Comment #: 6

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

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

Dear Mr. Secretary:

This comment responds to the Notice of Proposed Rulemaking issued by the Commission on March 29, 2004, regarding the pre-merger notification rules. In the Notice, the Commission proposes to amend its rules implementing the Hart-Scott-Rodino Antitrust Improvements Act set out in 16 C.F.R. Parts 801-03. Under the proposed rules, the formation of an unincorporated entity, such as a general partnership or limited liability company, would be subject to the reporting requirements of the Act essentially to the same extent as the formation of a joint venture corporation. This comment respectfully suggests that the Commission adopt a transitional rule exempting from the new regulations certain transactions that would become subject to the premerger notification requirements by virtue of the new rules but had been under active investigation by the Commission or the Justice Department prior to the effective date of the rules.

Last year, Sony Corporation of America entered into an agreement with Bertelsmann AG to form a general partnership to combine the recorded music businesses of the parties' subsidiaries. The transaction would have been reportable under the Act had the combined business been structured as a corporation rather than a partnership. Under the structure of the general partnership, each of the partners would receive a fifty percent interest in the partnership. Under the rules currently in effect, this transaction is not subject to a pre-merger notification requirement. If the Commission adopts the proposed rules but the parties are able to consummate the

transaction before the new rules become effective, the transaction would not be subject to a prior notification requirement. If, however, the new rules go into effect in their current form before consummation of the transaction, the parties would be required to file a premerger notification form with the Commission.

The new entity has been structured as a partnership for independent business reasons that are unrelated to the Hart-Scott-Rodino Act. Indeed, the parties expressed interest in having the transaction reviewed under the Act's procedures and sought the Premerger Notification Office's views on whether a filing under the Act would be accepted. Upon learning that such a filing would not be accepted because the transaction did not meet the jurisdictional requirements for a filing, the parties contacted the Commission's Bureau of Competition and the Justice Department's Antitrust Division and proposed to proceed under procedures that mimic the procedures of the HSR Act. Specifically, the parties proposed to the agencies that they would (a) submit to the reviewing agency the documents that would be required to be submitted under item 4(c) of the Notification and Report Form for Certain Mergers and Acquisitions, (b) agree to abide by a 30-day waiting period prior to consummation between the submission of the 4(c) documents prior to the issuance of compulsory process, (c) agree to respond to a request for additional information and documentary material (in the form of a subpoena and civil investigative demand), if compulsory process were issued by either agency during that 30-day period, and (d) also agree to a 30-day waiting period after coming into reasonable compliance with any compulsory process that may be issued.

Following discussions with the Bureau of Competition and Antitrust Division regarding these proposed procedures, 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 of the Commission, the Commission authorized Bureau of Competition staff to use compulsory process in an investigation of the proposed transaction. On February 19, 2004, the Commission issued both a subpoena duces tecum and a civil investigative demand ("CID") to Sony Corporation and Bertelsmann. 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, Sony has produced nearly one million pages of documents. In response to the CID, it has produced responses to numerous interrogatories and interrogatory subparts, including several interrogatories that required very extensive data, such as the prices, sales, revenues, and other information for products sold by the company during every month over a six-year period. Further, Sony produced documents from its foreign headquarters as if the production were pursuant to a Hart-Scott-Rodino Act second request. Bertelsmann has complied with an identical subpoena and CID. Both parties certified compliance with the compulsory process on May 21, 2004.

In short, this comment is being submitted at a very late stage of an investigation that has been conducted as a second request investigation under the Hart-Scott-Rodino Act in all but name, after both parties have complied with a subpoena and CID that were the functional equivalents of a very extensive second request. The parties have no assurance, however, that the Commission would act before the proposed rules, if adopted, go into effect. Further, the con-

summation of the transaction may be delayed even if the Commission acts promptly because of the need to clear the transaction with foreign antitrust authorities.

Thus, the parties face a substantial risk that a transaction that has already been subject to a full and thorough investigation would be subject to further delay, and the payment of very substantial filing fees, should the proposed regulations be adopted without a transitional rule to address transactions that were under 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 pre-consummation antitrust review simply by virtue of the ownership structure, no valid purpose would be served by subjecting the transaction described in this comment to the filing requirement of proposed 16 C.F.R. § 801.50. Against this absence of a valid purpose for requiring a filing, the unfairness of subjecting the parties to the requirements of the rule is manifest. The Commission has already sought and obtained the documents and information that it would have sought in a second request through its subpoenas and CIDs and required the parties to incur enormous legal, administrative, and copying costs. Imposing additional filing and waiting period requirements in such circumstances would be unduly burdensome and simply unfair.

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. It would require a premerger filing for every transaction in which the reviewing agency did not obtain compliance with compulsory process equivalent to a second request. 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 have been subject to an investigation.

Respectfully Submitted,

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JK/iy