

January 24, 2011

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MEMORANDUM

TO: Interested Persons

FROM: Emily Myers, Antitrust Counsel

RE: States Adhering to Revised Voluntary Premerger Disclosure Compact

As of today, the following states and jurisdictions have adhered to the revised NAAG Voluntary Premerger Disclosure Compact (as approved by the Attorneys General at the NAAG Spring Meeting in March 1994), a copy of which is attached:

Alabama	Kentucky	Ohio
Alaska	Maine	Oklahoma
American Samoa	Maryland	Oregon
Arizona	Massachusetts	Pennsylvania
Arkansas	Michigan	Puerto Rico
Colorado	Minnesota	Rhode Island
Connecticut	Mississippi	South Carolina
Delaware	Missouri	South Dakota
District of Columbia	Montana	Tennessee
Florida	Nevada	Texas
Guam	New Hampshire	Utah
Hawaii	New Jersey	Vermont
Idaho	New Mexico	Virgin Islands
Illinois	New York	Virginia
Indiana	North Carolina	Washington
Iowa	North Dakota	West Virginia
Kansas	Northern Mariana Islands	Wisconsin

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

**Spring Meeting
March 20-22, 1994
Washington, D.C.**

RESOLUTION

**REVISIONS TO THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
PRE-MERGER DISCLOSURE COMPACT**

WHEREAS, the Attorneys General, as chief law officers of their states, are the primary enforcers of the states' antitrust laws; and

WHEREAS, the Attorneys General also represent their states and the citizens of their states in federal antitrust litigation; and

WHEREAS, the Attorneys General have jurisdiction to enforce the antitrust law provisions relevant to mergers and acquisitions, and have frequently done so; and

WHEREAS, the National Association of Attorneys General adopted a Voluntary Pre-Merger Disclosure compact on December 12, 1987; and

WHEREAS, merging parties utilizing the Compact have raised questions as to the right of the States to obtain certain additional materials pursuant to the Compact; and

WHEREAS, in *California v. American Stores*, the Supreme Court held that States can obtain divestiture in merger cases; and

WHEREAS, the *American Stores* decision gives the states greater bargaining power with prospective merging parties; and

WHEREAS, the Chair of the Antitrust Committee invited all states to participate in a review of the Pre-Merger Compact for the purpose of revising the Compact to increase the States' bargaining power during the pre-merger review period and to clarify the application of the Compact in unusual situations such as hostile takeovers or where only one of the merging parties consents to access; and

WHEREAS, proposed revisions to the Compact were released for public comment on July 27, 1993 at the direction of the Antitrust Committee; and

WHEREAS, all comments on the Compact revisions were carefully considered; and

WHEREAS, the Attorneys General have considered the proposed revisions to the NAAG Voluntary Pre-Merger Disclosure Compact and have determined that these revisions would improve the Guidelines.

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

- 1) Approves the proposed revisions to the NAAG Voluntary Pre-Merger Disclosure Compact and urges each Attorney General to adhere to the revised Compact.
- 2) Authorizes the Executive Director and General Counsel to transmit these views to Congress, the Administration and to other interested parties.

BACKGROUND STATEMENT

On July 8, 1993, the NAAG Antitrust Committee gave preliminary approval to amendments to the NAAG Voluntary Pre-Merger Compact, originally adopted in 1987. The proposed amendments were circulated to the business community and to the antitrust enforcement agencies for review and comment. All comments received were carefully considered.

The Compact originally came into existence in large part because of several decisions, *Lieberman v. Federal Trade Commission* and *Mattox v. Federal Trade Commission*, which held that state Attorneys General could not obtain access to pre-merger filings directly from the FTC or the Department of Justice. Without access to the pre-merger materials, it is very difficult and expensive to analyze the transaction adequately.

The basic theory of the Compact was to provide private parties with an incentive to voluntarily provide the pre-merger materials to the States. In return for access, the signatory states' waive the right to resort to compulsory process against the merging parties as a means of obtaining additional information regarding the transaction during the pre-merger review period. The merging parties could satisfy their obligations under the Compact by providing one copy of the materials to the "liaison state" which would then provide copies of the materials to all other interested states.

