCOTT-RODINO
PREMERGER NOTIFICATION PROGRAM

**INTRODUCTORY GUIDE III**

MODEL REQUEST FOR ADDITIONAL INFORMATION
AND DOCUMENTARY MATERIAL
(SECOND REQUEST)

REVISED MAY 2007

FTC.GOV/BC.HSR
FTC PREMERGER NOTIFICATION OFFICE
(202) 326-3100

**AN OVERVIEW**


Also, the Antitrust Division of the Department of Justice Second Request Internal Appeal Procedure has been provided as reference.

The Guides are intended to provide a general overview and do not address specific proposed transactions. Because the premerger notification program applies to many different types of reporting persons and to many different types of transactions, the rules implementing the program are necessarily technical and complex. In order to assist those unfamiliar with the program, the PNO has published a variety of helpful information, including guides, procedures, announcements, speeches, rules and regulations, and interpretations of the rules. This information is available at the Federal
Introduction

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 7A of the Clayton Act or (the Act), established the Federal Premerger Notification Program (the Program). The Act requires that parties to certain mergers or acquisitions notify the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) (the enforcement agencies) before consummating the proposed acquisition. The parties must wait a specific period of time, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale)\(^3\), while the enforcement agencies complete their review. 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. The Program became effective September 5, 1978, after final promulgation of the Premerger Notification Rules (the Rules)\(^4\).

Second Request Process If either the FTC or the DOJ determines during the waiting period that further inquiry is necessary, the determining agency is authorized by Section 7A(e) of the Clayton Act to request additional information and documentary materials from any person required to file notification. A second request extends the waiting period for a specified period, usually 30 days (10 days in the case of a cash tender offer or a bankruptcy sale)\(^5\), after all parties have complied with the request (or, in the case of a tender offer or bankruptcy, after the acquiring person has complied)\(^6\). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action, if necessary, before the transaction is consummated. If the reviewing agency

\(^3\) 16 CFR Section 803.10(a).
\(^4\) 43 FR 33537, effective July 31, 1978.
\(^5\) 16 CFR Section 803.20(c).
\(^6\) 16 CFR Section 803.20(c).
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.

FTC Review Process

The FTC has implemented procedures to make merger investigations more
effective and more efficient. Procedures include a review process,
conferences, modification procedures and an appeals process.

Second Requests are prepared by the Bureau of Competition (“BC”) litigation staff. BC senior management reviews all second requests before issuance to ensure that specifications are as precisely and narrowly framed as possible and consistent with the needs of the investigation.

Soon after the issuance of a second request, the BC staff will convene a second request conference with the parties to the transaction. At the conference, the BC staff will discuss with the parties the competitive issues raised by the proposed transaction, if known, and consider which information and documents may be obtained relating to the competitive issues raised.

FTC Second Request Appeals Process

All Requests for Additional Information issued by the FTC invite recipients to discuss possible modifications with staff. If the recipient of a Request from the FTC believes that compliance with portions of the Request should not be required and the recipient has exhausted reasonable efforts to obtain modification of the Request from the lead staff attorney and the BC Assistant Director supervising the investigation, the recipient may petition the General Counsel of the FTC to hear an appeal on unresolved issues.

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The petition for an appeal shall be made by letter to the General Counsel, with a copy to the lead staff attorney. The petition shall be no longer than 2 pages in length and shall address petitioner’s efforts to obtain modification from BC staff.

1. Within 2 business days of receipt of such a petition, the General Counsel shall set a date for a conference with the petitioner and investigating staff.

2. Such conference shall take place within 7 business days of receipt of the petition, unless petitioner agrees to a longer time period before the conference or waives his right to a conference.

3. No later than 3 business days before the date of the conference, the petitioner and investigating staff may each submit to the General Counsel written briefs regarding the issues presented in the appeal petition. The briefs shall be no longer than 5 pages double spaced, shall be exchanged with opposing counsel on the same day they are submitted to the General Counsel, and shall include:

   - a concise explanation of the reasons why the petitioner believes compliance should not be required or of the reasons why investigating staff believe compliance is necessary; and
   - modifications that the petitioner proposes.

4. The General Counsel shall render a decision on the appeal within 3 business days following the conference.

A petition for an appeal made pursuant to this procedure must be made before the petitioner asserts substantial compliance with the Request for Additional Information, and the petitioner must agree to defer asserting substantial compliance until after this appeal process is completed or the petitioner withdraws its appeal.
DOJ Second Request Appeals Process\(^9\)

A. Appeals Regarding Modifications

If the recipient of a second request from the Department of Justice believes that the request is unreasonably cumulative, unduly burdensome, or duplicative and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding a modification, the recipient may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue (the “Reviewer”). The appeal shall be in writing, no longer than ten (10) pages double spaced, and shall include:

1. A concise explanation of the reasons why the recipient believes that compliance would be unduly burdensome, including a summary of compliance discussions at the staff and section chief level; and
2. the modifications that the recipient proposes.

