

DATE

BY E-MAIL

[COUNSEL for acquiring company A]

[COUNSEL for acquired company B]

Re: [Transaction]

Dear [COUNSEL]:

This letter (“the Agreement”) sets forth the understanding between the staff of the Bureau of Competition of the Federal Trade Commission (“FTC Staff”) and [Company A] and [Company B] (collectively the “Parties”) in connection with the proposed acquisition by [A] of [B] (the “Proposed Transaction”), which is the subject of Requests for Additional Information and Documentary Material issued by the Federal Trade Commission on [DATE] (“Second Requests”) [or commensurate request for non-reportable mergers].

This Agreement does not alter the Parties’ obligations to certify substantial compliance with the Second Requests, as modified in writing by FTC Staff.

This Agreement does not bind the Federal Trade Commission (“FTC”), any individual Commissioner, or any other federal or state Government entity, but rather is an agreement with FTC Staff. This Agreement does not alter the FTC’s legal ability to challenge the Proposed Transaction, including, but not limited to, after expiration of the timing set out below.

It is agreed as follows:

**I. Timing and Communication**

The Parties agree not to close the Proposed Transaction before 11:59 PM Eastern Time on the [60th–90th] calendar day following the date on which both Parties substantially comply with the Second Requests, as modified in writing by FTC Staff, unless the FTC earlier (i) terminates the Hart-Scott-Rodino Act waiting period without issuance of a complaint or following issuance of a complaint and consent order, and/or (ii) provides written notice that the FTC has closed its investigation.

**Commented [A1]: Note for Public Version:** The proposed date range shall not be interpreted as either a cap or a limit on the number of days the Parties must wait until closing. Some investigations may require in excess of 90 days for the review contemplated by this agreement.

February 2019

A. Notices

1. The Parties agree to provide FTC Staff with thirty (30) calendar days advanced notice before certifying that they have substantially complied with the Second Requests. Such notice shall be provided no earlier than ten (10) calendar days following the execution of this Agreement.

2. The parties agree to provide thirty (30) calendar days advanced notice before consummating the Proposed Transaction. The date identified for consummation of the Proposed Transaction shall be deemed the Closing Date for purposes of this Agreement. The Parties may not provide this advanced notice more than forty (40) calendar days prior to the Closing Date and must have a good faith basis for believing that they can consummate the proposed transaction on that Closing Date.

All notices required in Sections I.A. are to be made in writing in the form of the letters provided as Attachments A and B to this letter, as appropriate.

B. Computing Time and Extension of Deadlines

In computing any period specified in this Agreement, the day of the act, event, or default that triggers the period shall be excluded. The first day of the period shall be the first business day after the act, event, or default that triggers the period. The last day of the period of time shall be included unless it is a Saturday, Sunday, or federal holiday, in which case the period runs until 11:59 PM Eastern Time of the next business day on which the federal government is open. Any material received by the Bureau of Competition or the FTC after 5:00 PM Eastern Time shall be deemed received on the next business day.

In the event that the Federal Trade Commission is closed pursuant to a lapse in appropriations from Congress, all dates specified herein shall be extended day-for-day, for each calendar day the Federal Trade Commission closure is in place. This day-for-day extension shall include but is not limited to any date(s) between notice and certification of substantial compliance and any date(s) between certification of substantial compliance and close. Notices and certifications of substantial compliance may not be given if the Commission is closed pursuant to the first sentence of this paragraph. Any portion of a calendar day affected by a federal government closure shall be considered an entire day for the purposes of extending, day-for-day, the date(s) specified herein. For example, if the federal government is reopened at noon on a given calendar day, the date(s) specified herein shall be extended as if the federal government closure lasted that entire day.

Except as specifically provided herein, the failure of a Party to comply with any deadline in this Agreement shall cause any subsequent deadlines specified herein to be extended, day-for-day, for each calendar day the deadline is not met.

C. Communication / Exchange of Information

During the course of the investigation, FTC Staff and staff from the FTC's Bureau of Economics ("BE") will make a good faith effort to meet with the Parties, either in person or by

phone, as reasonably requested by either FTC Staff or either Party, to promote a continuing dialogue regarding the facts and the relevant legal and economic issues and to discuss progress in meeting the agreed-upon schedule discussed in this Agreement. FTC Staff and the Parties intend that the ongoing dialogue include a good faith exchange of information regarding any substantive issues, theories, or questions that FTC Staff may have regarding the Proposed Acquisition.

The Parties are encouraged to provide to FTC Staff the results of their own economic and econometric analyses, and any underlying data. FTC Staff will make good faith and reasonable efforts to provide feedback on the Parties' submissions. Also, as soon as practicable upon discovery of any deficiencies relating to a Party's certification, FTC Staff will notify the Party in writing of the deficiencies.

