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ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE**

**ANTITRUST MODERNIZATION COMMISSION
HEARINGS ON MERGER PROCESS**

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Introduction

The Antitrust Division is pleased to participate in the Commission's hearings on merger enforcement. In particular, the Commission has asked the Division to address the Hart-Scott-Rodino ("HSR") premerger review process.

Over the years we have developed a sound framework for determining the competitive effects of mergers. That framework is reflected in our Horizontal Merger Guidelines,¹ which set out a clear methodology for defining the parameters of the relevant market and provide for analysis of the potential anticompetitive effects of a merger based on both its likely unilateral effects and the possibility of anticompetitive coordinated effects.

In trying to assess the effectiveness of merger law and enforcement policy in ensuring competitive markets, examining the mergers that we challenge – and those that we do not – tells only part of the story. Critically important benefits are attained through deterrence of anticompetitive mergers that never see the light of day. Enforcement actions and policy that are both economically sound and clearly articulated doubtlessly stop firms from seriously considering many anticompetitive mergers, and empower attorneys advising firms to counsel against moving forward

¹ U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (with Apr. 8, 1997 revisions to Section 4 on efficiencies), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter Merger Guidelines].

with many others.

Efficiency and Efficacy in the HSR Process

The HSR process has proven to be an effective means of protecting consumers from anticompetitive mergers. The vast majority of mergers reviewed under HSR are able to proceed with minimal delay. A few mergers, however, require extensive review, and economically-sophisticated and fact-sensitive investigations can certainly be time-consuming, costly, and complex for all parties involved. The Division understands and shares the interest of businesses and antitrust counsel in minimizing unnecessary burden, delay, and expense in merger review and enforcement. In recent years, the Division has strived to make the premerger review process as efficient and focused as possible. We have made progress in reducing the costs of HSR review and, with due cooperation from merging firms and their counsel, still more progress can be made.

A. The Proven Value of the HSR Process

Before delving into an examination of the current HSR process, it is important to step back and recall what the Hart-Scott-Rodino Antitrust Improvements Act was intended to do and consider what it has accomplished.² We should not forget that before HSR, relatively few mergers were challenged at the

² A summary can be found in William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825 (1997).

premerger stage. The FTC and the Division had difficulty detecting and challenging anticompetitive mergers before they occurred, as this required learning about a proposed merger, gathering enough information to evaluate its effect on competition, and preparing for an injunctive action. In the absence of preliminary relief, merger litigation was lengthy, and with the need to unscramble the eggs, remedies were often both late in coming and ineffective. In the few merger cases the Division brings to challenge closed transactions, delays often last years. Today, in contrast, almost all FTC and Division merger challenges occur at the premerger stage, when effective injunctive relief is available. Premerger review has protected consumers from anticompetitive mergers.

The HSR process also provides benefits to businesses involved in mergers. HSR imposes a tight schedule for the Agencies' premerger review – no more than 30 days unless second requests are issued. Moreover, the parties get a high degree of certainty at the end of the HSR process as to whether they will face an enforcement challenge.³

³ Although a decision not to challenge an HSR-reported transaction prior to consummation does not preclude the Agencies from subsequently challenging it (15 U.S.C. 18a(i)(1)), such challenges have been extremely rare.

B. *Costs of the HSR Process Are Borne Overwhelmingly by Those Few Transactions that Raise Significant Competitive Concerns*

Examining the data on HSR review⁴ shows that the vast majority of transactions proceed with antitrust review imposing minimal burden (nothing beyond filing the initial notification) and minimal delay (30 days or less).

Premerger review is required only for acquisitions of fairly substantial size. Since February 2001, when legislation took effect increasing the HSR size-of-transaction threshold from \$15 million to \$50 million (with annual increases beginning in 2005, reflecting changes in GNP), HSR filings have decreased substantially, reflecting both the increase in thresholds in the legislation and an overall slowing of the merger pace in the economy. For example, in fiscal years 2004 and 2005, there were only 1,454 and 1,690 reportable transactions, respectively, as compared to 4,926 in fiscal year 2000 (the last full fiscal year under the \$15 million threshold). The Act's coverage has also been appropriately narrowed by Agency rulemaking efforts that have eliminated reporting and waiting requirements for classes of transactions not likely to raise competitive issues. For example, the recent rulemaking dealing with unincorporated entities – which the

⁴ Most of the referenced data are contained in the Annual Reports to Congress on HSR, covering fiscal years 2002, 2003, and 2004, *available at* <http://www.ftc.gov/reports/hsr05/050810hsrrpt.pdf>; <http://www.ftc.gov/os/2004/09/040903hsrrpt03.pdf>; <http://www.ftc.gov/os/2003/08/hsrannualreport.pdf>.