All appeals should be sent to the Office of Operations (Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within seven (7) days after the recipient has provided all necessary information.

An appeal must be made prior to assertion of compliance by the recipient, and the recipient must agree to defer asserting compliance until after the appeal process has been completed or the recipient has withdrawn its appeal.

\(^9\) http://www.usdoj.gov/atr/public/8430.htm
B. Appeals Regarding Substantial Compliance

If the recipient of a second request has certified that it is in substantial compliance with the request and, after exhausting reasonable efforts, has been unable to reach agreement with the section chief regarding compliance, the recipient, after receiving the deficiencies believed to exist from the section chief, may appeal the matter to a Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue (the “Reviewer”). The appeal shall be in writing, no longer than ten (10) pages double spaced, and shall include a concise explanation of the reasons why the recipient believes that it is in compliance, including a summary of compliance discussions at the staff and section chief level.

All appeals should be sent to the Office of Operations (Attn: Second Request Appeals), which will immediately forward the request to the appropriate Deputy Assistant Attorney General. Upon receipt of a written appeal, the Reviewer may request additional information from or a telephone conference with the recipient within two (2) business days. The Reviewer will render a decision on the appeal within three (3) business days after the recipient has provided all necessary information.

If the Reviewer determines that the recipient is in substantial compliance, the date of certification of substantial compliance will be the date on which the waiting period is determined to have begun. If the Reviewer determines that the recipient is not in substantial compliance, the Reviewer will recommend that a formal deficiency letter be issued.
SAMPLE - MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY INFORMATION (SECOND REQUEST) with Comments

May 2007

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The model request for additional information and documentary material is based on the fictitious transaction between Weebyewe Ltd. and Beeside Corporation. Following the model request is a sample certification page and a sample document index.

This model request addresses issues typically encountered in a merger investigation. This model request contains only suggestions for language and the particular circumstances of the merger being investigated will determine the information that will be requested. The purpose of the model request for additional information is to provide the basic framework of a request for additional information. Comments follow each specification explaining how the information that is sought relates to the issues involved in a merger investigation.

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REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO WEEBYEWE CORPORATION

Unless modified by agreement with the staff of the Federal Trade Commission, each specification of this Request requires a complete search of “the company” as defined in Paragraph “A” of the Definitions and Instructions which appear after the following Specifications. If the company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission’s need for documents and information, you are encouraged to discuss such questions and possible modifications with the Commission representatives identified on the last page of this Request. All modifications to this Request must be agreed to in writing by those representatives. You may find it
useful to provide the response to Specification 1 of this Request promptly and discuss limiting the required search with the Commission’s representatives before you begin your search.

SPECIFICATIONS

1. Submit (a) one copy of each organization chart and personnel directory in effect since January 1, [Yr-2] 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 [service] and (b) a list of all agents and representatives of the company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other persons retained by the company in any capacity relating to the proposed acquisition of Beeside by Weebyewe or any relevant product or relevant area covered by this Request (excluding those retained solely in connection with [environmental, tax,] human resources, pensions, benefits, ERISA, or OSHA issues).

2. List each relevant product manufactured or sold [service provided] by the company, and (a) provide a detailed description of the product [including its end uses] [service]; and (b) state [the brand name] and the division, subsidiary, or affiliate of the company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each relevant product listed in response to Specification 2 above, state:

(a) the company’s sales to all customers in each relevant area, stated separately in units and dollars;

[(b) that portion of the company’s sales to customers in each relevant area, stated separately, in units and dollars, that were of products manufactured in the U.S.);

[(c) that portion of the company’s sales to customers in each relevant area, stated separately in units and dollars, that were of products manufactured outside the U.S.];]
(d) that portion of the company’s sales to customers in each relevant area, stated separately, in units and dollars, that were of products purchased from sources outside the company and resold by the company rather than of products manufactured by the company;

(e) the names and addresses of the [company’s 20 largest customers] 20 persons who purchased the greatest unit and dollar amounts of the relevant product from the company in each relevant area; and

(f) the name, address, estimated sales, and estimated market share of the company and each of the company’s competitors in each relevant area in the [relevant service] manufacture or sale of the product.

