Merger Review Process Initiative
Model Process & Timing Agreement

DATE

BY FACSIMILE and E-MAIL

[COUNSEL for acquiring company A]

[COUNSEL for acquired company B]

Re: *[Transaction] – Proposed Stipulations Concerning the Parties' Second Request Compliance, Depositions, the Timing of DOJ Consideration of and Decision-Making Concerning the Proposed Transaction, and the Timing of any Post-Complaint Discovery in the Event of a Challenge by the DOJ*

Dear [COUNSEL]:

This letter sets forth the understandings between the Department of Justice ("DOJ"), Company A, and Company B in connection with the proposed acquisition by A of B, which is the subject of the requests for additional information and documents issued by DOJ on [DATE] ("Second Requests"). It is agreed as follows:

I. Narrow Search List

In order to substantially comply with the second request, each party must, *inter alia*, produce to the DOJ all documents that are responsive to the request and that are in the possession, custody, or control of the parties. However, in consideration of the cooperation that [Company A and Company B] have provided to the DOJ in its investigation of the proposed transaction thus far, and in light of this Process & Timing Agreement entered into by the parties and the DOJ staff, it is agreed that the parties need search only those individuals identified on Attachment A for documents that may be responsive to the Second Request. Please note that Attachment A is unique to each party.

The parties must also search (a) the hard-copy and electronic files of any predecessors or successors of the individuals identified on Attachment A, to the extent that such files may include documents that fall within the relevant date range specified in the Second Request; (b) the hard-copy and electronic files of secretaries and other administrative assistants who support any of the individuals identified on Attachment A; and (c) any hard-copy or electronic central files, databases, data sets, or other repositories of potentially responsive information (*e.g.*, business plans, budgets, sales reports, bid files, patent files). Except where otherwise noted herein, the parties are required to produce data and other non-documentary information responsive to the request regardless of where such data and information are located.

Staff reserves the right to add up to a total of five custodians to each party's custodian list at any time prior to the party's certification of substantial compliance with the second request, prior to the filing of a complaint, or as otherwise agreed, subject to the review and approval of the responsible Section Chief and only in the event that information received subsequent to the execution of this agreement leads staff to conclude that access to the files of the additional custodians is reasonably necessary to the investigation. In addition, should either party produce or rely upon information from the files of an individual who is not among those identified on Attachment A, that party shall be required to conduct a thorough search of that person's files and produce any responsive documents and information to the Division. The addition of custodians need not delay a party's certification of compliance with the Second Request. The parties agree that they shall submit responsive documents found in the files of any additional custodians within 15 business days of the party's receipt from the Division of the names of the additional custodians. Failure to meet this schedule shall cause all remaining post-certification dates described in this letter to be moved back, day-for-day, until all requested materials have been submitted.

[Other negotiated limitations – e.g., deferred production – may be described here.]

II. Data requests

[Details of negotiated data requests or limitations may be described here or covered in a separate letter.]

III. Electronic Information

[Details regarding the submission of electronic information (e.g., e-mail, file formats, metadata, method and specifics of production, submission of electronic data to the extent not described in section II above) may be described here or covered in a separate letter.]

IV. Conduct of DOJ's Merger Investigation

A. Timing of Closing. The parties have agreed not to close their transaction prior to [DATE[1]], unless DOJ notifies the parties in writing at an earlier date that it will not oppose the transaction. The parties have requested and DOJ shall endeavor to provide notice of its decision as to this transaction at the earliest practicable date.

B. Communications/Exchange of Information/White Papers. To promote a continuing dialogue, during the course of the investigation DOJ staff will be available bi-weekly to discuss legal and economic (or econometric) issues raised by the transaction and to discuss progress towards meeting the agreed upon schedule. To encourage substantive dialogue and narrowing of issues, the parties and the DOJ will work in good faith to discuss economic (or econometric) data and analysis. The parties are encouraged to provide the results of their own economic and econometric analyses, and any underlying data, to staff. DOJ staff will make reasonable efforts to reciprocate, recognizing, however, that DOJ staff may be prohibited by law from exchanging analyses or data that is based in whole or in part upon information or documents produced by third parties pursuant to civil investigative demands.

[1] See Attachment B (merger investigation milestones).

The parties shall submit any white papers concerning their transaction to DOJ by [DATE]. To ensure that the parties focus their white paper analysis on relevant issues, DOJ staff will use its best efforts to identify and notify the parties of any legal or economic issues that are no longer of concern no later than [DATE]. In the event the parties intend to rely upon economic (or econometric) data or analysis in any presentation to DOJ Front Office personnel, they shall provide such data or analysis to DOJ staff at least five (5) business days prior to any Front Office presentation.

