

## **GUIDANCE ON PRE-MERGER EXCHANGES OF INFORMATION**

Section 17 of the Philippine Competition Act<sup>1</sup> (the “Act”) states that parties to a notifiable merger or acquisition (“Transaction”) are prohibited from consummating their agreement until after it has been approved by the Philippine Competition Commission (the “PCC” or the “Commission”). Prior to the Commission’s approval of a Transaction, it is crucial for the notifying parties to remain independent firms in the market and refrain from, among others, exchanges of confidential business information.<sup>2</sup>

A pre-merger exchange of confidential business information between notifying parties may constitute premature consummation of the transaction (or ‘gun-jumping’) punishable under Section 17 of the Act.<sup>3</sup> Such pre-merger exchanges can likewise be regarded as an anti-competitive agreement prohibited under the Act.<sup>4</sup>

To prevent inappropriate dissemination of confidential business information, to ensure that competition is protected during the review process, and to safeguard competition in the event the merger or acquisition does not take place, is delayed or modified, the PCC prescribes the following measures to guide the notifying parties:

1. Notifying parties are strongly discouraged from consulting or employing the same counsel regarding a Transaction, including the preparation of the Notification Forms (the “Form”) and any other submissions to the PCC.
2. Authorized representatives and contact persons designated by a notifying party in its Form must be different and independent from those designated by the other notifying party.

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<sup>1</sup> Rep. Act no. 10667 (2015).

<sup>2</sup> Rep. Act no. 10667 § 4 (e); PCA-IRR Rule 2 § 2 (e); PCC Rules on Merger Procedure § 9.

<sup>3</sup> PCC Rules on Merger Procedure, §§ 3.5 and 16.1. A notifiable merger which is notified but consummated, in whole or in part, prior to the expiration of the waiting period is considered void and shall subject the parties to an administrative fine equivalent to one (1) to five (5) percent of the value of transaction.

<sup>4</sup> Rep. Act no. 10667 § 14 (c).

3. Information necessary for due diligence must be narrowly tailored and reasonably related to a specific due diligence or pre-merger integration planning issue.
4. If confidential business information must be exchanged for due diligence and pre-merger integration planning, parties are advised to employ third-party consultants that limit the dissemination and use of that information within the parties' businesses. The group of individuals ("clean team") who shall assemble, review, and analyze sensitive and other confidential data under certain protocols and prior to regulatory approval or consummation of the deal<sup>5</sup> should not include any personnel responsible for competitive planning, pricing, or strategy.
5. Personnel who will be granted access to confidential business information must be properly identified and strictly monitored.
6. Should counsel discover sharing of confidential business information not in accordance with these guidelines during the waiting period,<sup>6</sup> said counsel should instruct the parties to stop the information exchange immediately and inform the PCC on how the information was used, and the extent of the information exchanged.

The notifying parties, their counsels, and consultants are reminded of their obligation to exercise utmost diligence in ensuring that pre-merger information exchange is avoided.

Likewise, notifying parties should undertake an assessment in light of this notice if it should engage the same counsel to represent them in their pre-merger activities and filings with the PCC. Counsels may likewise find it useful to evaluate if there is a necessity to avoid conflicts of interest in representing competitors at the same time, for the same transaction, and handling their respective confidential business information.

## **Mergers and Acquisitions Office**

11 April 2019

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<sup>5</sup> Koob, J. (2006). *The Clean Team: An Emerging Tool for M&A Success*. 3rd Quarter 2006 issue of the *WorldatWork Journal* (Volume 15, Number 3).

<sup>6</sup> Rep. Act no. 10667 § 17.