MERGER MANIA: HOW A BUSINESS LAWYER CAN ASSIST ANTITRUST COUNSEL

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The current wave of merger mania shows no sign of abating.

One indicator is the fact that, during the fiscal year ended Sept. 30, 1997, more than 3,700 large deals were reported to the Department of Justice and the Federal Trade Commission in compliance with the premerger notification requirement of the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, 15 U.S.C. §18a (HSR Act). In comparison, around 1,600 deals were reported in fiscal 1992, while generally about 1,500 transactions were reported annually in the late 1980s.

And, unlike many of the big deals in the 1980s, more of the recent transactions are strategic deals, meant to take advantage of synergies between the merging parties. While most of these transactions do not raise significant antitrust issues of any type, many do raise such questions, particularly those involving competitors. This is reflected in the fact that the number of "Second Requests" issued by the federal antitrust enforcement agencies in response to HSR filings almost tripled from fiscal 1992 to fiscal 1997, while the number of notifications filed rose by about 230 percent. And a number of smaller deals not subject to the HSR premerger notification requirement have also been investigated when antitrust questions were raised.

Although antitrust counsel is ultimately responsible for the antitrust review of a transaction, transaction or regular business counsel is responsible for ensuring that antitrust counsel is retained whenever appropriate. Moreover, transaction counsel have an important role to play in ensuring that the antitrust review process goes smoothly, because they will most likely have knowledge of the client that is more complete than that of antitrust counsel and because they will probably have a longer-standing relationship with the client. Indeed, some of the crucial preparation for antitrust review may be *best* done by transaction counsel. Some of the best preparation for antitrust review should be done on a continuing basis, before any specific transaction is contemplated; this is often best done by business counsel.

Transaction counsel should have some familiarity with:

- the potential antitrust issues that may arise in any review of the transaction,
- the steps to learn more about those issues and to develop a strategy for dealing with them, and

- the actual antitrust review process, from premerger notification, to initial waiting period and Second Request or "quick look," through resolution.

Much of this knowledge should come from working with antitrust counsel on the transaction, and participating with antitrust counsel in the client education process.

This article reviews the ways business counsel can help avoid an antitrust review of a transaction, and can ease an antitrust review and the resolution of any antitrust concerns about a deal. It also summarizes the antitrust review process.

Transaction counsel should keep in mind that a deal with potential anti-competitive impact may be investigated by the antitrust enforcement authorities, regardless of whether premerger notification was required. Thus, independent of any analysis of the need to file premerger notification under the HSR Act, transaction counsel should be prepared to make a preliminary assessment of the substantive antitrust implications of a proposed transaction, if for no other reason than to determine the need for antitrust counsel and to try to ensure that any antitrust review proceeds as smoothly and expeditiously as possible.

Even those transactions that do not raise substantive antitrust law concerns often have procedural implications under the premerger notification requirement of the HSR Act. (*See the HSR sidebar.*) Unless they have a working knowledge of the requirements of the HSR Act, business counsel may not know when premerger notification is required and may expose the clients to substantial civil penalties. A crucial fact that counsel should remember regarding premerger notification is that notification may be required whether or not the transaction is likely to have any anticompetitive effect on the marketplace.

In order to prepare for a possible substantive antitrust review, once a potential transaction is brought to counsel's attention, counsel needs to make a preliminary assessment of the likely antitrust issues raised by the deal. Most business counsel should have the general knowledge needed to make such a preliminary assessment, so that an informed determination may be made as to the need for antitrust counsel. Once it is decided to retain antitrust counsel, and antitrust counsel concludes that the potential issues are significant, there are substantial ways business counsel can further the process of preparing the client for the possible antitrust review and of preparing for the review.

The importance of preparing the client for the possibility of a substantial antitrust review cannot be over emphasized. Many clients feel that a deal is too small in dollar terms to have any antitrust significance and learn to their chagrin or outrage otherwise--that the antitrust laws are concerned with market competitiveness, regardless of the size of the market or the

deal. Clients could also believe that any antitrust investigation will be something that the lawyers should take care of without impeding the progress of the deal or requiring any attention from the business people.