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any relevant product [provides any relevant service] for the company, and for each such facility state:

(a) whether the facility was leased, acquired, or built by or for the company, and, if not built by the company, the name of the person who built the facility for the company or from whom the facility was leased or acquired;

(b) the date of the facility’s opening or acquisition, the length of time and cost in dollars required to open the facility from initial plan to full production, and its current estimated replacement cost and time necessary to replace it; and

(c) 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 capacity, the number of shifts normally used at the facility, and the feasibility of increasing capacity [by X% or more], including the costs and time required.
If the company believes that this Specification may be narrowed in any way that is consistent with the Commission’s need for documents and information it is encouraged to discuss possible modifications with Commission representatives who will consider modifying this Specification on a case-by-case basis.

5. For each relevant product [service], submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising plans and strategies.

6. Submit all documents relating to the company’s or any other person’s plans relating to any relevant product [service], including, but not limited to, business plans, short term and long range strategies and objectives; budgets and financial projections; expansion or retrenchment plans; research and development efforts; and presentations to management committees, executive committees, and boards of directors. For regularly prepared budgets and financial projections, the company need only submit one copy of final year-end documents and cumulative year to date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any relevant product [each relevant service], including, but not limited to, market studies, forecasts and surveys, and all other documents relating to (a) the market share or competitive position of the company or any of its competitors; (b) the relative strength or weakness of companies producing or selling each relevant product [providing each relevant service]; (c) supply and demand conditions; (d) attempts to win customers from other companies and losses of customers to other companies, [including, but not limited to, all sales personnel call reports]; (e) allegations by any person that any company that manufactures or sells any relevant product [provides any relevant service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints, threatened, pending, or completed lawsuits, and federal and state investigations; and (f) any actual or potential effect on the supply, demand, cost or price of any relevant product [service] as a result of competition from any other possible substitute product [service].
8. Submit all documents relating to the company’s or any other person’s price lists, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, and pricing decisions relating to any relevant product [service].

9. State the name and address of each person that has entered or attempted to enter into, or exited from, the manufacture or sale of each relevant product [any relevant service] in any relevant area from [Yr-10] to the present. For each such person, identify the relevant product(s) it manufactures or sells or manufactured or sold [service(s) it provides or provided], the relevant area in which it sells or sold the product(s) [provided the services], and the date of its entry into or exit from the market. For each entrant, state whether the entrant built a new facility, converted assets previously used for another purpose (identifying that purpose), or began using facilities that were already being used for the same purpose.

10. For each relevant product [service], identify or describe (including the bases for your response) and submit all documents relating to:

   (a) requirements for entry into the production or sale of the product [providing the relevant service] in each relevant area including, but not limited to, research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;

   (b) the total costs required for entry into the production or sale of the product [providing the relevant service]; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the product [providing the relevant service]; the methods and amount of time necessary to recover such costs; and the total sunk costs entailed in satisfying the requirements for entry;

   (c) possible new entrants into the manufacture or sale of the product [providers of the service] in each relevant area; and
(d) the minimum viable scale, the minimum and optimum plant size, production line size, capacity utilization rate, production volume, requirements for multi-plant, multi-product, or vertically integrated operations, or other factors required to attain any available cost savings or other efficiencies necessary to compete profitably in the manufacture or sale of the product [providing the relevant service] {deleting references as appropriate for service industries}.

11. Submit all documents (except engineering and architectural plans and blueprints) relating to any plans of the company or any other person for the construction of new facilities, the closing of any existing facilities, or the expansion, conversion, or modification (if such modification has a planned or actual cost of more than $xxxxxxx) of current facilities for [providing any relevant service] the manufacture or sale of any relevant product.

12. Submit all documents relating to actual and potential imports into, or exports from, each relevant area of any relevant product, including, but not limited to, documents showing: the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any person; and any costs or barriers to imports or exports. Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each relevant area of any relevant product.

13. Identify, and state whether the company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the production or sale of any relevant product [relating to any relevant service]. Submit one copy of all documents that discuss or describe production, sale, prices, competition or entry conditions relating to the relevant product submitted by the company or any other person to each such association, service and organization or its agents. Submit one copy of all documents that discuss or describe production, sale, prices, competition or entry conditions relating to the relevant product received by the company or any other person from each such association, service and organization or its agents.
14. Submit all documents relating to any plans of, interest in, or efforts undertaken by the company or any other person for any acquisition, divestiture, joint venture, alliance or merger of any kind involving the manufacture or sale of any relevant product [any relevant service] other than the proposed acquisition of Beeside by Weebyewe.