Although the Compact was little utilized initially, two developments have encouraged parties to invoke the Compact more often. First, the United States Supreme Court held in *California v. American Stores* that states could obtain divestiture in merger cases. Second, the Department of Justice and FTC adopted a Protocol under which the states could obtain access to pre-merger materials from the federal authorities in the event that the merging parties consented to such access. Since those developments, a number of merging parties have invoked the Protocol and/or the Compact.

On occasion, the states have found themselves in a difficult position from which to negotiate for the provision of additional materials not required or requested by the federal authorities. Some parties have gone so far as to assert that under the Compact the states are precluded from even asking for the voluntary provision of additional materials. The same parties have suggested that actions brought after the successful completion of the federal pre-merger review should be barred by laches for the minimal time necessary to obtain the materials via compulsory process after the expiration of the federal review period.

The present amendments address certain problems that have arisen during the utilization of the Compact. The amendments are designed to increase the states' bargaining power during the pre-merger review period and to clarify the application of the Compact in unusual situations such as hostile takeovers or where only one of the merging parties consents to access.

The principal modification in the Compact occurs in the Fourth Proviso. Instead of a complete waiver of the right to utilize compulsory process during the pre-merger review period, the States would now retain the right to use compulsory process whenever the merging parties have declined to voluntarily provide additional requested materials to the States within

a reasonable time period. It is anticipated that this readjustment in the balance will provide the states with greater bargaining power during the review period without providing an undue disincentive to merging parties to utilize the procedure in the first place.

The other proposed changes in the Compact are as follows:

□ **Proviso 2** -- "The parties" was changed to "any party" to make clear that the compact could be invoked by less than all of the parties to the merger transaction. This would clearly cover the hostile takeover situation.

□ **Proviso 3** -- A reference to the Fourth Proviso was added to make it clear that the merging parties' obligations extend to all materials provided to the federal agencies in connection with the transaction. The original version of the Compact did not make it clear that merging parties were obligating themselves to provide the states with everything that they provided to the federal agencies. This was especially true for materials turned over voluntarily that were not part of a formal filing.

The Chair of the Multistate Antitrust Task Force was added as an alternative "liaison state" to give merging parties a default party to contact wherever the identity of the "liaison state" might be difficult to ascertain.

□ **Proviso 4** -- In addition to the change described above, this Proviso has been altered to make it expressly clear that the merging parties must provide any additional materials beyond the initial filings to the states on a contemporaneous basis.

□ **Proviso 5** -- This is a new Proviso expressly related to hostile takeovers.

□ **Proviso 6** -- This is a new Proviso that expressly asserts that the invocation of the terms of the Compact by some of the merging parties does not in any way affect the states' right to subpoena any third parties to the transaction or to serve subpoenas on parties to the merger transaction who have not elected to utilize the Compact.

□ **Proviso 7** -- This is a new Proviso that expressly states that the election to utilize the Compact shall constitute a waiver of the confidentiality provisions of the federal law with respect to pre-merger filings. An appropriate amendment to the Protocol by the federal agencies would permit the federal agencies to dispense with the necessity of a separate waiver being addressed to them.

□ **Proviso 10** -- The addition of the phrase "to the extent permitted by law" with respect to the states' obligation to return the materials provided under the Compact was designed to obviate potential future conflicts should they arise.

□ **Proviso 12** -- The Antitrust Report of Matthew Bender was added to the list of publications in which the Compact must be published.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
Voluntary Pre-Merger Disclosure Compact

The undersigned state and territorial Attorneys General who are empowered under federal and/or state antitrust law to enjoin corporate mergers and acquisitions which are likely substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country hereby institute the "NAAG Voluntary Pre-Merger Disclosure Compact" ("The Compact") which shall be governed according to the following rules and principles:

First, that the Attorney General members of The Compact agree that it is in the interests of the business community, the general welfare and economy and citizens of their states and the harmonious and orderly administration of state and federal antitrust law that state and federal government officials invested with authority to enforce the antitrust laws as they relate to mergers and acquisitions ("mergers") analyze the same factual information when determining whether a merger is anticompetitive, and further that such information is now disclosed to the federal antitrust enforcement agencies pursuant to certain provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 codified in Section 7A of the Clayton Act, 15 U.S.C. § 18a ("H.S.R. filing"), and implemented in Subchapter H of Title 16 of the Code of Federal Regulations, 16 C.F.R. § 800 et seq;

Second, that any party to any proposed merger subject to the filing requirements of 15 U.S.C. § 18a may voluntarily file a photocopy of the first filing with the "liaison state" member of The Compact, as defined in the Third Proviso herein, simultaneous with the filing of the original with the federal enforcement agency. The liaison state shall thereafter forthwith notify all signatories of The Compact of the filing and identity of the merging parties;

Third, the "liaison state" upon whom the voluntary filings specified in the Second and Fourth Provisos herein shall be made, shall be a member of The Compact determined in the following order of preference: First the Attorney General of the state which is the principal place of business of the acquiring party to the merger, next to the Attorney General of the state

which is the principal place of business of the acquired party,¹ next to the Attorney General of the state of incorporation of the acquiring party and next to the Attorney General of the state of incorporation of the acquired party. If no member of The Compact falls within the foregoing four preferences, the parties may make the voluntary filing upon the Chair of the Multistate Antitrust Task Force or any other member of The Compact who is willing to act as the liaison state for such transaction;

Fourth, the parties to The Compact agree to serve no other or further investigative subpoenae, Civil Investigative Demands or other compulsory pre-complaint demands for disclosure upon the merging party that makes the voluntary filing specified in the Second Proviso during the pendency of the Hart-Scott-Rodino waiting period, (including any extension of the waiting period as permitted under the statute), provided, however, that the merging parties shall additionally and contemporaneously file with the liaison state a single photocopy of any other materials that may be supplied to the federal agencies in connection with their review of the transaction, including without limitation, any "second" and subsequent requests for additional material requested by the federal enforcement agencies under the provisions of 15 U.S.C. § 18a(e) and, provided further, however, that nothing contained herein shall preclude the parties to The Compact from serving investigative subpoenae, Civil Investigative Demands or other compulsory pre-complaint demands for disclosure upon the merging parties for any additional materials which any party to The Compact has requested be voluntarily supplied by any such merging party during such waiting period or any extension(s) thereof and which such merging party has refused to provide within a time period that is reasonable under the circumstances;

¹ Acquiring and acquired party are defined in subchapter H of Title 16 of the Code of Federal Regulations for use by the parties to the merger in preparing the H.S.R. filing. Therefore, the parties will already have determined the identity of the acquiring and acquired firms.

Fifth, that The Compact shall apply to "hostile" transactions, but only to those parties to the hostile transaction that make the voluntary filings specified in the Second and Fourth Provisos, herein;

Sixth, that The Compact shall not preclude any member of The Compact from serving investigative subpoenas, Civil Investigative Demands or other pre-complaint demands for disclosure, at any time, upon any person that does not make the voluntary filing specified in the Second Proviso;

Seventh, that a party, by making the voluntary filings specified in the Second and Fourth Provisos herein, agrees and consents to allow the members of the Compact to have access to such filings in the hands of the federal antitrust enforcement agencies and will, at the request of any party to The Compact, so advise the federal agencies in writing in the form, if any, that may be reasonably required by any such federal agencies;

Eighth, that the members of The Compact agree to keep confidential the H.S.R. filing, not to make any portion of such filing public except as may be relevant to instituting a judicial action to enjoin the merger or file comments with regard to the merger with the federal enforcement agencies and to limit the use of such information solely to instituting an action to enjoin the merger under federal or state antitrust law or commenting upon the merger in writing to the federal enforcement agencies;

Ninth, that the members of The Compact may inspect the H.S.R. filing at the headquarters of the liaison state or direct the liaison state to furnish a photocopy of the filing, providing that a member requesting a copy of the filing will reimburse the liaison state for the costs of photocopying;

