



## MEMORANDUM

From: AMC Staff<sup>†</sup>

To: Commissioners

Date: June 14, 2006

Re: Merger Enforcement—HSR Pre-Merger Review Process Discussion Memorandum

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The Commission adopted the following question for study: “Should the Hart-Scott-Rodino merger review process be revised to address issues relating to the number and type of transactions requiring pre-merger notification, the length of investigations, the burden imposed by ‘Second Requests’ and civil investigative demands on the merging companies and third parties, and transparency of the enforcement agencies’ decisional process?”<sup>1</sup> This issue was recommended for study by, among others, the American Bar Association Antitrust Section, the U.S. Chamber of Commerce, and the National Association of Manufacturers.<sup>2</sup>

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<sup>†</sup> This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

<sup>1</sup> See Memorandum Re: Mergers Issues Recommended for Study, at 2, 7-9 (Dec. 21, 2004); January 13, 2005, Meeting Trans. at 76.

<sup>2</sup> Report of the Section of Antitrust Law of the American Bar Association (“ABA”) to the Antitrust Modernization Commission, at 2, 12-13 (Sept. 30, 2004); Comments of the Business Roundtable Regarding Commission Issues for Study at 2 (Sept. 29, 2004); Chamber of Commerce of the United States of America, Re: Suggestions from the U.S. Chamber of Commerce Regarding Antitrust Issues that Are Appropriate for Commission Study, at 2 (Sept. 30, 2004); Edward D. Cavanagh, Re: Proposed Agenda Items for AMC, at 2 (Oct. 1, 2004); National Association of Manufacturers, Re: Suggestions of Issues for Commission Study From the National Association of Manufacturers, at 2 (Oct. 14, 2004).

The Commission sought comment on the following specific questions.

1. Several commenters in the first phase of the Commission's work advised that the Commission should study the burden involved in responding to HSR "Second Request" merger investigations. The Commission invites companies and/or their counsel who have experienced Second Request investigations to comment on the burden involved, providing specific information on costs by type (*e.g.*, attorneys' fees, economist and other expert fees, document and electronic information production costs, employee time, and costs associated with delay of closing) and length of the investigation.
2. Should changes be made to the HSR pre-merger notification system, *e.g.*, with respect to HSR reporting thresholds or the information required to be included in the initial filing?
3. Should any changes be made to the HSR "Second Request" process currently used by the FTC and DOJ? Please address both the possibility of broad systemic change and of more limited changes within the existing system, being as specific as possible and considering, for example (and without limitation): (i) whether the U.S. should adopt processes similar to those used by other jurisdictions, such as those employed by the European Union (*e.g.*, the Form CO) or Canada (*e.g.*, long and short-form reporting); (ii) the extent to which various types of information sought in a typical Second Request contribute to merger assessment; (iii) whether and how the burden associated with documents and data requests could be reduced without materially impeding the federal agencies' ability to execute their enforcement responsibilities; (iv) how merging companies can expedite the HSR process.<sup>3</sup>

The Commission held a hearing on this topic on November 17, 2005, consisting of one panel. The witnesses were: Wayne Dale Collins, partner at Shearman & Sterling LLP (formerly Deputy Assistant Attorney General for Antitrust under William F. Baxter and Special Assistant to Vice President George Bush); Susan A. Creighton, then director of the FTC Bureau of Competition (now partner at Wilson Sonsini Goodrich & Rosati); J. Robert Kramer, II, Director of Operations/Director of Civil Enforcement for the DOJ Antitrust Division; David P. Wales, Jr., then partner at Cadwalader, Wickersham & Taft, LLP (now Deputy Director in the FTC Bureau

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<sup>3</sup> 70 Fed. Reg. 28,902, 28,906 (May 19, 2005).

of Competition)<sup>4</sup>; and Mark D. Whitener, Senior Counsel, Competition Law and Policy, General Electric Company (formerly Deputy Director in the FTC Bureau of Competition).

In addition, FTC Chairman Deborah Platt Majoras and Assistant Attorney General Thomas O. Barnett addressed the issue of the Hart-Scott-Rodino premerger review process when they testified before the AMC on March 21, 2006.<sup>5</sup>

The Commission received comments from six entities relevant to these issues.<sup>6</sup>

## **I. Background**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”)<sup>7</sup> was enacted in 1976 to create “a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to the consummation, and to improve procedures to facilitate enjoining illegal mergers before they were consummated.”<sup>8</sup> The law responded to concerns that, without

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<sup>4</sup> Mr. Wales testified for Stephen C. Sunshine, partner at Cadwalader, Wickersham & Taft, LLP, who was unavailable the day of the hearing. Mr. Wales and Mr. Sunshine jointly prepared their written testimony.

<sup>5</sup> Unless otherwise noted, all citations to “Trans.” are to the transcript of the November 17, 2005, Merger Enforcement hearing.

<sup>6</sup> American Bar Association, Antitrust Section, Comments Regarding the Hart-Scott-Rodino Second Request Process (Dec. 7, 2005) (“ABA Comments re HSR Process”); Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission (Nov. 4, 2005) (“Business Roundtable Comments”); Comments of the Chamber of Commerce of the United States of America (Nov. 8, 2005) (“U.S. Chamber of Commerce Comments”); International Bar Association, Re: Comments Regarding Merger Enforcement (Oct. 26, 2005) (“IBA Comments”); International Chamber of Comments, Comments on Selected Issues for Study by the US Antitrust Modernization Commission (Sept. 1, 2005) (“ICC Comments”); Letter from Janet McDavid, Hogan & Hartson LLP; Phillip Proger, Jones Day; Michael Reynolds, Allen & Overy LLP; J. William Rowley QC, McMillan Binch Mendelsohn LLP; & Neil Campbell, McMillan Binch Mendelsohn LLP, on behalf of the Merger Streamlining Group, to Deborah A. Garza, Chair, Antitrust Modernization Commission, Re: Mergers—The Second Request Process (Feb. 3, 2006) (“Merger Streamlining Group Comments”).