Without the understanding and participation of the client, preparing for the antitrust review will be much more difficult than otherwise. In the worst case, a poorly prepared client may make it very difficult indeed for a transaction to survive antitrust review. Business counsel can play an important role in this preparation because of their relationship with the client.

Some of this client preparation should be done on a continuing basis, *before* any specific transaction is even contemplated or brought to antitrust counsel's attention. For example, a pre-existing document trail, both hard copy and electronic, may unnecessarily complicate matters. Therefore, some of the necessary education may best be done by corporate counsel or regular business counsel as part of continuing preventive counseling.

Often, less than optimal language appears in the strategic and marketing plans regularly prepared by clients, outside the context of any particular transaction. These materials generally contain competitive review and market analysis, and are inevitably among the first to be demanded by the antitrust agencies when they investigate a deal. Therefore, counsel may want to participate in the strategic planning process, at least to the extent of providing guidelines on language and format. Appropriate use of language and drafting of documents may also be reviewed in periodic compliance seminars.

In their documents, many clients define the markets in which they do business in the narrowest terms, so that their market position may be the most substantial possible. This can boomerang when a transaction is under antitrust scrutiny. For example, the court in Staples' recent unsuccessful attempt to acquire Office Depot was influenced by the fact that "Staples uses the phrase 'office superstore industry' in strategic planning documents." *Federal Trade Commission v. Staples Inc.*, 970 F. Supp. 1066, 1079 (D.D.C. 1997).

Another recent case study of how such a narrow view of the marketplace may place substantial hurdles before a transaction is the TCI-QVC acquisition, which combined the only two national television shopping networks, Home Shopping Network and QVC. The parties' documents discussed the relevant market as television shopping. In part because of that record, the transaction was investigated at length by the FTC staff, and it was not until appeals were made to the commissioners that a broader view of the relevant market prevailed and the transaction cleared.

Some clients may even characterize their particular products as a market, implying that no other products compete with theirs. For example, a business person may write that he or she is competing in the "rayon yarn

market." Yet, a questioner may be told that this business person is facing stiff competition from nylon yarn and that many customers have switched to this other material, so that rayon sales have suffered. Nonetheless, the client's documents may show that it accounts for a substantial portion of the "rayon yarn market" without any reference at all to nylon. At the least, the client could have discussed the subject wholly adequately by speaking of "rayon yarn" and not the "rayon yarn market." It can accurately report its strong position relative to other rayon yarn makers by discussing its position in rayon yarn sales, not in the rayon yarn "market," which leads to the erroneous inference that no other products compete with rayon yarn.

Clients may also characterize the marketplace, even if properly defined, in infelicitous ways. One marketing manager read a book by Michael Porter, a marketing authority, and began writing reports characterizing competitors as "good" and "bad," the good ones being those who do not compete on the basis of price. That earned the writer a deposition. The parties in the failed Staples-Office Depot deal characterized as a "noncompetitive market," geographic areas that did not have office superstores but did have warehouse-club, consumer-electronics or mass-merchandiser stores. It might have been equally accurate to say that there were few known competitors in the particular geographic area.

Strategic planning documents may also analyze a menu of potential transactions, including their competitive implications. A strategic plan may speculate that a positive result of a potential transaction will be that "competition will be reduced" or that a "legal monopoly" will be created. It may have been more than sufficient, and perhaps more accurate and relevant, to say that profits could rise and market presence could increase following such a deal.

In addition, many documents that may raise issues are created during the transaction process before antitrust counsel is informed of the deal. For example, investment bankers drafting offering memoranda for a transaction may also overstate the market position of a business being sold, to enhance its desirability. To the extent possible, it would be advisable for business counsel to review the offering memorandum for these aspects before it is completed.

Documents created by the client in analyzing the proposed transaction in speculative, overly enthusiastic terms are also fertile ground for an antitrust enforcer. For example, in the aborted Staples-Office Depot transaction, the parties' position was not at all helped by their own documents, which discuss the "[b]enefits from pricing in [newly, as a result of consolidation] noncompetitive markets" and the "potential margin lift overall as the industry moves to 2 players." *FTC v. Staples*, 970 F. Supp. at 1079.