C. Compliance. The parties have informed DOJ staff that they anticipate that they will comply with the second requests by [DATE]. [The parties agree that they will comply with the second requests on a rolling basis, beginning on or about [DATE].] In the event the parties do not comply by [DATE], all dates in Section II.C-F shall be moved back, day-for-day, for each day that compliance is delayed beyond [DATE]. If any date falls on a weekend or federal holiday, that date shall be the next business day.

Within ten (10) business days of the parties' certifying compliance with the requests, DOJ staff will provide the parties a preliminary assessment as to whether it believes the parties have in fact complied with the second requests. The parties agree to use their best efforts to resolve any deficiency DOJ staff may identify within ten (10) business days after such assessment. Deficiencies discovered after [DATE] shall be resolved by the parties and DOJ staff in good faith, but shall not affect the dates in this section.

D. Interviews/Depositions. DOJ staff shall identify by [DATE] those employees or agents of the parties that it proposes to interview or depose. The parties shall make such persons available for interviews or CID depositions during the period between [DATE RANGE]. Should the parties seek to move the date of any deposition to a date beyond [DATE RANGE] the dates in Section IV shall be moved back, day-for-day, so that the period between the date of the final deposition and the date that the staff must complete its recommendation for the Division's Front Office remains the same.

E. Section Recommendation. DOJ staff shall submit their recommendation to the Division's Front Office by [DATE]. The DOJ staff shall provide the parties an oral summary of their recommendation and its rationale no later than [DATE]. The management of [RELEVANT SECTION] shall be available to meet with the parties prior to making its final recommendation on or before [DATE].

F. Front Office Meetings. Should DOJ staff recommend that a complaint be filed to block the proposed transaction, the parties shall be given an opportunity to meet with Deputy Assistant Attorney General [___] and the Director/Deputy Director of Operations on or prior to [DATE]. If necessary, the parties shall also be given an opportunity to meet with the Assistant Attorney General on or prior to [DATE].

V. Post-Complaint Proceedings and Discovery

The parties shall not initiate a declaratory judgment action against DOJ relating to the transaction. If DOJ should file a court challenge to the proposed transaction, it need not seek a temporary restraining order and the parties shall not close the transaction until after the court has

either heard and ruled in their favor on a DOJ request for a preliminary injunction or issued a decision following a trial on the merits.

The parties acknowledge that compliance with the second requests as modified by this letter shall not be sufficient to prepare the DOJ for an extended preliminary injunction hearing (more than 2 days) or for a trial on the merits, should the DOJ file a complaint in federal district court to block the proposed transaction. Therefore, in the event of a litigated challenge to the proposed transaction the parties stipulate to a post-complaint discovery period of **[X]** months prior to any extended hearing on a request for a preliminary injunction or trial on the merits. The parties and the DOJ agree to use their best efforts to reach an agreement on a [hearing/trial] schedule.

* * * * *

Please indicate your agreement with the above terms by signing and returning a copy of the enclosed letter.

Sincerely,

[NAME]
Chief
[_____] Section

So Agreed:

_____/s/
Counsel for Acquiring Company A

_____/s/
Counsel for Acquired Company B

Attachment A – Search List for [Company A]

[list of custodians]

Attachment B
Sample Milestones for Merger Investigation (w/Process & Timing Agreement)

Note: These milestones are provided for illustration purposes only. The format of any merger investigation is subject to negotiation between the parties and the Antitrust Division.

- Initial HSR filings
- Second Requests issued
- Parties respond to Second Requests (as limited) and submit certificates of compliance
- DOJ staff provides preliminary assessment regarding parties' compliance
- DOJ staff identifies party executives it proposes to interview or depose
- Interviews and depositions conducted
- Parties resolve any compliance issues raised by DOJ staff
- DOJ staff identifies and notifies the parties of any legal or economic issues that are no longer of concern
- Parties submit any white papers
- Pre-staff recommendation meetings between parties and section/EAG management
- DOJ staff recommendations submitted to the Division's Front Office
- DOJ sections provide parties an oral summary of their recommendation and underlying rationale
- Parties meet with Deputy Assistant Attorney General and Director/Deputy Director of Operations (if necessary)
- Parties meet with the Assistant Attorney General (if necessary)
- Final enforcement decision