<sup>7</sup> 15 U.S.C. § 18a (as amended).

<sup>8</sup> S. Rep. No. 803, 94th Cong., 2d Sess., at 61 (1976) (“S. Rep. No. 803”).

such a process, merger enforcement was ineffective because post-consummation, “it is often too late to . . . [obtain] meaningful relief even if a violation is established” (*i.e.*, unscrambling the eggs is not feasible).<sup>9</sup>

As commentators have subsequently observed, the agencies had little opportunity to obtain information about mergers before they occurred and thus could seldom challenge them prior to consummation.<sup>10</sup> Post-acquisition litigation was lengthy, taking an average of five to six years.<sup>11</sup> As a result, any relief that was obtained was usually inadequate.<sup>12</sup> The “tortured litigation history” of *United States v. El Paso Natural Gas Co.* (17 years of post-acquisition litigation before relief was achieved) was the “poster child” for the legislation.<sup>13</sup>

Congress considered alternative approaches at the time. Most notable was a more drastic option of imposing an automatic stay, giving the agencies “broad discretion to obtain preliminary relief barring consummation of mergers pending complete discovery and a full trial on the merits.”<sup>14</sup> Congress did not choose this route because “the prospect of protracted delays of many months . . . might effectively ‘kill’ most mergers.”<sup>15</sup>

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<sup>9</sup> *Id.* (“[A]fter consummation occurs, many large mergers become almost unchallengeable”); *see also* H.R. Rep. No. 1373, 94th Cong., 2d Sess., at 8 (1976) (The absence of pre-notification requirements “meant that many large and illegal mergers had successfully consummated in recent years, before the government had any realistic chance to challenge them”); S. Rep. No. 803, at 61-65.

<sup>10</sup> William J. Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott Rodino Act*, 65 Antitrust L.J. 825, 828-29 (1997) (“Baer, *Reflections*”).

<sup>11</sup> *Id.* at 829-30 (citing Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43, 46-52 (1969)).

<sup>12</sup> *Id.* at 830-31.

<sup>13</sup> *Id.* at 826-27 (citing *El Paso*, 376 U.S. 651 (1964)).

<sup>14</sup> William Blumenthal, *Introductory Note, Symposium, Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 Antitrust L.J. 813, 814 (1997).

<sup>15</sup> 122 Cong. Rec. H10,293 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino).

The legislative history suggests that the reach of the HSR Act and the extent of the premerger investigations under it were intended to be limited in scope. Sponsors and proponents emphasized that the bill was directed toward “the very largest” or “[g]iant corporations.”<sup>16</sup> Indeed, Representative Rodino repeatedly indicated that the HSR Act “will reach only about the largest 150 mergers a year.”<sup>17</sup> The reach of the Act was limited in recognition that, if its requirements “were imposed on every merger, the resulting added reporting burdens might more than offset” the enforcement benefits.<sup>18</sup> In fact, in the early years of the Act, a relatively smaller number of transactions were reported to the agencies.<sup>19</sup>

The burdens imposed by the process were expected not to be large. Representative Rodino reported that “[t]he House conferees contemplate that, in most cases, the government will be requesting the very data that is already available to the merging parties and has already been assembled and analyzed by them.”<sup>20</sup> The legislation expressly intended to make “lengthy delays and extended searches . . . rare.”<sup>21</sup> At the time, however, the agencies placed much greater reliance on structural presumptions than they do today, making many mergers

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<sup>16</sup> H.R. Rep. No. 94-1373, at 11; 121 Cong. Rec. 8143 (1975) (Sen. Hart).

<sup>17</sup> 122 Cong. Rec. 25,052 (1976); *see also* H.R. Rep. No. 94-1373, at 11.

<sup>18</sup> H.R. Rep. No. 94-1373, at 11.

<sup>19</sup> *See* Sixth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, at app. A (July 26, 1983) (noting report of 868 transactions in 1979, 824 transactions in 1980, and 1083 transactions in 1981).

<sup>20</sup> 122 Cong. Rec. 30,876-77 (daily ed. Sept. 16, 1976).

<sup>21</sup> *Id.*

presumptively unlawful.<sup>22</sup> (By comparison, the agencies today focus much more closely on the likely competitive effects of each transaction.<sup>23</sup>)

As originally enacted, the Act required a filing if two tests were met (1) a “size of persons” test requiring that one person have at least \$100 million in annual net sales or total assets and the other have at least \$10 million; (2) a “size of transaction” test generally covering transactions where the value of stock or assets was \$15 million.<sup>24</sup> For transactions meeting both tests, the parties to the transaction were required to file a pre-merger notification report and observe a 30-day waiting period before consummating the transaction (unless the period was earlier terminated by the agency). The investigating agency could extend the initial 30-day waiting period by serving the parties with a Request for Additional Information and Documentary Materials (commonly called a “second request”) to investigate further the transaction. If a second request issued, the parties were required to continue to refrain from consummating their transaction until 20 days after they “substantially complied” with the request, with substantial compliance effectively being determined by the agency.<sup>25</sup>

This basic structure remains today, although, as noted below, the filing thresholds have been increased. In addition, beginning in 1989, the acquiring party has been required to pay a

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<sup>22</sup> Deborah Platt Majoras, Reforms to the Merger Review Process, at 6 (Feb. 16, 2006) (“FTC 2006 Merger Process Reforms”), *available at* [www.ftc.gov/os/2006/02/mergerreviewprocess.pdf](http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf).

