



AFRICA STUDIO/Shutterstock.com

Clean Team Agreement

This Standard Document can be used by merging parties to reduce antitrust risk by establishing procedures for the exchange of competitively sensitive information while allowing the parties to complete due diligence and plan for integration in a transaction likely to face antitrust scrutiny. It includes integrated notes with important explanations and drafting tips.

**LAURA A. WILKINSON**

PARTNER
WEIL, GOTSHAL & MANGES LLP

Laura is a member of the firm's antitrust group and focuses her practice on mergers and acquisitions. She has obtained merger clearance for clients in a variety of industries and has served as lead antitrust counsel for numerous multibillion-dollar transactions. Before joining the firm, Laura served as Deputy Assistant Director of the Federal Trade Commission.

PROVISIONS AND DRAFTING NOTES

DRAFTING NOTE

READ THIS BEFORE USING DOCUMENT

Merging parties that compete may enter into a clean team agreement (CTA) to protect competitively sensitive information, particularly that of the target company,

that is shared during due diligence and for integration planning.

Under a CTA, access to the merging parties' competitively sensitive information is limited to members of a clean team and is

protected from disclosure. The clean team may comprise a small group of people or a large team of people, and the competitively sensitive information may be located in a separate electronic or physical data room, sometimes called a clean room.

Although the target's information is typically protected by a confidentiality agreement, merging parties may take the additional step of entering into a CTA for the most sensitive information where:

- The transaction is likely to receive antitrust scrutiny from the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ).
- The merging parties have significant competitive overlaps.
- A large volume of competitively sensitive information will be shared.

In practice, most transactions do not need a CTA because they do not involve these factors.

The disclosure of competitively sensitive information during due diligence, negotiations, and integration planning between competitors can give rise to antitrust concerns, even if the transaction does not close. These exchanges can violate the antitrust laws because they can facilitate or invite collusion. Access to the seller's competitively sensitive information may also hurt the target and competition as a whole if the buyer gains a competitive advantage over the target and the deal does not close.

Exchanges of information may violate:

- Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade, such as competitors agreeing or colluding on price (for more information, search [Establishing an Agreement Under Section 1 of the Sherman Act](#)).
- Section 5 of the FTC Act, which broadly prohibits unfair methods of competition and unfair or deceptive acts or practices (for more information, search [FTC Act Section 5: Overview](#)).



Search [Information Exchange and Integration Planning in M&A: Antitrust](#) for more on the antitrust issues relevant to the exchange of information between merging parties.

ADVANTAGES AND DISADVANTAGES OF USING A CTA

Merging parties should weigh the advantages of exchanging competitively sensitive information by using a CTA, such as enabling detailed synergy analysis and integration planning, against the potential for anticompetitive effects, as well as the risk that an antitrust agency may have concerns about the information exchanges, which may extend the antitrust agency's investigation.

By entering into a CTA, members of the clean team can review competitively sensitive information on pricing, costs, customers, and employees that the merging parties could not independently view. Access to this information allows the merging parties to:

- Use the due diligence period and time between signing and closing more productively so that they can begin integration earlier and rely on data rather than assumptions.
- Evaluate clearance strategies based on an analysis of both companies' asset performance and valuation, including deciding which assets to divest to remedy an antitrust concern.

Additionally, the buyer can get a head start, often of several months, on analyzing the financial impact of the transaction, including deal synergies and efficiencies and preparing integration plans.

However, clean teams should be used sparingly because their implementation:

- Can be expensive.
- Places a significant burden on the merging parties, including by preventing members of the clean team from returning to certain roles if the transaction does not close.
- Takes a significant amount of time to administer.

TIMING OF ENTERING INTO A CTA

Merging parties that decide to enter into a CTA should do so after executing a confidentiality agreement, but before receiving any required approval under the Hart-Scott-Rodino (HSR) Act.

The antitrust agencies have authority to review all transactions, not just those requiring HSR approval. In non-HSR-reportable transactions, merging parties should enter into a CTA where there potentially are significant antitrust issues that make antitrust review likely.

COVERED INFORMATION

Clean teams handle competitively sensitive information, such as information about:

- Sales strategies.
- Pricing, including pricing plans.
- Sales or promotional plans.
- Strategic plans.
- Customers and suppliers (including details of contracts with customers and suppliers, such as prices, volumes, and terms).
- Product performance.
- Future product plans, including research and development projects.
- Plant and equipment or facility performance.

The clean team may prepare reports for the merging parties' boards or management that aggregate or summarize the information in a format that masks the sensitive details.

Some CTAs define competitively sensitive information, while others state that it includes information either merging party deems to be competitively sensitive or confidential, such as proprietary, strategic, financial, pricing, production, and operational information.

The CTA may require that clean team material be marked by the disclosing party as "clean team material." The merging parties (or their antitrust counsel) generally will agree about how material is classified. However, it is possible that, for example, the target may attempt to keep certain information out of the hands of the buyer's key decision makers by liberally classifying material as clean team material.