Tenth, that the members of The Compact agree, to the extent permitted by law, to return the H.S.R. filing to the merging parties after the uses specified in the Eighth Proviso are completed or to destroy the H.S.R. filing, at the option of the merging parties;

Eleventh, that any state or territorial Attorney General may become a member of The Compact or resign from membership at any time upon duly notifying the General Counsel of NAAG in writing of such action, provided, however, that the resignation from The Compact

shall not relieve the resigning member from any obligation that a member of The Compact has to the parties to a particular merger under this Compact when such parties have duly filed the H.S.R. material with the liaison state prior to the resignation;

Twelfth, that the General Counsel of NAAG shall request and cause a copy of The Compact and the identity of its members to be published in the Antitrust Report of NAAG, the Antitrust and Trade Regulation Report of the Bureau of National Affairs, the Trade Regulation Reports of the Commerce Clearing House, the Antitrust Report of Matthew Bender and other appropriate publications and will further inform such publications of each instance when an Attorney General joins or resigns from The Compact.

SIGNATORIES:

ELECTION FORM

NAAG VOLUNTARY PRE-MERGER DISCLOSURE COMPACT

In accordance with the Eighth Principle of the Voluntary Pre-Merger Disclosure Compact adopted by the National Association of Attorneys General on December 12, 1987, I, _____, Attorney General of _____, (insert name of Attorney General) (state)

hereby resign from the Pre-Merger Compact. This resignation is effective immediately.

I hereby declare my intention [to adhere] [not to adhere]* to the NAAG Voluntary Pre-Merger Disclosure Compact as revised and approved by the NAAG Antitrust Committee on March 22, 1994. Regardless of my present intention, I reserve the right to resign from or adhere to the Compact at any time in the future, upon written notification to the Executive Director of NAAG.

ATTORNEY GENERAL OR DESIGNEE

Dated: _____, 1996

* Please cross out one

PLEASE MAIL TO:
Emily Myers
Antitrust and Special Projects Counsel
NAAG
2030 M Street, NW 8th Floor
Washington, D.C. 20036

MODEL CERTIFICATE FOR STATES

General Counsel
Federal Trade Commission
Washington, D.C. 20530

Re: Participation in Program for Federal-State Cooperation in Merger Enforcement:
Certification of Intent to Maintain Confidentiality

On behalf of the Attorney General of [name of state or jurisdiction], I certify that the [name of jurisdiction] will maintain the confidentiality of all information and analysis (hereafter "information") obtained directly from the Commission under the captioned program, as well as all information obtained indirectly from the Commission through another state participating in the program. All information obtained under the program will be used only for official law enforcement purposes.

If any such information is subject to a discovery request in litigation or an access request under a public access law, the [name of jurisdiction] will advise the General Counsel of the Federal Trade Commission ("General Counsel") of the request, and will vigorously assert any privilege or exemption claimed by the General Counsel, or assist the General Counsel in intervening in a state or federal proceeding to protect the information in question. In no event will any action be taken, or any statement be made, that will compromise the Commission's claim of confidentiality.

I understand that information obtained pursuant to this certification may be shared with other state Attorney General offices only if they have filed a certification with the General Counsel.

Signed: _____

Position: _____

Telephone: _____

MODEL WAIVER FOR SUBMITTERS

Assistant Director for Premerger Notification
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

With respect to [the proposed acquisition of X Corp. by Y Corp.], the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Federal Trade Commission Act, 15 U.S.C. §41 *et seq.*, the Hart-Scott-Rodino Act, 15 U.S.C. §18a(h), and the Federal Trade Commission's Rules of Practice, 16 C.F.R. §4.9 *et seq.*, insofar as these protections in any way limit discussions about [identity of transaction] between the Federal Trade Commission and members of the NAAG Voluntary Pre-Merger Disclosure Compact ("Compact").

I understand that the Commission will not provide the states with copies of filings by [indicate entity] under the Hart-Scott-Rodino Act. Rather, these materials will be provided to the states by [indicate entity] pursuant to the Compact, and will be provided only with such confidentiality protections as are accorded by the Compact and its members.

Signed _____

Position _____