<sup>23</sup> *Id.* (“[A]n unintended collateral effect has been to increase the burden on the parties and the agencies.”)

<sup>24</sup> The Act included some alternative ways this test might be met that were not retained in the amendments discussed *infra*.

<sup>25</sup> ABA Section of Antitrust Law, *The Merger Review Process: A Step-By-Step Guide to Federal Merger Review*, 8-10, 3d ed. (2006) (“ABA, *The Merger Review Process*”). The requirement that the parties substantially comply with the request before the waiting period could run was designed “[t]o speed the process and assure prompt compliance and cooperation.” S. Rep. No. 803, at 69.

fee with its filing, initially set at \$20,000.<sup>26</sup> Today, the amount of the fee is determined by the value of the transaction; the maximum fee is \$280,000.<sup>27</sup> Fees are used to (partially) fund DOJ and FTC enforcement.

A significant number of HSR filings are made each year. In 2000, the number of HSR filings reached a high of 9,941 (covering 4926 transactions). The number of filings subsequently fell, largely due to an increase in the statutory thresholds effected by the 2000 HSR Amendments (described below), along with a decrease in transactional activity.<sup>28</sup> In FY 2004, filings totaled 2,866 (involving 1454 transactions),<sup>29</sup> and the agencies issued a total of 35 second requests, or 2.6 percent of the transactions for which a second request could have been granted.<sup>30</sup> Thus, while parties must complete an initial filing for a very large number of transactions, the agencies issue second requests for a relatively small portion of these transactions. Early termination was requested for 1241 transactions in FY 2004, and granted in 943 cases (or 76 percent of the time). HSR fee collections totaled \$199 million in FY 2005.<sup>31</sup>

Many commentators believe that the HSR pre-notification program has been very successful in achieving its primary objectives of allowing “effective premerger review [and] a meaningful opportunity to challenge mergers at the pre-consummation stage . . . .”<sup>32</sup> Other

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<sup>26</sup> See Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations Act for the Fiscal Year Ending September 30, 1990, Section 605, enacted on Nov. 21, 1989; 54 Fed. Reg. 48,726 (Nov. 24, 1989).

<sup>27</sup> The filing fee structure is described at page 9, below.

<sup>28</sup> FTC (Bureau of Competition) and Department of Justice (Antitrust Division), *Fiscal Year 2004 Annual Report to Congress* (2005). AMC staff have requested further data from the agencies regarding the HSR process.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Federal Trade Commission, *Performance and Accountability Report, Fiscal Year 2005*, at 96 (2005).

<sup>32</sup> See, e.g., Baer, *Reflections*, at 834.

commentators, however, have criticized the HSR Act, arguing that it has led to the “replacement of merger control through litigation with a comprehensive scheme of merger regulation.”<sup>33</sup>

In addition, various commentators have argued that compliance with the Act has imposed excessive costs. Those concerns were investigated in depth by the International Competition Policy Advisory Committee (“ICPAC”).<sup>34</sup> ICPAC’s Final Report (issued in 2000) concluded that the HSR Act’s notification thresholds were too low, capturing too many transactions, and recommended increasing the size of transaction test.<sup>35</sup> The ICPAC Report also observed that “[m]any business groups and practitioners . . . perceive the second-request process to be ‘unduly burdensome.’”<sup>36</sup> While ICPAC concluded that the agencies were “generally striking the right balance between avoiding unduly burdensome initial filing requirements and maintaining their ability to identify competitively sensitive transactions,” it found that the second request process could benefit from “adjustment.”<sup>37</sup> It proposed various “best practices” for the agencies to follow.<sup>38</sup>

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<sup>33</sup> Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 *Antitrust L.J.* 865, 865 (1997); see also Testimony of Steven C. Sunshine and David P. Wales Before the Antitrust Modernization Commission, *The Hart-Scott-Rodino Pre-merger Review Process*, at 1 (Nov. 17, 2005) (“Sunshine & Wales Statement”) (“[T]he HSR Act has fundamentally altered the orientation of the antitrust review of proposed mergers away from litigation and towards government regulation.”); William J. Kolasky & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 *Admin. L. Rev.* 889, 890-91 (1997) (generally “the two federal antitrust enforcement agencies . . . with only occasional judicial oversight, now shape antitrust policy, especially with respect to mergers,” most importantly due to the HSR Act).

<sup>34</sup> International Competition Policy Advisory Committee, Antitrust Division, *Final Report to the Attorney General and Assistant Attorney General for Antitrust* (2000) (“ICPAC Report”).

<sup>35</sup> *Id.* at 124-27.

<sup>36</sup> *Id.* at 137 (footnote omitted).

<sup>37</sup> *Id.* at 134.

<sup>38</sup> *Id.* at 141, 139-40.