ABA Antitrust Section commented was “grounded in improved logic with due regard for administrability” – expanded various exemptions. The recent expansion of one of those exemptions, the “intra-person” exemption, would have exempted 248 transactions that were reported between 1997 and 2002.⁵

Even among the relatively large transactions for which premerger reporting is required, the vast majority require only the initial premerger notification form, which elicits objective information within the possession of the filing party and is neither particularly costly nor burdensome to prepare.⁶ Indeed, 2,979 of the 3,655 transactions reported during fiscal years 2002-2004 proceeded without the FTC or the Division opening an investigation, meaning that 82 percent of the time, no information other than what was in the filings was sought from the parties. Moreover, in transactions for which no investigation is opened, the Agencies routinely grant requests for early termination of the waiting period,⁷ allowing some

⁵ See 69 Fed. Reg. 18686, 18689 n.16 (April 8, 2004).

⁶ See International Competition Policy Advisory Committee, Final Report 117 (2000) (U.S. notification form requires “only limited information.” While a company with multiple product lines, subsidiaries, or affiliates must expend a fair amount of effort when it completes its first HSR form, “those companies that frequently make acquisitions may choose to keep the nontransaction-specific portions of their HSR form current so that they are able to complete a filing for a new transaction without too much additional effort.”).

⁷ See Formal Interpretation No. 13, available at <http://www.ftc.gov/bc/hsr/frmlintrps/fi13.htm> (if a party to a transaction requests early termination of the waiting period and if the Agencies have decided not to take any enforcement action during the waiting period, the Agencies will normally grant the request).

two thirds of HSR-reported transactions to proceed in fewer than 30 days, often within the first 10 days of the waiting period. In FY 2004, for example, the Agencies granted approximately 76 percent of requests for early termination, with nearly 60 percent occurring within the first 10 days of the waiting period.

Even among those limited number of transactions where the FTC or the Division opens an investigation, there is a high probability that the investigation will be concluded without the issuance of a second request. In fiscal year 2004, for example, only 35 of 236 transactions in which the Agencies commenced an investigation (less than 15 percent) resulted in second requests. Overall, with only a small percentage of HSR transactions resulting in investigations at all, and with second requests being issued in only a small percentage of those investigations, only a tiny percentage of HSR transactions result in second requests – 2.5 percent in fiscal year 2004. Thus, fully 97.5 percent of HSR reported transactions were able to proceed with no second request. Even when second requests are issued, a significant number of investigations are closed before full compliance is made. For example, of the 12 FY 2005 DOJ second request investigations closed thus far, eight of them involved only partial compliance.

C. The Agencies Have Taken Recent Steps to Reduce the Costs and Burdens Inherent in Second Request Investigations, but Achieving Cost Reductions Depends Greatly on Cooperation of the Parties

1. The Division's 2001 Merger Review Process Initiative

In October 2001, the Antitrust Division announced its Merger Review Process Initiative. The Initiative was designed to reduce the burdens of merger review on both the merging parties and the Division.

First, Division staff is instructed to use the initial 15/30 day HSR waiting period aggressively to close matters for which further investigation is not necessary. In an effort to eliminate unnecessary second requests, staff asks for limited voluntary information and documents during the initial waiting period. Second, staff was asked to use its knowledge to tailor second requests “as narrowly” as possible. The sharply focused and narrow investigative models were linked with “appropriate timing and procedural protections for the Division in the event of a challenge to the transaction.” Third, the post-second request issuance period was to be marked by regular consultation with the parties and negotiated scheduling agreements.

The Division believes that its efforts to better use the initial waiting period is paying real dividends. In the three fiscal years (1999-2001) before the Initiative was

announced, 37 percent of our preliminary investigations led to issuance of a second request. In the three subsequent fiscal years (2002-2004), that rate has fallen to 22 percent, an overall drop of approximately 40 percent. Early decisions on mergers that we can determine are not likely to harm competition mean not only that the merging parties are spared the expense and delay of second requests, but also that the Division is able to allocate resources to matters of greater competitive concern.

Some, but by no means all, of the decrease in the percentage of investigations that result in a second request can also be attributed to the technique of withdrawing the initial HSR filing and refileing it. This restarts the clock and gives us another initial waiting period for review before we need to decide whether to issue a second request. We understand and respect that the decision to withdraw and refile is solely one for the parties to make. We have supported this option, and refileing without repayment of the filing fee is allowed as long as it takes place within two business days of the withdrawal. In the three fiscal years before the Initiative was announced, parties used this technique in 14 percent of our HSR preliminary investigations. In the subsequent three fiscal years, that figure rose to 19 percent. During those three post-Initiative years, in 60 percent of instances where the filing was withdrawn and refiled, no second request was issued. We can credit at least some of the impetus for greater use of this technique to improved

early dialogue with Division staff, giving counsel better signals for what matters can be successfully resolved without a second request.