Godzilla Code Name Created a Problem

Microsoft's recent attempt to acquire Intuit (Quicken) was not furthered

when Intuit gave Microsoft the code name "Godzilla" during the negotiations. The parties' documents described how the transaction would give customers "one clear option," or, in other words, no choice, thus "eliminating a bloody share war" that will in turn "enrich the terms of trade we can negotiate with customers." They concluded that, "as a combination, we would be dominant."

And this writer represented one of the parties in a transaction where an investigation was triggered by documents that contained language such as "[a]fter the merger, there will only be one other competitor left, and two nonpeople should meet and arrange prices where they should be." In fact, only the writer believed that to be the case. Similarly, that writer believed that
"[a]mong the effects of the acquisition will be a major positive impact on product pricing, since both parties' product prices will rise with the combined market power of both companies behind it." Again, only the writer, and no customer, had that view.

As a result of such over-zealous drafting, a deal that was eventually cleared in unaltered form without challenge, was delayed for almost six months while tens of thousands of documents were reviewed and produced, dozens of interrogatory responses and affidavits were drafted, and witnesses were examined.

In ambiguous situations, a written trail may tip the balance. Therefore, keeping in mind the government's approach when drafting materials may help avoid having the written trail delay the deal.

At the least, once transaction counsel is informed of a deal and determines that there may be antitrust issues involved, it would be wise to advise the client to gather and provide to antitrust counsel all documents, *whether in hard copy or electronic form (especially e-mail)*, evaluating the transaction, and all recent strategic or operating plans relating to the businesses involved.

These types of documents will almost certainly be produced:

- as Item 4(c) materials with an HSR premerger notification (*see HSR sidebar*),
- in response to a "Second Request" under the HSR Act following the filing of the notification (*see below and HSR sidebar*), or
- in response to a request for voluntary disclosure during the HSR initial waiting period or in a "quick look" (*discussed below*).

This early compilation of such materials will at least provide antitrust counsel with the earliest opportunity to learn about materials that may create issues and to develop strategies for dealing with those issues.

At this point, it would be helpful to identify the two groups of client

personnel who will be crucial to the success of any antitrust review of a deal: senior management personnel involved in the transaction and most interested in its consummation; and personnel who have access to the data and documents that will be needed to analyze the transaction or respond to a Second Request.

Transaction counsel may be best placed to identify these personnel and to facilitate briefing them on the antitrust aspects of the transaction. These persons should be made aware of the review process and the likely issues in the proposed deal that may trigger the process. They should also be debriefed as to their knowledge of the marketplaces involved in the proposed transaction. The second group of client personnel could also provide initial identification of the likely locations and volume of materials that would be relevant to an antitrust analysis or may be needed to respond to a Second Request.

It is fundamental but not always readily achieved, that, if the client understands the process and the issues involved, it will be better prepared to face the burden of an investigation. Also, counsel could more readily gather the materials needed both to prepare the antitrust strategy and to respond to a Second Request. Without the endorsement of senior management and the participation of knowledgeable client personnel, the antitrust review process will probably be more prolonged, more expensive and more disruptive. Counsel will need to devote more resources to locating needed materials, and take more time to do so, disrupting the client's activities for that much longer.

The experience of AlliedSignal Inc., where the writer was employed for several years, bears out these maxims. After a special effort was made to involve senior management in the earliest stages, and to have business personnel take primary responsibility for document searches (following detailed briefings on how to conduct the searches and with the ready availability for continuing consultation of in-house business and antitrust counsel), the cost and time spent by AlliedSignal in responding to Second Requests (four in less than two years) dropped by up to 30 percent.

In the worst case, without the client's full participation, important materials or data may be missed or not discovered until much later, possibly after the premerger notification or the response to the Second Request has been certified to the antitrust agency as complete. This type of complication can frustrate transaction counsel's goal of closing the deal for the client. It can also, in the case of missed documents that should have been produced to the government, lead to lengthy investigations and substantial penalties for noncompliance with the HSR requirement. The $2.97 million penalty paid by Automatic Data Processing Inc. in 1996 for failure to produce Item 4(c) materials--which were apparently not discovered until the Second Request stage--is a salutary lesson. *United States v. Automatic Data Processing Inc*., 1996-1 Trade Cas. (CCH) 71,361 (D.D.C. 1996).