Congress addressed certain of ICPAC's recommendations when it enacted the 21st Century Acquisition Reform and Improvement Act of 2000 ("2000 HSR Amendments").<sup>39</sup> The 2000 HSR Amendments made substantial changes to the filing requirements. It increased the size-of-transaction threshold, to an aggregate value of \$50 million of the voting securities or assets (or both) of the acquired person.<sup>40</sup> Transactions valued at greater than \$200 million were made reportable without regard to the "size-of-person" test.<sup>41</sup> Transactions valued between \$50 million and \$200 million were generally made reportable if they met the "size of person" test (requiring that one person have at least \$100 million in annual net sales or total assets and the other have at least \$10 million).<sup>42</sup> Moreover, the 2000 HSR Amendments also provided that, starting in FY 2005, these thresholds would be adjusted in step with increases in the Gross Domestic Product, and accordingly the statutory the applicable thresholds have been increased.<sup>43</sup>

Congress also amended the filings fees, establishing a tiered structure based on the value of the transaction: \$45,000 for transactions valued at less than \$100 million; \$125,000 for transactions valued between \$100 million and \$500 million; and \$280,000 for transactions valued at \$500 million or more.<sup>44</sup> These thresholds are also adjusted for changes in Gross

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<sup>39</sup> Section 630 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

<sup>40</sup> ABA, *The Merger Review Process*, at 67.

<sup>41</sup> *Id.* at 68.

<sup>42</sup> *Id.*

<sup>43</sup> 15 U.S.C. § 18a(a)(2) ("as adjusted and published for each fiscal year beginning after September 30, 2004 . . . to reflect the percentage change in the gross national product for such fiscal year"); *see also* 71 Fed. Reg. 2,943-44 (Jan. 18, 2006) (setting new filing thresholds; increasing the statute's \$50 million size of transaction test to \$56.7 million; the \$10 million and \$100 million size of transaction thresholds to \$11.3 million to \$113.4 million; and the from \$200 million to \$226.8 million).

<sup>44</sup> ABA, *The Merger Review Process*, at 100.

National Product, and so have been increased.<sup>45</sup> The new fees were intended to make the change revenue neutral for the agencies.<sup>46</sup> In addition, Congress extended the waiting period following compliance with the second request from 20 to 30 days.<sup>47</sup>

The 2000 HSR Amendments also required the agencies to designate a senior official to hear appeals of second requests.<sup>48</sup> Congress considered, but did not adopt, a requirement for a magistrate to hear appeals of second requests.<sup>49</sup> Finally, the 2000 HSR Amendments directed the agencies to conduct one-time internal reviews of the HSR process, “implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay,” and report back to Congress within 180 days.<sup>50</sup>

The agencies each made reports to Congress in 2001.<sup>51</sup> Since then, each agency has engaged in a variety of internal initiatives designed to improve the HSR process, including

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<sup>45</sup> 71 Fed. Reg. 2,943-44 (Jan. 18, 2006) (setting new thresholds for determining HSR fees at \$113.4 million (instead of \$100 million), and \$567.0 million (instead of \$500 million).

<sup>46</sup> Report from the Bureau of Competition, Prepared Remarks of Molly S. Boast, Acting Director, Bureau of Competition, Federal Trade Commission, Before the American Bar Association, Antitrust Section, Spring Meeting, at 2 (March 29, 2001) (“While the number of filings will decrease, the filing fees will increase. To make these changes revenue-neutral, Congress implemented a tiered fee structure.”).

<sup>47</sup> 15 U.S.C. § 18a(e).

<sup>48</sup> 15 U.S.C. § 18a(e)(B)(i)-(v) (“The assistant attorney general and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person . . .”).

<sup>49</sup> ABA Comments re HSR Process, at 11.

<sup>50</sup> 15 U.S.C. § 18a(e)(1)(B)(v).

<sup>51</sup> Federal Trade Commission, *Report to Congress Regarding Merger Review Procedures* (June 19, 2001), available at <http://www.ftc.gov/os/2001/06/hsrreport.htm>; United States Department of Justice, Antitrust Division, *Report to Congress Regarding Merger Review Procedures* (June 19, 2001), available at <http://www.usdoj.gov/atr/public/guidelines/8550.pdf>.

efforts to improve the efficiency of investigations during the initial waiting period and reduce the burden of second requests.<sup>52</sup>

DOJ began a Merger Review Process Initiative in 2001, which was designed to improve use of the initial 30-day waiting period and to improve communication with merging parties during the second request process.<sup>53</sup> AAG Barnett testified that, for fiscal years 2002 through 2005, 19 percent of HSR-reported transactions were subject to preliminary investigation, and only three percent were subject to second request investigations.<sup>54</sup> In cases where second requests were issued but the transaction was not challenged, the average length of the investigation (from opening of the investigation to closing) has decreased from 248 days in FY 2001 to 134 days in FY 2005.<sup>55</sup>

The FTC established a Merger Process Task Force in 2004 to conduct a thorough "top-to-bottom review of [its] existing procedures."<sup>56</sup> On February 16, 2006, the FTC announced a

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<sup>52</sup> See Statement of J. Robert Kramer, II on behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on Merger Process, at 7-15 (Nov. 17, 2005) ("Kramer Statement") (describing various initiatives taken by DOJ over the past ten years); Statement of Assistant Attorney General Thomas O. Barnett, on Behalf of the United States Department of Justice, at 7-9 (March 21, 2006) ("Barnett Statement") (focusing on the Division's 2001 Merger Review Process initiative); Statement of Deborah Platt Majoras, Chairman, Federal Trade Commission, before the Antitrust Modernization Commission, at 10 (March 21, 2006) ("Majoras Statement"); Remarks by Deborah Platt Majoras, Chairman, The Federal Trade Commission, ABA Antitrust Section Fall Forum, *Looking Forward: Merger and Other Policy Initiatives at the FTC*, 11-13 (Nov. 18, 2004); ABA Comments re HSR Process, at 5.