15. Submit all documents (except documents solely relating to [environmental, tax,] human resources, OSHA, or ERISA issues) relating to the proposed acquisition of Beeside by Weebyewe and provide:

(a) a timetable for the proposed acquisition, a description of all actions that must be taken prior to consummation of the proposed acquisition, and any harm that will result if the acquisition is not consummated;

(b) a detailed description of (including the rationale for, and identification of all documents directly or indirectly used to prepare the company’s response to this sub-part) all plans for changes in Weebyewe’s and Beeside’s operations, structure, policies, strategies, corporate goals, financing, business, officers, employees or any other area of corporate activity as a result of the proposed acquisition;

(c) a detailed description of (including the identification of all documents directly or indirectly used to prepare the company’s response to this sub-part and quantification, if possible, of all cost savings, economies or other efficiencies) the reasons for the proposed acquisition and the benefits, costs, and risks anticipated as a result of the proposed acquisition, including, but not limited to, all cost savings, economies, or other efficiencies of whatever kind; and

(d) a detailed description of all statements or actions by any person (identifying the person by name, title, and business address) in support of, in opposition to, or otherwise expressing opinions about the proposed acquisition or its effects.
16. Submit documents sufficient to show and, to the extent not reflected in such documents, describe in detail the company’s policies and procedures relating to the retention and destruction of documents.

17. List (a) each federal judicial district (e.g., District of Columbia, Southern District of New York) within the United States in which the company has an agent to receive service of process as well as each such agent’s name, current business and home addresses, and telephone numbers; (b) each federal judicial district within the United States in which the company is incorporated or licensed to do business or currently is doing business; and (c) each federal judicial district within the United States in which the company has an office or a facility, and, for each such office or facility, list the address and the individual in charge (with his or her title).

18. Identify the person(s) 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 person(s) to whom the instructions were given. For each specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the persons (identified by name and corporate title or job description) whose files were searched by each.

**DEFINITIONS AND INSTRUCTIONS**

For the purposes of this Request, the following definitions and instructions apply:

A. The term “the company” or “Weebyewe” means 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 “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.
B. 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 “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.

C. The term “documents” means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the company. The term “documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person’s files; and copies of documents the originals of which are not in the possession, custody or control of the company.

(1) Unless otherwise specified, the term “documents” excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) documents solely relating to [environmental, tax, human resources, OSHA, or ERISA issues].

(2) The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission’s need for documents and information, you are encouraged to discuss a possible modification to this instruction with the
Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this instruction to:

(a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the company;

(b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Commission representatives; or

(c) include other proposals consistent with Commission policy and the facts of the case.

(3) If the company intends to utilize any De-duplication or Near-de-duplication software or services when collecting or reviewing information that is stored in the company’s computer systems or electronic storage media in response to this Request, or if the company’s computer systems contain or utilize such software, the company must contact Commission representatives to determine, with the assistance of the appropriate government technical officials, whether and in what manner the company may use such software or services when producing materials in response to this Request.

D. The term “person” includes the company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

E. The term “relating to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
F. The terms “and” and “or” have both conjunctive and disjunctive meanings.

G. The term “plans” means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

H. 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 in the same manufactured form as purchased.

I. The term “relevant product [service]” as used herein means, and information shall be provided separately for, each [name or list of product(s) or service(s) at issue].

J. The term “relevant area” means, and information shall be provided separately for, (a) the United States and (b) worldwide [or regional or local market(s)].

K. The term “minimum viable scale” means the smallest amount of production [smallest service volume] at which average costs equal the price currently charged for the relevant product [service]. It should be noted that minimum viable scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.

L. The term “sunk costs” means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the relevant product [provide the relevant service] that cannot be recovered through the redeployment of these assets for other uses.

M. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for: (1) documents for each of the years from [WPE - 2 years] to the present; and (2) information for each of the years from January 1, [Yr-3] to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If
calendar year information is not available, supply the company’s fiscal year data indicating the twelve month period covered, and provide the company’s best estimate of calendar year data.

N. This Request shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this Request produced or obtained by the company up to forty-five calendar days prior to the date of the company’s full compliance with this Request. [If warranted add the following language: except for documents responsive to Specification 7 or Specification 15, for which the date is (insert #) calendar days prior to the date of the company’s full compliance with this Request.]

O. The company shall discuss the form and method of production of responsive documents with the Commission representative identified on the last page of this request. The company shall be permitted to use any form and method of production of responsive documents that the Commission representative approves in writing. The Commission can support the following production forms and methods:

1. In lieu of original paper documents, the company may submit either paper or electronic copies of original documents. If the documents are provided electronically as TIFF images, they should be accompanied by OCR;

2. In lieu of original documents stored electronically, the company may submit documents in the following forms:

   a. Electronically stored documents, except Microsoft Excel files and Access databases, may be produced as single-page TIFF images with a corresponding file containing the extracted text from the document, accompanied by an Opticon load file. Metadata and custodian information shall be provided in a delimited ASCII format. Microsoft Excel and Access files shall be provided natively.

   b. Electronically stored documents, excluding e-mail other than Microsoft Outlook, may be produced natively.
Please discuss logistics of native production with the Commission representative identified on the last page of this request.