In order to bring the client on board, it may be helpful for transaction counsel together with antitrust counsel to circulate a memo to the personnel likely to be involved in any antitrust review, describing the process and introducing the legal personnel who will be involved. Memoranda should also be circulated to the transaction working group regarding creation and retention of materials likely to be responsive to Item 4(c). It may also be desirable to distribute memoranda to all who may have materials responsive to a likely Second Request, requesting the retention of materials generally, including materials such as e-mail.

Such memoranda are important adjuncts to in-person briefings to the business personnel. While antitrust counsel should take the laboring oar in this area, these preparatory activities are all ones that transaction counsel can expedite because of their greater knowledge of the deal and the cast of characters involved.

Once a deal is underway and it is clear that there may be substantive antitrust issues, another area that transaction counsel should have a nodding acquaintance with--and may be of substantial assistance in client education--relates to the antitrust review process itself. The process of a substantive antitrust review of a transaction subject to pre-merger notification can be summarized generally as follows.

Both the FTC and the DOJ will review the notification quickly in the first week or so of the initial waiting period. If one of the agencies feels that a closer look is needed, it will request "clearance" for the transaction from the other agency, so that it could then take the lead in any investigation of the deal. In the event that both agencies are interested in the transaction, the staffs will negotiate as to which agency will have clearance. In the worst case, clearance negotiations may consume much of the initial waiting period, so that the agency ultimately with clearance is almost as a practical matter compelled to issue a Second Request in order to obtain more time to review the transaction.

The agency with clearance will generally approach the parties during the initial waiting period to request the informal submission of additional data. This process is an opportunity for the parties to provide information and arguments to address any concerns the staff expresses, present their case and to try to avoid the issuance of a Second Request. In many cases, the provision of the information requested, plus a presentation by a knowledgeable business representative of the client, will persuade the staff that no further review is required. In this process, business counsel may provide helpful comments to antitrust counsel as to the business reasons for the transaction and the likely competitor and customer reactions to the deal, and help direct antitrust counsel to the sources of data in those areas.

If the concerns of the antitrust agency are not fully allayed during the initial waiting period, then a Second Request will be issued, indefinitely extending the waiting period until, in most cases, 20 days after the request

has been substantially complied with. The Second Request will generally ask for production of documents and written responses to interrogatories. In addition, the agency may ask to take the testimony under oath of the client's personnel involved in the deal or in the businesses that raise antitrust concerns. It is rare that a full response to a Second Request can be completed in less than two months; more commonly, it will require three or four months before all the materials requested are gathered, processed and produced to the government. The production will often involve tens of thousands, if not hundreds of thousands, of sheets of paper, and, increasingly, many computer disks and tapes.

To alleviate the burden of the Second Request on the parties, and the time pressure placed on the enforcement staff by the 20-day window to review the response to the Second Request, the two antitrust agencies have devised an informal "quick look" process. In the "quick look," the parties do not respond to the Second Request (so the 20-day clock does not start), but provide narrower categories of data in response to requests from the staff that are focused on the particular areas causing concern. This creates an opportunity for the parties to address the antitrust issues without undertaking the burden of responding to the full Second Request. However, it also creates the risk that the waiting period is extended indefinitely while the parties embark on what may ultimately be a fruitless detour to persuade the staff that there are no antitrust issues with the deal.

A "quick look" may be most useful in transactions where a Second Request was issued because for some reason clearance was obtained late in the initial waiting period and the staff simply did not have enough time to review the deal, not because the staff definitely had substantial antitrust concerns about the transaction. If the "quick look" does not persuade the staff that the transaction is not anticompetitive, then the parties must still respond to the Second Request in order to run out the waiting period and be free to consummate the deal (absent a court order barring a closing).

Throughout the initial waiting period, the "quick look" and Second Request process, the agency will be contacting competitors and customers, and sometimes suppliers, of the parties for their views on the marketplace and on the likely competitive impact of the proposed transaction. The agency will in fact request that the client identify for the staff such third parties and their contact data. More than one deal has cleared antitrust scrutiny in no small part because of the support of the customers. One major factor in the FTC's ultimate approval of Boeing's acquisition of McDonnell Douglas was the response of dozens of aircraft buyers that they are unlikely in any event to place orders in the foreseeable future with McDonnell Douglas and that they had no objections to the transaction.