The second area of clear improvement is that, once we have issued second requests, we have endeavored to keep channels of communication open and cooperative through regular consultations and negotiated scheduling agreements. Because of these efforts, almost every matter that results in a meeting between the merging parties and the Division's Front Office has a scheduling agreement in place to allow for an orderly review of the merger. And, as important, the meetings are better focused on the critical issues because of the improved dialogue between the staff and the parties.

We have received some extremely positive feedback from both private parties and Division staff, who say that when they have followed the practices set forth in the Initiative and entered into procedural agreements, investigations have been more internally transparent, orderly, efficient, and, ultimately, more effective in identifying the issues that are most relevant to our merger review.

The remaining focus was how to reduce time and dollar costs associated with second requests for both the Division and the parties. If anything, the issue has become more urgent as the proliferation of electronic documents adds to the costs of compliance and review. In short, a second request issued today identical to one

issued even five years ago now will likely result in a substantially greater production.

The way that the second request issue was addressed in the Merger Process Initiative was to urge staff to draft second requests narrowly and to negotiate fast and limited investigations with counsel. Fast track or “quick look” investigations could take a couple of different courses. First, an investigation could be focused on a specific issue or issues leaving full compliance to instances when the Division’s issues had not been resolved. This was the option used in a large merger recently reviewed by the Division. The parties and the Division agreed that entry was a determinative issue, and second request compliance and the staff’s investigatory efforts were centered on that issue. Once the Division determined that entry appeared to be likely, timely, and sufficient to maintain a competitive market, the matter was closed. In the second option, rather than contemplating possible two-stage production, the government would require only limited production if it had procedural safeguards to obtain full discovery in the event of litigation.

Sharply reducing second request production imposes significant litigation risks on the Division. Defendants in merger cases typically desire quick, but substantial, hearings. To accept sharply reduced investigative discovery, the Merger Process Initiative linked such reductions to “appropriate timing and procedural

protections for the Division in the event of a challenge to the transaction.” This linkage is important, since Congress intended the second request mechanism not only to give the government the information it believes is necessary to evaluate the transaction, but also “to prepare a possible case.”⁸

We had hoped that, in a significant number of investigations, parties would be willing to promise the Division appropriate post-complaint discovery in return for the Division narrowing the second requests to the few issues likely to be determinative in our deciding whether to challenge the transaction. We think this is a “trade” that would benefit both sides.

While merging parties and their counsel ideally want to preserve as many options as possible, including the option to ask the judge for an expedited trial, an unwillingness to pursue this type of trade appears to be counterproductive overall and likely to be counterproductive in individual instances as well. In many deals, there are huge potential savings of money and, maybe more important, potential savings of time for the merging parties, as well as for the Division, if we can agree to narrow the second requests – whether in the initial drafting or in post-issuance negotiations. In fiscal years 1999-2005, the Division issued second requests in 248 merger investigations, but only four merger cases were tried. With so few cases

⁸ H.R. Rep. No. 94-1373, at 6 (1976).

actually litigated, it seems to make sense to reach reasonable accommodations to reduce production burdens in the much broader number of acquisitions facing a second request.

2. The Second Request Internal Appeals Process

In addition to the Division's Merger Process Initiative, it is important to note that a policy we instituted ten years ago⁹ – to provide a formal process for antitrust counsel to appeal an impasse in negotiations with the staff and section chief over the proper scope of a second request or compliance with a second request – remains in effect. Under this policy, counsel may appeal second request issues to a Deputy Assistant Attorney General outside the line of authority for approving any later case recommendation.

The Division's formal appeal process has, to my knowledge, been used on only four occasions. One of the appeals involved the scope of the second request. The question was whether the second request should cover one type of product or two, and that appeal was decided in favor of Division staff.

There have been three appeals on the question of compliance, all coming

⁹ U.S. Dep't of Justice & Federal Trade Comm'n, *Hart-Scott-Rodino Premerger Program Improvements*, March 23, 1995, at 17; FTC News Release, FTC, Justice Announce Amendment to Hart-Scott-Rodino Rules (August 2, 1995), *available at* <http://www.ftc.gov/opa/1995/08/scndapl.htm>. The procedure was revised in June 2001, and the current version is available at <http://www.usdoj.gov/atr/public/8430.htm>. The 2000 amendments to the HSR Act incorporated a requirement for such a review procedure. 15 U.S.C. § 18a(e)(1)(B)(i).

before the 2000 HSR legislation. One appeal was granted, one denied, and the third can be viewed a split decision. The appeal granted involved a party's claim that one of its products was not covered by the second request because descriptions in its product literature were inaccurate. The appeal denied involved a party's claim that it need not produce documents pertaining to a business that it had stated its intention to divest. The "split decision" concerned whether certain back-up computer tapes had to be produced; this appeal was granted on condition that the party retain the tapes and, in the event the Division decided to challenge the transaction, produce the tapes promptly.