#### D. Investigational Hearings and Document Productions

To the extent investigational hearings ("IHs") are conducted in this matter, FTC Staff will use reasonable best efforts to identify IH witnesses no later than the fifteenth (15th) business day after both Parties certify substantial compliance with the Second Requests ("Compliance Date"). The Parties agree to make such witnesses available such that their IHs may be completed within ten (10) business days after FTC Staff identifies each witness, or ten (10) business days after receipt of documents belonging to each witness, or a later date if agreed to by staff. The Parties also agree to produce an up-to-date resume for each IH witness at least five (5) business days prior to the date of that witness's IH.

For each IH witness identified prior to a Party certifying substantial compliance, the Party will produce a substantially complete document production, including relevant non-custodial Specifications identified by FTC Staff, to the FTC at least fifteen (15) business days prior to the agreed-upon date of the witness's IH (the "IH Document Production Date"). Contemporaneous with the substantial completion of the document production for each custodian or at the earliest practicable date, the Parties shall identify in writing the cut-off date for the collection of documents for each custodian. If additional responsive, non-duplicative, and non-privileged documents or information from a witness's files or in response to relevant non-custodial productions are produced after this deadline, FTC Staff reserves the right to hold open, re-open, continue, or reschedule that witness's IH. If FTC Staff decides to hold open or re-open an IH for this reason, FTC Staff will use the additional hearing time to question the witness on only the documents and information produced after the IH Document Production Date and any additional topics related to those documents and that information.

## II. Second Request Production and Post-Compliance Period

#### A. Rolling Production and Priority Custodians/Specifications

The Parties shall use good faith efforts to produce responsive materials on a rolling basis (i.e., the responsive documents from each individual's files will be produced as soon as practicable after such documents are reviewed, processed, and copied, and the Parties' documents will be produced in multiple, sequential batches). Each production shall be accompanied by a data overlay updating metadata for the entire production (e.g., updating the

alternative custodian field for all documents in the current production and all documents previously produced).

Within five (5) business days of execution of this Agreement, the Bureau shall identify no more than [X] Priority Custodians from each Party. The Priority Custodians shall be listed and attached as an appendix to this Agreement following identification by FTC Staff. The Parties agree to produce substantially complete document productions from the Priority Custodians at least thirty (30) business days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Custodian materials.

**Commented [A2]:** Note for Public Version: The proposed priority custodian range shall vary based on the unique facts and timing of the second request investigation.

The Parties will substantially comply with Specifications [X-Y] in the Second Requests (“Priority Data”) at least thirty (30) business days prior to certifying substantial compliance with the Second Requests. The Parties shall submit written confirmation of compliance with this obligation upon completion of its submissions of Priority Data.

**B. Second Request Modifications**

Staff agrees to work in good faith with the Parties to consider reasonable requests for modification to the Second Request.

**III. Preliminary Injunction Proceeding**

The Parties shall not initiate a declaratory judgment action against the FTC relating to the Proposed Transaction. In the event that the FTC files an enforcement action pursuant to Section 13(b) of the Federal Trade Commission Act, on or before the Closing Date, seeking to enjoin the Proposed Transaction, the Parties agree to file a joint stipulation with the court as follows:

A. The Parties and the FTC hereby stipulate to a Temporary Restraining Order (an executed version is attached hereto as Attachment C) preventing the Parties from consummating the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after a court rules on a motion for a preliminary injunction or the date set by the District Court, whichever is later; and

B. The Parties shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, the Proposed Transaction until the timing identified in the paragraph immediately above.

This agreement shall not be construed to limit in any way the FTC’s right to seek additional discovery in the context of any federal court hearing.

**IV. Construction**

Nothing in this Agreement affects FTC Staff’s ability to reject a submission that it determines is not in substantial compliance with the Second Requests, or in the case of an HSR filing, is deficient. This Agreement may only be amended or modified through a written instrument signed by the parties.