(3) Electronic productions may be submitted in the following methods:

(a) Responsive documents may be submitted through an online repository maintained by an independent vendor;

(b) Responsive documents may be submitted directly to the Bureau on any combination of the listed media types; however, the Bureau prefers IDE hard drives for productions over 10GB:

- CD-R CD-ROM formatted to ISO 9660 specifications;
- DVD-ROM for Windows-compatible personal computers;
- IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data.
- USB 2.0 Flash Drives

(4) Documents submitted in hard copy shall be submitted in sturdy cartons not larger than 1.5 cubic feet. Number each such box and mark each such box with corporate identification and the name(s) of the person(s) whose files are contained in the box.

P. All documents responsive to this request, regardless of format or form and regardless of whether submitted in paper or electronic form:

(1) shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the company’s files and shall not be shuffled or otherwise rearranged. For example:

(a) if in their original condition papers were stapled, clipped or otherwise fastened together or maintained in file
folders, binders, covers or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover or container from which such documents came; and

(b) if in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;

(2) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

(3) shall be produced in color where necessary to interpret the document;

(4) shall be marked on each page with corporate identification and consecutive document control numbers;

(5) shall be accompanied by an affidavit of an officer of the company stating that the copies are true, correct and complete copies of the original documents;

(6) shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person’s documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.
Q. If any documents created prior to the company’s HSR filing are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log [hereinafter Complete Log] that includes each document’s authors, addressees, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the person’s full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all nonprivileged portions of any responsive document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the company that were not directly or indirectly furnished to the company or any third-party, such as internal law firm memoranda, may be omitted from the log.

In place of a Complete Log of all documents withheld from production based on a claim of privilege, the company may elect to submit a Partial Privilege Log (“Partial Log”) for each person searched by the company whose documents are withheld based on such claim and a Complete Log for a subset of those persons, as specified below:

(1) The Partial Log will contain the following information: (a) the name of each person from whom responsive documents are withheld on the basis of a claim of privilege; and (b) the total number of documents that are withheld under a claim of privilege (stating the number of attachments separately) contained in each such person’s files. Submit all nonprivileged portions of any
responsive document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the document have been made.

(2) Within five (5) business days after receipt of the Partial Log, Commission staff may identify in writing five individuals or ten percent of the total number of persons searched, whichever is greater, for which the company will be required to produce a Complete Log in order to certify compliance with this Request.

(3) For the company to exercise the option to produce a Partial Log, the company must provide a signed statement in which the company acknowledges and agrees that, in consideration for being permitted to submit a Partial Log:

(a) the Commission retains the right to serve a discovery request or requests regarding documents withheld on grounds of privilege in the event the Commission seeks relief through judicial or administrative proceedings;

(b) the company will produce a Complete Log of all documents withheld from production based on a claim of privilege no later than fifteen (15) calendar days after such a discovery request is served, which will occur promptly after the filing of the Commission’s complaint; and

(c) the company waives all objections to such discovery, including the production of a Complete Log of all documents withheld from production based on a claim of privilege, except for any objections based strictly on privilege.

(4) The company retains all privileged documents that are responsive to this Request until the expiration of the Hart Scott
Rodino waiting period or the completion of any litigation challenging the acquisition of Beeside by Weebyewe.

(5) The Commission will retain the right to require the company to produce a Complete Log for all persons searched in appropriate circumstances.

R. If the company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation “est.” If there is no reasonable way for the company to make an estimate, provide an explanation.

S. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the company’s document retention policy as disclosed or described in response to Specification 16 of this Request, but the company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents.

T. In order for the company’s response to this Request to be complete, the attached certification form must be executed by the official supervising compliance with this Request, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to (appropriate staff) at (telephone number). The response to the Request shall be addressed to the attention of (appropriate staff) and delivered between 8:30 a.m. and 5:00 p.m. on any business day to Federal
Trade Commission. If you wish to submit your response by United States mail, please call one of the staff listed above 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 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 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 Commission uses such copies in any court or administrative proceeding, the company will not object based on the Commission not offering the original document.

____________________________________
(Signature)

____________________________________
(Type or Print Name and Title)

Subscribed and sworn to before me at the City of ____________________, State of ________________, this _____ day of ________________, 19_____.

____________________________________
(Notary Public)

____________________________________
(Date Commission Expires)
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