I suspect that the paucity of internal appeals is due to a combination of factors, including the reasonableness of staff and good faith by the parties. Nevertheless, parties should be aware of the appeals option and invoke it if they remain concerned after their good faith second request negotiations with the staff.

3. The Importance of Parties' Cooperation in Reducing Merger Review Costs

The cooperation of the merging parties and their counsel throughout the merger review process is crucial in limiting the burden and costs of that review. In the early stages, providing timely and complete responses to voluntary information requests and making company officials and economic experts available can help both the process and the parties. For example, in a 2003 investigation of a large

merger, our staff aggressively used the initial waiting period, and the parties promptly responded to our requests for voluntary information and made their expert economists available for a timely and frank economist-to-economist dialogue. We were able to avoid wasteful and unnecessary activity in thoroughly evaluating some potentially significant competitive concerns, and to conclude quickly, without the need to issue a second request, that further investigation was not warranted.

In the second request stage, if parties agree to a staged production that focuses on specific issues, second requests can often be narrowed in practice even if the second request was not specifically narrowed prior to its issuance. We frequently advise counsel informally as to which parts of the second requests are most likely to be determinative. If the parties are willing, they can respond to those parts first, and wait to see if it will be necessary to respond to the other parts. This may enable the merger to go forward without the Division obtaining a complete response to the second request. In any event, all second requests invite counsel to discuss with staff any modifications that could alleviate the compliance burdens while producing the necessary information. Moreover, as I have mentioned, counsel's willingness to enter into agreements regarding post-complaint discovery could result in significantly narrower second requests. Finally, the parties'

willingness to enter into scheduling agreements allows for a more orderly review and makes the entire merger review process more efficient and effective.

Beyond these specific cooperative actions that parties can take to reduce the costs of premerger review, I can not emphasize too strongly the benefits that flow from honesty and due diligence throughout the review process. The integrity and efficiency of the process are undermined if the parties or their counsel make representations about what data exist without reasonably diligent efforts to confirm their accuracy, if they ignore a carefully drafted and limited second request and produce literally millions of pages of nonresponsive documents, if they use non-obvious “definitions” of common terms in construing requests, or if they make unilateral and undisclosed decisions about what the Division “really” wants.

Further, merging parties – who often urge us to eschew presumptions and engage in ever-more-sophisticated analysis – need to recall, even as we take steps to reduce significantly the number of documents produced to the Division, the need for access to data to conduct empirical studies will likely increase.¹⁰ Courts increasingly expect some level of empirical analysis in merger cases. Furthermore, consumer welfare is enhanced when we are able to reach correct decisions, and our ability to reach the correct decision may hinge on our ability to get the data we need

¹⁰ See Thomas O. Barnett, *Substantial Lessening of Competition – The Section 7 Standard*, 2005 Colum. Bus. L. Rev. 293, 303 (2005).

and the time to analyze it.

4. Continuing Efforts on Process Improvements

As part of our efforts to improve the efficiency of the merger review process, we are conducting a focused historical examination of merger challenge recommendations to determine which specifications in the second requests provided information that ultimately proved important in the decision to challenge a transaction. Even more importantly, we are asking how deep in the organization did the documents come from that were used in recommending an enforcement action. Did they come from senior managers? How much do we “give up” if we cut back the number of custodians whose files are searched? We believe that this will help us identify useful modifications to the Merger Process Initiative, possibly eliminate some second request specifications, and provide a basis for staff to enter into useful negotiations on second requests.

We are committed to continuing to look for ways to make the HSR process more efficient and more focused. We share the interest expressed by businesses and antitrust practitioners in reducing the burden, delay, and expense of the HSR process. The delays and costs of large second request productions affect the Division as well as the parties. Accomplishing a reduction will be easier if they join in our efforts. Over the years, we have maintained – and we will continue to

maintain – an open dialog with the antitrust bar to solicit further ideas for consideration.

Conclusion

Anticompetitive mergers lead to fewer choices, less innovation, and increased prices for American consumers. However, mergers can also generate procompetitive benefits, such as lower costs or increased innovation. Our task as antitrust enforcers is to cull out and interdict from the universe of mergers those particular ones that are likely to substantially lessen competition, while allowing all other mergers to proceed with as little burden and delay as possible. I think we are doing a good job of accomplishing that task, and we are continuously striving to do even better.

We appreciate being a part of the Commission's exploration of this important area of federal antitrust enforcement.