February 2019

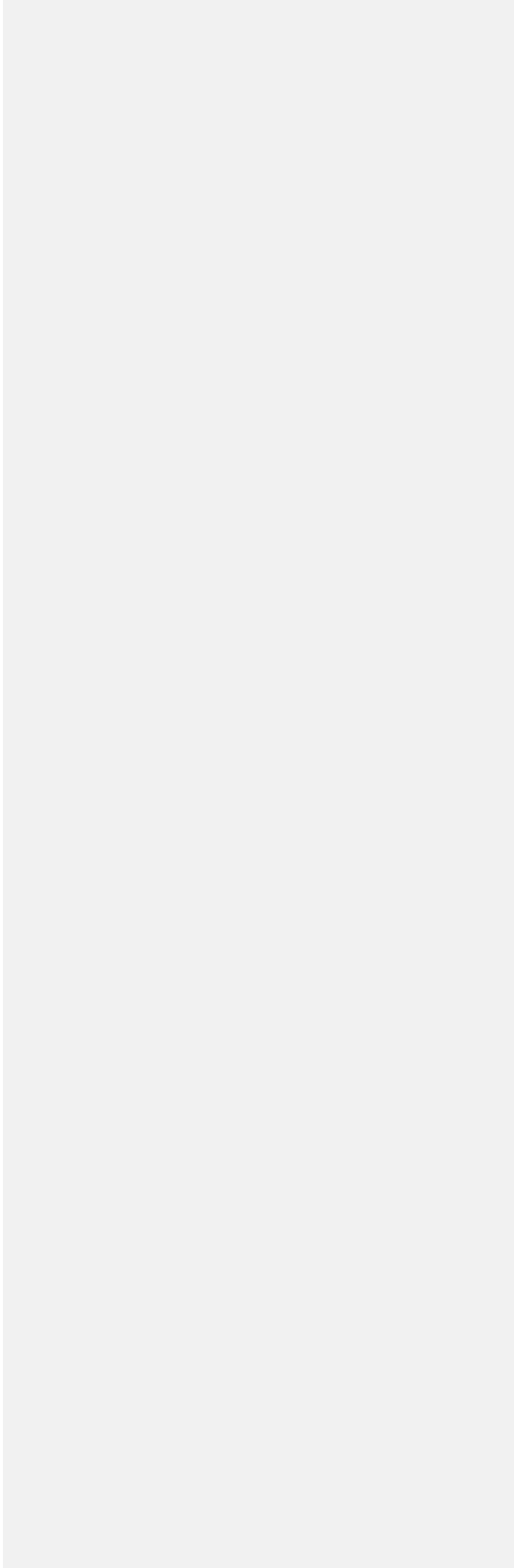
If you agree to the terms set forth in this Agreement, please indicate your agreement by countersigning below and returning to us.

\_\_\_\_\_  
Counsel for [Company A]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Counsel for [Company B]

\_\_\_\_\_  
Date



**Attachment A: Pre-Certification Notice Template**

[FTC Staff and Address]

**Re: Notice of Intent to Certify Substantial Compliance; FTC File No. [XX]**

Dear [FTC Staff],

We write on behalf of [Company A] and [Company B] (collectively, “the Parties”) in connection with the Requests for Additional Information and Documentary Material (“Second Requests”) issued by the FTC to [Company A] and [Company B] on [Date].

We hereby provide notice to FTC Staff that the Parties intend to certify substantial compliance with the Second Request and CID on or after [today’s date + 30 calendar days].

\_\_\_\_\_  
Counsel for [Company A]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Counsel for [Company B]

\_\_\_\_\_  
Date

**Attachment B: Pre-Consummation Notice Template**

[FTC Staff and Address]

**Re: Notice of Intent to Consummate the Proposed Transaction; FTC File No. [XX]**

Dear [FTC Staff],

We write on behalf of [Company A] and [Company B] (collectively, “the Parties”) in connection with the proposed merger of [Company A] and [Company B] (the “Proposed Transaction”).

We hereby provide notice to FTC Staff that the Parties intend to consummate the Proposed Transaction on or after [today’s date + 30 calendar days] as limited by Section I.A.2 of this Agreement, which shall be deemed the Closing Date for purposes of the timing agreement executed by the Parties and Commission staff on [Date].

We also hereby confirm that on or after [today’s date + 30 calendar days], the Parties’ good faith belief is that they will be able to close the Proposed Transaction because all conditions precedent to the closing of the Proposed Transaction (including any described in the Parties’ Letter of Intent dated [Date]) will have been satisfied or waived if the FTC does not sue to block the Proposed Transaction.

\_\_\_\_\_  
Counsel for [Company A]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Counsel for [Company B]

\_\_\_\_\_  
Date

**Attachment C: Temporary Restraining Order**

In the event that the Federal Trade Commission (“FTC”) files an enforcement action seeking to enjoin the proposed merger of [Company A] and [Company B] (the “Proposed Transaction”) on or before the date that [Company A] and [Company B] have identified for consummating the Proposed Transaction, [Company A], [Company B], and the FTC hereby stipulate to a Temporary Restraining Order in federal district court stating that:

- a. [Company A] and [Company B] shall not consummate the Proposed Transaction until after 11:59 PM Eastern Time on the fifth (5th) business day after the court rules on the FTC’s motion for a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act or until after the date set by the District Court, whichever is later; and
- b. In connection with paragraph immediately above, [Company A] and [Company B] shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such transaction; and
- c. In computing any period of time specified in this attachment, the day of the act, event, or default that triggers the period shall be excluded. The term “business day” as used in this attachment refers to any day that is not a Saturday, Sunday, or federal holiday.

\_\_\_\_\_  
Counsel for [FTC Staff]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Counsel for [Company A]

\_\_\_\_\_  
Date

\_\_\_\_\_  
Counsel for [Company B]

\_\_\_\_\_  
Date