Members of the clean team generally are prohibited from disseminating clean team materials to anyone other than clean team members. Reports prepared by clean team members that aggregate or summarize competitively sensitive information, such as those on customer contract pricing or

profitability, are generally reviewed by antitrust counsel to ensure they do not reveal competitively sensitive information (meaning, they are clean) before being distributed more broadly.

The CTA should specify that the clean team members can only use the information for the stated purpose (generally due diligence or integration planning) and that they cannot share the information further within their company. The CTA generally provides that all confidential information is either returned or destroyed if the transaction does not close.

ASSEMBLING THE CLEAN TEAM

The clean team is generally composed of members that are familiar with data management and the relevant industry.

Members may include:

- Internal employees of the merging parties that are:
 - not involved in the competing products' day-to-day operations (for example, pricing, marketing, sales, or production); or
 - removed from day-to-day responsibilities while serving on the clean team and for a sufficient period of time for the exchanged information to become stale should the transaction not close (usually six months to two years).
- Outside consultants, such as a law firm, an accounting firm, or an economic consulting firm.

(See Beau W. Buffier, Jessica K. Delbaum, and Matthew Jennejohn, *Mergers*, Antitrust Advisor, § 4.90 (West 5th ed. 2016).)

A buyer is generally restricted from placing key current employees responsible for the products or services at issue on the clean team. Therefore, the buyer may instead choose:

- Employees working in a financial capacity.
- Recently retired employees.

Alternatively, the buyer may use internal employees but agree to assign them to new jobs if the transaction does not close to prevent them from using competitively sensitive information gained through the clean team to the competitor's disadvantage.

In some transactions, it may be preferable to use outside consultants rather than either merging party's internal employees to eliminate the actual or perceived risk of an anticompetitive information exchange. Outside consultants may be useful because they:

- Can freely gather and examine sensitive or competitive data on costs, customers, or employees from both merging parties that otherwise cannot be shared.
- Have experience analyzing the applicable information, evaluating business operations, and developing detailed integration plans.

ROLE OF ANTITRUST COUNSEL

The clean team often works at the request of, or in connection with, legal counsel. Each merging party should engage its own antitrust counsel. Antitrust counsel should:

- Consider the client's goals in using the clean team, including:
 - what reports should be prepared; and
 - how the reports should be prepared, including data aggregation and analytical methodologies and assumptions.
- Determine and negotiate:
 - the clean team members, whether outside consultants, internal employees, or both;
 - the party paying the costs of outside consultants working on the clean team;
 - the definition of competitively sensitive information;
 - the expected level of disclosure by each merging party, such as whether they intend to provide projections for the future or only historic data or information;

- how clean team materials are to be treated if the transaction does not close;
 - how clean team members are to be treated if the transaction does not close;
 - the clean team's governance structure, typically a committee of executives from each merging party; and
 - how disputes should be resolved by the governance committee.
- Ensure that each merging party has executed a confidentiality agreement setting out the levels of disclosure and how data and information are handled.
 - Discuss whether specific information has been correctly designated as clean team material.
 - Maintain a record of shared information and review the clean team reports to ensure that they meet appropriate criteria for distribution to non-clean team members.

ANCILLARY AGREEMENTS

In addition to signing a confidentiality agreement, merging parties executing a CTA should also execute a joint defense agreement (JDA). A JDA allows counsel to merging parties to share confidential information under the common interest and joint defense privilege without waiving the attorney-client privilege, the work product privilege, or other privileges.



Search [Joint Defense Agreement for Merger Investigations](#) for a model JDA, with explanatory notes and drafting tips.

The merger agreement sometimes states that a CTA is in place and specifies that any information that the target believes in good faith is competitively sensitive information is to be shared under the terms of the CTA.

CLEAN TEAM AGREEMENT

This Clean Team Agreement (the **"Agreement"**) is entered into by and between [BUYER NAME] and its affiliates, and [SELLER NAME] (collectively the **"Parties"**) on [DATE].

WHEREAS, the Parties are considering a potential transaction involving the combination of their businesses;

WHEREAS, the Parties wish to ensure the proper treatment of certain competitively sensitive [SELLER NAME] information that may be exchanged for purposes of [BUYER NAME]'s evaluation of this potential transaction;

WHEREAS, the Parties wish to ensure the proper treatment of certain competitively sensitive information that may be exchanged for the purpose[s] of [[analyzing synergies and integration planning] [and/or] [conducting due diligence]] with respect to this potential transaction;

DRAFTING NOTE

INFORMATION EXCHANGED FOR DUE DILIGENCE AND INTEGRATION PLANNING

A CTA helps protect the parties' exchange of competitively sensitive information shared for specific legitimate purposes, such as to:

- Complete due diligence.
- Evaluate and value the proposed transaction, including whether it is likely to lead to:

- synergies, meaning how the companies are likely to perform better together than apart; and
- efficiencies or cost savings.
- Plan for integration, to ensure a smooth transition and to achieve synergies quickly on closing.