<sup>53</sup> March 21, 2006, Hearing Trans. at 24 (Barnett); Barnett Statement, at 8-9, Attachments 3-5.

<sup>54</sup> Barnett Statement, Attachment 3.

<sup>55</sup> *Id.*, Attachment 5.

<sup>56</sup> Prepared Remarks of Susan A. Creighton, Director, Bureau of Competition, Federal Trade Commission, before the Antitrust Modernization Commission: Hart-Scott-Rodino Second Request Process, at 1-2 (Nov. 17, 2005) ("Creighton Statement"); Majoras Statement, at 10; Trans. at 199-201 (Creighton).

series of reforms resulting from the Task Force's work.<sup>57</sup> The reforms, which will be applied to all subsequent HSR filings, including the following:

- Adopting a presumption that a party will not have to search more than 35 employees' files to comply with a second request (subject to conditions and possible enlargement by the Director of the Bureau of Competition).<sup>58</sup> Significantly, in order to avail themselves of this presumptive limitation, the merging parties must either agree to complete their response to the second request 30 days before formally certifying to substantial compliance (in other words, agree to a doubling of the second 30-day waiting period) or agree to "a mutually acceptable 'rolling' production or other timing agreement."<sup>59</sup> In addition, the merging parties must agree to propose to the court jointly with the FTC a scheduling order that allows for at least 60 days of discovery in the event the FTC decides to seek an injunction prohibiting the transaction.<sup>60</sup>
- A presumption that the relevant time period for a second request will be two years prior to the request (subject to enlargement if staff sees fit and excepting data requests).<sup>61</sup>
- Provisions to reduce substantially the requirements for the preservation of backup tapes containing e-mail and other electronic documents.<sup>62</sup>
- Permitting a party to produce a partial privilege log providing only the name of a custodian and the total number of documents withheld (subject to staff's right to require a complete privilege log for up to the greater of five custodians ten percent of the total number of custodians searched in order to certify compliance and the FTC's right to serve discovery requests for additional information should it seek an injunction or pursue administrative relief).<sup>63</sup>
- Staff will inform the parties about the competitive effects theories under consideration and the types of empirical data that may prove useful in responding to the agency's concerns. Parties will be entitled to meet with a Director or Deputy Director of the Bureau of Competition and the Bureau of Economics to

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<sup>57</sup> See FTC 2006 Merger Process Reforms; see Majoras Statement, at 11 (summarizing reforms).

<sup>58</sup> FTC 2006 Merger Process Reforms, at 9-19.

<sup>59</sup> *Id.* at 15-16.

<sup>60</sup> *Id.* at 18-19.

<sup>61</sup> *Id.* at 19-21.

<sup>62</sup> *Id.* at 24.

<sup>63</sup> *Id.* at 25-26.

discuss any concerns that the amount and kind of data requested by the staff is overly burdensome or unnecessarily broad.<sup>64</sup>

Chairman Majoras explained that “[t]he central purpose of the reforms is to lower the costs of merger investigations for the FTC and the parties by reducing the volume of materials that parties must preserve and produce to respond to a second request, while preserving the FTC’s ability to conduct thorough merger investigations.”<sup>65</sup> She said that the reforms are intended to “increase the responsibility of the senior management of the Bureaus of Competition and Economics for ensuring that second requests do not impose undue burdens on the parties.”<sup>66</sup> Finally, she characterized these reforms as “the start, rather than the end” of HSR reform at the FTC.<sup>67</sup>

DOJ has undertaken a similar review of its merger process, with a focus on second request improvements, and expects to announce reforms shortly.<sup>68</sup> It is specifically considering a reform to limit the number of custodians whose files are searched.<sup>69</sup>

## II. Discussion of Issues

### A. Criticisms of Existing Process

Commenters and witnesses generally testified that the HSR Act has been very successful in ensuring that the government has an adequate opportunity to identify and challenge

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<sup>64</sup> *Id.* at 21-23.

<sup>65</sup> Majoras Statement, at 10-11.

<sup>66</sup> *Id.* at 11-12. For example, the FTC requires that lawyers with substantial experience participate in all second request negotiations. *Id.* at 12.

<sup>67</sup> *Id.* at 12 (listing likely future initiatives, *e.g.*, reducing the burden of data requests and improving hardware and software available for reviewing electronic documents and data); FTC 2006 Merger Process Reforms, at 9.

<sup>68</sup> Barnett Statement, at 9 (“[s]hortly, I expect the Division to announce further revisions that will improve” the HSR process); *see* Kramer Statement, at 16.

<sup>69</sup> Trans. at 248 (Kramer).

anticompetitive mergers, thereby protecting the public interest.<sup>70</sup> In addition, witnesses generally testified that, overall, the merger pre-notification system works well.<sup>71</sup> However, some suggested that the approach to filings and initial investigations could be improved, and there were widespread calls for reducing the burden associated with the second request process.