Customers Can Help a Deal Clear Antitrust Scrutiny

While it would be unwise to approach competitors in such (and most other) situations, it is desirable from both the business and the legal perspective to contact customers and suppliers early in the process. As soon as the proposed transaction is public, the client will often want for

business reasons to contact customers and suppliers to assure them that the deal will be a positive development. Such briefings should also include the factors that make the transaction beneficial to competition in the marketplace, in deals where antitrust questions may arise.

The client should also take the opportunity to introduce counsel to those customers or suppliers that have been identified to the antitrust agency, so that counsel may brief those third parties on what they may expect from the agency and to obtain a sense of the likely response those third parties will provide to the agency. Business counsel may be better placed than antitrust counsel to work with the client to organize the contacts with customers to garner their support for both the transaction and any proposed settlement.

Also throughout this process, the parties will not only be responding to the agency's information requests, but will also be presenting their case (both in presentations and in "white papers") and be considering what acceptable business resolution may address the government's concerns and permit the deal to close. Business counsel may be particularly valuable in these two aspects. They may be helpful in structuring a resolution to an antitrust objection that makes sense from a business perspective. Business counsel may have a more informed view of the client's objectives in doing the transaction than antitrust counsel (or may be better positioned to learn what these objectives are), and may therefore have valuable suggestions into the types of changes in the deal that may be suggested to the client as a way of settling the government's concerns with the transaction.

It is not uncommon for Second Requests to be avoided when the parties propose an acceptable business solution, a "fix-it-first," to the agency staff during the initial waiting period. Such a "fix-it-first" that is accepted by the agency will not only relieve the client of the burden of a Second Request, but also of the longer lasting responsibility of a consent decree that would be entered for resolutions reached later in the process. Here too, it is helpful to have the support of the client's customers in persuading the antitrust agencies that a proposed settlement will fully address the agencies' concerns. It might be noted that, sometimes, a proposed "fix-it-first" resolution acceptable to the staff at an early stage of the process may no longer be acceptable in later stages when the agency has substantially completed its review and is poised to make a court challenge to the deal. Staples may have been faced with just this situation.

The antitrust review process in transactions that are not subject to premerger notification is substantively identical to that of deals notified to the government. The staff will look for the same type of data and make the same kind of analysis. The differences lie in how the review is initiated, the timing of the review, the relative negotiating strengths of the players and the processes available to the agencies.

Since there is no official notification to the antitrust agencies of the deal,

the agencies may begin an investigation of the transaction only after the deal was brought to their attention in some other way, either before or after closing, such as by published reports or complaints by customers, suppliers or competitors, or even by voluntary notification by the parties. Moreover, the agencies must rely on their general investigative powers, through subpoenas and civil investigative demands, in addition to informal requests, to obtain the data they need for their review.

In these situations, unless the agencies can obtain a court order, the parties can close the deal at any time. Courts are unlikely to grant an injunction against the consummation of a transaction without a substantial showing by the agencies that the proposed deal will harm competition. Therefore, there is a greater likelihood that any agency challenge to the transaction will occur only after the deal has closed, than for transactions subject to premerger notification. The available remedies in those situations are more likely to involve only the buyer. And in cases where the agencies do not learn of a deal until after it has closed and then open an investigation, that process is under very different time constraints and pressures from an investigation under the HSR process.

With these guidelines in mind, business counsel will contribute substantially toward the minimization of the probability of an antitrust review of a transaction and the expeditious completion of any antitrust review.

Premergers and the HSR

The purpose of the HSR Act is to provide an opportunity for the federal antitrust agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission) to review large transactions before they close. The HSR premerger notification requirement is therefore procedural, and not at all substantive. The premerger notification requirement must be satisfied for large deals regardless of the likely competitive effect of those deals. Conversely, deals with anti-competitive impact are subject to challenge whether or not premerger notification was required and regardless of the size of the deal.

The two basic tests of the reportability of a transaction are the "size of persons" involved in the deal and the "size of transaction." If both thresholds are crossed and the transaction involves interstate commerce, then the deal is subject to HSR premerger notification, unless an exemption applies.

