Comment #: 5

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Via Hand Delivery

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex E)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *Comments to HSR Proposed Rulemaking, Project No. P989316*

Dear Mr. Secretary:

This comment responds to the Federal Trade Commission's ("FTC's") March 29, 2004 Notice of Proposed Rulemaking ("NPR") regarding proposed amendments to the Hart-Scott-Rodino ("HSR") pre-merger notification rules of practice, 16 C.F.R. Parts 801-03. We respectfully propose that the FTC adopt a transitional rule exempting from the new regulations certain transactions that are or have been under active investigation by the FTC Bureau of Competition or the Antitrust Division of the Department of Justice ("DOJ").

We represent Bertelsmann AG, which in 2003 entered into an agreement with Sony Corporation of America to form a joint venture to combine their recorded music businesses. The transaction is structured as a newly formed general partnership, under which each of the partners will receive a fifty percent interest in exchange for the contributed businesses. The parties confirmed with the FTC that, under the HSR rules then in effect, this transaction would not be subject to a pre-merger notification under the Act. Under the proposed amendments set forth in the NPR, the formation of an unincorporated entity, such as the Sony-BMG general partnership that is now under active investigation by the FTC, would be subject to the reporting requirements of the HSR rules. Thus, if the new rules go into effect in their current form, before consummation of the transaction, the parties would be required to submit a premerger notification filing to the FTC and DOJ premerger offices.

The proposed Sony-BMG joint venture was structured as a partnership for business reasons unrelated to the HSR Act. Indeed, the parties expressed interest in having the transaction reviewed under the HSR Act and sought the Premerger Notification Office's views as to whether a filing under the HSR Act could be accepted. The parties were informed that a filing under the HSR Act would not be accepted, and

thus the parties contacted the FTC Bureau of Competition and the DOJ Antitrust Division and proposed to proceed under procedures that follow the procedures of the HSR Act.

On December 4, 2003, the parties completed the submission of "4(c) documents" to both agencies. On February 12, 2004, following clearance of the matter to the FTC, the FTC authorized Bureau of Competition staff to use compulsory process in an investigation of the proposed transaction. On February 19, 2004, the FTC issued both a Subpoena Duces Tecum and a Civil Investigative Demand ("CID") to each of the parties. The subpoena and CID required the submission of documentary evidence and responses to interrogatories that are far more extensive in scope than those specified by the agency's model second request. In response to the subpoena, the parties collectively produced well over a million pages of paper and electronic documents. The documents produced included documents from each parent company's foreign headquarters. In response to the CID, the parties also produced responses to numerous interrogatories and interrogatory subparts, including several interrogatories that required the production of extensive data.

In short, this comment is submitted at a very late stage of an investigation that has been conducted as a second request investigation under the HSR Act in all but name. Both parties to the investigation have complied with a subpoena and CID that are the functional equivalents of a very extensive second request. As a result of these proposed amendments to the HSR pre-merger notification rules of practice, the parties face the prospect that a transaction that currently is the subject of a full and thorough investigation would be subject to additional delay and the payment of very substantial filing fees. Imposing additional filing and waiting period requirements in these circumstances would be unduly burdensome and unfair, and would represent an inappropriate exercise of governmental power.

The proposed regulations should be adopted with a transitional rule to address transactions that were under active investigation before the commencement of the rulemaking. Given that the intent of the proposed rules is to ensure that transactions structured as partnerships do not escape full, pre-consummation antitrust review simply by virtue of their form of ownership, no valid purpose would be served by subjecting the proposed Sony-BMG transaction, or any other similar transaction, to the filing requirements of proposed 16 C.F.R. § 801.50.

Accordingly, the Commission is requested to include in its final rules a transitional rule that would read as follows:

> Section 801.50 shall not apply to any transaction that has been the subject of an investigation by either the Federal Trade Commission or the Antitrust Division of the U.S. Department of Justice in which, prior to the effective date of that section, the reviewing agency obtained documentary material and information under compulsory process from all parties that would be required to submit a Notification and Report Form for Certain Mergers and Acquisitions under Section 801.50 but for this transitional rule.

Such a transitional rule would exempt from the premerger filing requirements only a small class of transactions that are outside the intended scope of the proposed rules. Thus, the rule would not interfere with any of the purposes of the proposed regulations but would avoid the imposition of an unfair burden on parties that already are subject to comprehensive inquiry.

Sincerely,

Jacqueline I. Grise

JIG:prm