### 1. *Filings and initial investigations*

Few commenters raised concerns about the initial filing system or waiting period. One witness criticized the burden that the initial filing places on the large majority of transactions that pose no competitive issues; several others identified concerns with the contents of the HSR filing itself and the conduct of initial investigations. These specific criticisms are set out below, in conjunction with the reforms proposed to address them.<sup>72</sup> (Several commenters and witnesses also expressed concern with the delays resulting from clearance disputes between the agencies, which are addressed in the Federal Enforcement Institutions Discussion Memorandum.<sup>73</sup>)

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<sup>70</sup> See Kramer Statement, at 2-3 (before the HSR Act, the Antitrust Division could not effectively detect and challenge anticompetitive mergers; premerger review effectively protects consumers from anticompetitive mergers).

<sup>71</sup> Trans. at 204 (Whitener) (“in the main, it’s a system that works well”); Trans. at 202 (Kramer) (HSR process is “successful from any global view”); Prepared Statement of Wayne D. Collins before the Antitrust Modernization Commission, Hearing on Merger Enforcement, Panel III: The Hart-Scott-Rodino Process, at 2 (Nov. 17, 2005) (“Collins Statement”) (HSR Act provides “an adequate statutory framework for merger review,” and the U.S. agencies “have done many things well, [though] there is significant room for further improvement”); U.S. Chamber of Commerce Comments, at 14-15 (Praising agencies for reducing the number of second requests); cf. ICPAC Report, at 140 n.127 (2000 report observed that “business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is ‘fundamentally sound’”).

<sup>72</sup> See below, pp. 16-21.

<sup>73</sup> Trans. at 205 (Whitener) (“[T]his Commission has an opportunity, I think, to do something very useful for the antitrust community, and that is to give the agencies the support they need to go ahead and complete the effort . . . to come up with an effective interagency clearance allocation agreement.”); Trans at 210 (Wales) (agreeing with Whitener). See generally Enforcement Institutions-Federal Discussion Memorandum (May 19, 2006).

## 2. *The second request process*

There was considerable criticism of the second phase of merger review, particularly the cost and delays imposed by second requests. Such concerns, and efforts to address them, are longstanding, as described above. The comments in many instances renew concerns that appear in previous commentaries. In particular, nearly all commenters and witnesses, including witnesses representing the FTC and DOJ expressed concern over the costs and delay associated with the second request process. These concerns are summarized below.

- Second requests are “overbroad and require parties to produce an extraordinary amount of documents and data.”<sup>74</sup>
- Second requests impose an “enormous burden of compliance” that is “overwhelming for the parties involved.”<sup>75</sup>
- Extensive second request productions burden the enforcement agency as well.<sup>76</sup> The production of documents and other information that is “irrelevant or unnecessary” slows down the review process and taxes scarce staff resources.<sup>77</sup>
- The U.S. second request process is unique among antitrust jurisdictions, requiring a greater volume of documents and imposing substantially higher costs than are associated with investigations conducted by other jurisdictions.<sup>78</sup>
- The HSR process is “not compliant” with the ICN’s recommended practice calling for “[e]fficient, timely and effective review.”<sup>79</sup>

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<sup>74</sup> Business Roundtable Comments, at 11; ICC Comments, at 4 (many ICC members have reported that overly broad second requests are being issued).

<sup>75</sup> U.S. Chamber of Commerce, at 15; ABA Comments re HSR, at 3 (reporting “a consensus in the private bar that second requests are unduly burdensome” and an apparent “recognition and concern about the burden of second requests at the antitrust agencies”); Trans. at 204-06 (Whitener) (second request process needs to be “significantly reformed” because productions are large and costly); *see also* U.S. Chamber of Commerce Comments, at 15 (calling for “reducing the cumulative burden of duplicative file searches”).

<sup>76</sup> Trans. at 286 (Kramer).

<sup>77</sup> Trans. at 287 (Creighton).

<sup>78</sup> IBA Comments, at 24.

<sup>79</sup> Merger Streamlining Group Comments, at 5; *see also* Trans. at 206 (Whitener) (expressing concern that inefficient second request process can impose “a cost in terms of respect for the system”).

Witnesses and commenters generally agreed that several developments have increased the burden of second requests in recent years. First, an “explosion in the number of documents maintained by business firms” has resulted from the increased storage of documents in electronic format over the past several years.<sup>80</sup> Second, agencies today rely “more on detailed and direct market analyses . . . [which] are fact intensive, and can require a substantial volumes of documents and quantitative data.”<sup>81</sup>

The second request process goes far beyond what Congress appears to have intended in the HSR Act.<sup>82</sup> Indeed, one significant study concluded in 2003 found that the U.S. second request process was the most expensive merger review process in the world, costing more than double that of a typical in-depth review in the European Union.<sup>83</sup> The cost of responding to a typical second request has been estimated to be \$5 to \$10 million per party.<sup>84</sup> The length of time

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<sup>80</sup> Creighton Statement, at 2 (“Data from one source that we received suggested that a custodian who maintained four boxes of documents in 1998 would be likely to maintain roughly 140 boxes of documents today.”); FTC 2006 Merger Process Reforms, at 2 (“advances in technology—from the copy machine to e-mail—have resulted in companies’ producing and retaining substantially more documents”).

<sup>81</sup> FTC 2006 Merger Process Reforms, at 2; Creighton Statement, at 2-3 (emphasizing the impact of “increasing sophistication of substantive merger analysis,” “rigorous [judicial] standards” and “increasing use of data-dependant economic analysis”).

<sup>82</sup> ABA Comments re HSR Process, at 6 (“The burden imposed by second requests today far exceeds what Congress originally envisioned in enacting the HSR Act.”); Business Roundtable Comments, at 10-12. *See generally* p. 5, *supra*.