The "size of persons" test can be met by crossing any of three alternative thresholds:

- manufacturing acquired "person" with annual net sales/total assets $\geq$$10 million; acquiring person with total assets/annual net sales

≥$100 million;
- nonmanufacturing acquired person with total assets ≥$10 million; acquiring person with total assets/annual net sales ≥$100 million; or
- acquired person with ≥$100 million annual net sales/total assets; acquiring person with total assets/annual net sales ≥$10 million.

A "person" for HSR purposes is an "ultimate parent entity" and all entities it controls directly or indirectly, while an "ultimate parent entity" is an entity not controlled by any other entity.

The "size of transactions" test can be met by crossing either of two alternative thresholds:

- ≥$15 million in assets and/or voting securities held after transaction; or
- ≥50 percent held after transaction of voting securities of issuer, which, together with all entities it controls, has ≥$25 million in total assets/annual net sales.

It should be noted that, if the $15 million, but not the 50 percent, thresholds is met and the HSR requirement has been satisfied for that deal, then additional notifications may be required before later acquisitions can be completed that would result in the acquiring person holding 15 percent, 25 percent or 50 percent of the voting securities of the issuer.

The major exemptions to the notification requirement are:

- acquisitions for investment purposes, of up to 10 percent of the outstanding voting securities; however, acquisitions of a competitor, or of the parent of a competitor, regardless of the size of the transaction, are considered by the staffs of the Antitrust Division of the DOJ and the FTC not to be for investment.
- acquisitions of interests in partnerships or member-managed limited liability companies, unless the transaction will result in one entity controlling all the interests in the partnership or the LLC; there is no distinction between general and limited partnership interests for HSR purposes.
- certain types of transactions involving foreign entities or assets.
- transactions within a corporate family where the affiliation is through ownership of voting securities; therefore, the acquisition by a 70 percent partner of the remaining 30 percent of a partnership is not exempt under this exemption.
- acquisitions of options or warrants to purchase voting securities, or securities that do not currently carry voting rights; the exercise of such options or warrants or the conversion of such securities to securities with current voting rights may be subject to notification.
- acquisitions within one year of a notification for which the waiting period has ended, if the acquisitions will not bring the acquiring person over the next reporting threshold; thereafter, if the deals

> within the first year bring the acquiring person over the reporting threshold for which that notification was filed, then acquisitions within five years of the notification, if the acquisitions will not bring the acquiring person over the next reporting threshold.

The applicable waiting period after notification has been filed before a deal may close is:

- 30 days after all parties have filed in deals directly between the acquiring and the acquired person.
- 30 days after the acquiring person has filed in deals not directly involving the acquired person (such as open market purchases), except for cash tender offers.
- 15 days after the acquiring person has filed in a cash tender offer.
- 10 days after the acquiring person has filed in a purchase in bankruptcy.

Early termination of the waiting period may be granted on written request where the two agencies see no substantive antitrust issues.

The waiting period may also be extended effectively indefinitely by the issuance of a request for additional information, a "Second Request," at the end of the initial waiting period. The Second Request extends the waiting period until:

- 20 days after it has been substantially complied with, except in cash tender offers.
- 10 days after it has been substantially complied with, in cash tender offers.
- unclear in the case of purchases in bankruptcy.

The filing fee is $45,000, payable by the acquiring person to the FTC. Penalties for noncompliance with the notification requirement are civil penalties of up to $10,000 a day for each day of a failure to file the notification, plus indefinite extension of the waiting period until the notification requirement has been satisfied.

See, generally, Axinn, Fogg, Stoll & Prager, *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act* (Rev. Ed. 1996) (Law Journal Seminars-Press); ABA Section of Antitrust Law, *Premerger Notification Practice Manual* (1991).

Getting specific: Item 4(c)

Item 4(c) of the HSR premerger notification form requires the filing with the FTC and DOJ of:

> All studies, surveys, analyses and reports which were

> prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Examples of 4(c) materials include:

- offering memoranda, whether prepared internally or by consultants
- board presentations
- analyses of the market impact of the proposed transaction
- analyses of the transaction's impact on the competitive position of the parties
- sales and market position projections based on the proposed transaction.

Materials not in hard-copy form, such as e-mail, also must be produced if they contain the types of discussion indicated in Item 4(c). Materials that may be subject to attorney-client or other privileges must still be identified, though not produced, if they are otherwise of the types required by Item 4(c).