WHEREAS, the Parties have agreed to limit the access to and use of such competitively sensitive information by [BUYER NAME] employees, affiliates, and agents for this reason; and

WHEREAS, the terms of the confidentiality agreement between [BUYER NAME] and [SELLER NAME], dated as of [DATE] (the "**Confidentiality Agreement**"), will remain in full force and effect, and this Agreement supplements the Confidentiality Agreement;

NOW, THEREFORE, the Parties hereto agree as follows:

1. The following documents and data, as they relate to [BUSINESS UNIT], will be deemed to be and defined as "**Competitively Sensitive Information**" for purposes of this Agreement:

- a. Detailed information regarding pricing, including pricing strategy;
- b. Details of sales strategies or pricing plans, sales or promotional plans, strategic plans, future product plans, and other information concerning future strategies; and
- c. Other documents and data determined by [SELLER NAME] to be competitively sensitive, provided that the nature of such documents shall be identified to the Clean Team (as defined herein) promptly after such documents or data are provided to the other party.

2. [BUYER NAME] represents and warrants to [SELLER NAME] that the Competitively Sensitive Information identified in Section 1 is necessary for its evaluation of this potential transaction between [BUYER NAME] and [SELLER NAME].

3. Competitively Sensitive Information shall be disclosed by [SELLER NAME] only to individuals who (x) are employed by one of the entities named in (a) or (b) below, (y) sign an acknowledgement in the form of Exhibit A attached hereto, and (z) are either named in Exhibit B attached hereto or approved in writing by [SELLER NAME] upon request by [BUYER NAME] (collectively, the "**Clean Team**"); provided, however, that nothing contained in this Agreement in any way shall obligate, or be interpreted to obligate, [SELLER NAME] to provide any documents or data to the Clean Team or [BUYER NAME].

- a. [NAME OF OUTSIDE LAW FIRM].
- b. [NAME OF INVESTMENT BANKERS/NAME OF CONSULTANTS].

[SELLER NAME] shall also have the sole right to determine the scope of documents to disclose to the Clean Team in response to requests by [BUYER NAME] to review Competitively Sensitive Information for the purpose of evaluating this potential transaction.

[BUYER NAME] represents and warrants to [SELLER NAME] that none of the individuals who will participate on the Clean Team currently have, or are reasonably likely to have [in the foreseeable future/for a period of [twelve (12) months/OTHER TIME PERIOD] following the date this potential transaction is terminated], direct pricing, sales, or marketing responsibilities for [BUYER NAME] or any competitor of [SELLER NAME].

4. [BUYER NAME] agrees and agrees to cause each member of the Clean Team: (a) to maintain the confidentiality of Competitively Sensitive Information; (b) not to disclose Competitively Sensitive Information to any persons other than the Clean Team; (c) to return or destroy all Competitively Sensitive Information promptly upon request of [SELLER NAME] (with such destruction to be certified in writing by the authorized officer of [BUYER NAME] supervising such destruction), in accordance with Section [SECTION NUMBER] of the Confidentiality Agreement; and (d) not to use Competitively Sensitive Information for purposes other than evaluating this potential transaction, in accordance with Section [SECTION NUMBER] of the Confidentiality Agreement.

5. [BUYER NAME] shall cause [the Clean Team/BUYER'S LAW FIRM] to provide [SELLER NAME]'s outside counsel, [SELLER'S LAW FIRM], on an outside-counsel-only basis, with an advance copy of each written report generated by the Clean Team with respect to the Clean Team's review of Competitively Sensitive Information, provided that the Clean Team may redact from such advance copy any conclusions reached by the Clean Team so long as such redacted information does not include any Competitively Sensitive Information. [SELLER'S LAW FIRM] must approve the advance copy of each written report or provide a list of specific objections in writing by [REASONABLE DEADLINE] if the advance copy is sent to it between [TIME FRAME] [Eastern Standard Time/TIMEZONE] of [the same day/the previous day], based on electronic mail time stamps. [SELLER'S LAW FIRM] must approve the advance copy of each written report or provide a list of specific objections in writing by [TIME FRAME] if the advance copy is sent to it [between 12:01 p.m. and 11:59 p.m. of the preceding calendar day/TIME FRAME], based on electronic mail time stamps. Such written report may be furnished to [BUYER NAME] if, and only if, such written report is approved in writing in advance by [SELLER'S LAW FIRM] and no changes are made in such written report after it is approved other than the restoration of conclusions redacted in accordance with this Agreement. If [SELLER'S LAW FIRM] does not approve the advance copy of such written report or provide a list of specific objections in the relevant time period denoted, the written report shall be deemed approved and may be furnished to [BUYER NAME].

DRAFTING NOTE

CLEAN TEAM REPORTS

Counsel should customize the bracketed language to specify a reasonable deadline for the seller's law firm to approve the advance copy of any written report that is received

within a specified time frame. For example, counsel may specify that an advance copy received the previous day before 11:59 p.m. is to be approved by 6:00 p.m. Eastern Standard Time the following day.

6. [BUYER NAME] agrees to be responsible and liable for any breach of this Agreement by any member of the Clean Team.

[Signatures]

[Exhibit A: ACKNOWLEDGMENT]

[Exhibit B: Approved Members of the Clean Team]



Search [Clean Team Agreement](#) for the complete, online version of this resource, which includes relevant exhibits to the CTA.