<sup>83</sup> PricewaterhouseCoopers, *A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews*, at 42 (July 2003) (“PWC Survey”); Merger Streamlining Group Comments, at 6 (citing PWC Survey).

<sup>84</sup> Sunshine & Wales Statement, at 4; Merger Streamlining Group Comments, at 6 (the second request “often takes in the neighborhood of half a year and costs several millions of dollars”).

from the announcement of the transaction to approval after a second request has been estimated to average about half a year.<sup>85</sup>

B. Filing requirements and the initial review

AMC witnesses and commenters identified several possible reforms to the initial filing requirements that could reduce the overall burden of HSR compliance, as described below.

1. *Change the HSR filing thresholds*

The 2000 HSR Amendments increased the size of transaction threshold to \$50 million and provided that they be automatically increased according to the increase in the Gross Domestic Product, as mentioned above.<sup>86</sup> One commenter, the U.S. Chamber of Commerce, applauded the reduction in filing that resulted, but argued that “the vast majority of filings raise no competitive concerns,” so that the “the number of filings can be reduced much further, either by Congressional or agency action . . . .”<sup>87</sup> In contrast, the International Chamber of Commerce noted the “meaningful changes” to the thresholds, and supported “wait[ing] until there has been additional experience with those new thresholds” before taking further action.<sup>88</sup>

2. *Adopt a new filing form along the lines of those used by the European Union or Canada*

The Commission invited comment specifically regarding whether it should recommend that the HSR filing form and/or second request process should be changed to be more like what

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<sup>85</sup> Sunshine & Wales Statement, at 4 (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); Merger Streamlining Group Comments, at 6 (reporting that the for second request process often takes half a year); Barnett Statement, Attachment 5 (citing average duration of approximately four months for matters that DOJ does not challenge in court).

<sup>86</sup> See p. 6, above (also noting other adjustments made by the 2000 HSR Amendments).

<sup>87</sup> U.S. Chamber of Commerce Comments, at 13.

<sup>88</sup> ICC Comments, at 2.

is done in the European Union (*e.g.*, the Form CO) or Canada (*e.g.*, long and short-form reporting).

The EU filing requirements cover certain transactions with a “Community dimension”—combined world-wide turnover of €5 billion and at least two parties with turnover in the EU of €250 million.<sup>89</sup> The parties in standard practice have extensive consultations with EU competition authorities on the substance of the transaction prior to a filing the notification form—known as the Form CO. The Form CO is considerably longer and more burdensome than the HSR form, and requires the parties to include substantial information regarding the affected markets.<sup>90</sup> Filing of the Form CO formally begins Phase I of an investigation, starting the 25-day period during which the EC must issue its Phase I decision.<sup>91</sup> As discussed below, in some cases, a more extensive Phase II investigation is initiated, with a waiting period of 90 days (which may be extended for a limited period).<sup>92</sup>

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<sup>89</sup> John J. Parisi, *A Simple Guide to the EC Merger Regulation of 2004*, The Antitrust Source, at 3 (Jan. 2005) (“Parisi, *A Simple Guide*”). Alternatively, the regulation applies if (1) the combined world-wide turnover of the merging parties is over €2.5 billion, (2) in each of three member states the parties have combined turnover exceeding €100 million (and at least two parties have turnover of at least €25 million in each of those states), and (3) the community-wide turnover of at least two parties is at least €100 million. However, a filing is not required under this test if each of the merging parties obtains more than two-thirds of its turnover in the same member state. *Id.* at 5-6.

<sup>90</sup> James B. Kobak, Jr., *Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on the Two Sides of the Atlantic*, 64 Antitrust L.J. 341, 358 (1996) (“Form CO . . . require the parties to address the question of market definition and other substantive elements in a way that an HSR filing does not.”).

<sup>91</sup> Parisi, *A Simple Guide*, at 5. In certain circumstances, the period for the Phase I decision may be lengthened to 35 days. *Id.* at 6.

<sup>92</sup> See below, at pp. 27-28; see also Parisi, *A Simple Guide*, at 7.

The Canadian premerger notification process allows parties to elect to file a short form (with a waiting period of 14 days) or a long form (waiting period of 42 days).<sup>93</sup> The short form is “not onerous,” and is designed for parties who believe their transaction poses little competitive threat.<sup>94</sup> Within the 14-day period, the Commissioner of Competition may order a long form filing for those transactions he deems to require further information; and the 42-day waiting period does not begin to run until the long form is submitted.<sup>95</sup> The long form requires parties to submit considerably more information and related documents about their businesses.<sup>96</sup> The Commissioner may require additional information beyond that submitted with the long form only by application for a court order.<sup>97</sup> The Canadian Competition Bureau in practice “often requests and obtains production of more modest quantities of key material on a voluntary basis.”<sup>98</sup>

The Merger Streamlining Group suggested that the United States adopt a process similar to Canada’s.<sup>99</sup> They propose a system in which the parties could file initially an “HSR plus,” akin to a Canadian long form. This filing, which would call for information specified in advance by the agencies, would provide information required for a second phase investigation, but would be “less far-reaching and burdensome than a standard Second Request.”<sup>100</sup> The agencies could obtain any further information they need for their investigation through the use of civil

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<sup>93</sup> John D. Bodrug & Christopher D. Margison, *Merger Notification and Review in Canada*, 15-SPG Antitrust 33, 33 (2001) (“Bodrug & Margison, *Merger Notification and Review in Canada*”).

<sup>94</sup> *Id.* at 33-34.

<sup>95</sup> *Id.* at 34-35.

<sup>96</sup> *Id.* at 33-34.

<sup>97</sup> *Id.* at 34.

<sup>98</sup> Merger Streamlining Group Comments, at 8; Bodrug & Margison, *Merger Notification and Review in Canada*, at 34.

<sup>99</sup> Merger Streamlining Group Comments, at 8-10.

<sup>100</sup> *Id.* at 9.

investigative demands (“CIDs”).<sup>101</sup> By providing key information and documents, agency staff would have more time to review critical documents, rather than reviewing a more substantial production made on a rolling basis or after certification of substantial compliance.<sup>102</sup> This proposal would not require statutory change; instead, the agencies would, within the existing statutory framework, commit to completing investigations of any transaction opting for the “HSR plus” filing within a set time period (*e.g.*, five months).<sup>103</sup>

The ABA declined to recommend adoption of an initial filing requirement resembling either the EU Form CO or the Canadian system.<sup>104</sup> The heightened initial filing requirement of both approaches, they submitted, would not likely improve the agencies’ ability to identify which transactions deserve further investigation, nor would it reduce overall production burdens, as the agencies would likely continue to seek significant amounts of information in preparation for possible litigation.<sup>105</sup>

3. *Allow parties to elect to use a “short form” filing that reduces the requirements for 4(c) documents and reduces the amount of revenue information provided on the HSR form.*

The current HSR form requires merging parties to provide documents pursuant to item 4(c) and a variety of information, including revenues for the most recent available year and for a base year.<sup>106</sup> One witness proposed to allow merging parties to elect to perform a more limited

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<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.* at 9-10.

<sup>103</sup> *Id.*

<sup>104</sup> ABA Comments re HSR process, at 13.

<sup>105</sup> *Id.*

<sup>106</sup> See HSR Notification and Report Form and Instructions, at iv-v, *reprinted in* ABA, *The Merger Review Process*, at Appendix 4, 4-19 to 4-20.

4(c) document search and omit provision of revenue data.<sup>107</sup> The government would then have 20 days to determine whether additional information is needed (whether revenue figures or additional 4(c) documents).<sup>108</sup> If such additional information were requested, it would extend the initial waiting period until 10 days after the submission of the additional information.<sup>109</sup>

#### Pros

- Costs could be reduced for parties in the large majority of transactions that raise no competitive concerns.<sup>110</sup>

#### Cons

- The revenue figures are critical to the initial review conducted by the Premerger Notification Office. Eliminating the requirement to provide such information would “greatly extend the time that it took [the agency] to” determine that transactions do not raise competitive concerns and terminate the review.<sup>111</sup>
- The burden of producing revenue figures appears fairly limited, since “[m]ost . . . companies have systems in place through which they can actually produce this information very inexpensively.”<sup>112</sup>

#### 4. *Allow voluntary extensions of the initial waiting period*

The HSR Act does not allow for an extension of the initial 30-day waiting period. As a result, in order to permit the reviewing agency to have additional time to consider whether to issue a second request, an acquiring party may chose to withdraw its HSR filing and refile it, restarting the 30-day waiting period.<sup>113</sup> Although the acquiring party must search for and produce any additional Item 4(c) documents that may have been created since the initial filing, it

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<sup>107</sup> Sunshine & Wales Statement, at 9-10

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Trans. at 217 (Creighton); Trans. at 219 (Kramer) (“I would agree that the NAICS Codes are very important in the initial review of the” filing); *see also* Trans. at 221 (Whitener).

<sup>112</sup> Trans. at 220 (Collins).

<sup>113</sup> ABA, *The Merger Review Process*, at 141.

does not have to pay a second filing fee so long as it re-files within 48 hours.<sup>114</sup> (There is only one “free bite” however; a second withdrawal and re-filing would require the payment of an additional filing fee.) The additional time often avoids a second request. DOJ estimated that about 60 percent of parties who pull and refile do not receive a second request.<sup>115</sup>

One witness proposed the creation of a formal statutory mechanism for extending the initial waiting period, which would avoid the need to “pull and refile.”<sup>116</sup>

#### Pros

- Providing such statutory authority would simplify procedures and reduce burdens on the parties in responding to situations in which extensions are needed.<sup>117</sup>

#### Cons

- The burdens of the current informal system are minimal.<sup>118</sup>
- Making it too easy to extend the initial waiting period may undermine the clarity of a fixed period. The proposal might also set a poor precedent for other jurisdictions, in contrast to fixed deadlines for review.<sup>119</sup>

#### C. Reforms to the Second Request Process

Commenters and witnesses from the bar were nearly unanimous in criticizing the cost and delays imposed by the second request process, as described above. They suggested a number of avenues for reform, described below.

Both Chairman Majoras and Assistant Attorney General Barnett advised the Commission that statutory change to improve the HSR process is not warranted. They believe that

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<sup>114</sup> *Id.*; Sunshine & Wales Statement, at 10-11.

<sup>115</sup> Trans. at 284 (Kramer).

<sup>116</sup> Sunshine & Wales Statement, at 10-11.

<sup>117</sup> *Id.*

<sup>118</sup> Trans. at 218 (Creighton) (“I’m not aware of anyone having failed to be able to pull and refile within the two days and so incur the extra filing fee”).

<sup>119</sup> Trans. at 221 (Whitener).

improvements can best be achieved through the implementation of internal reforms directly addressing the primary sources of burden and delay.<sup>120</sup> They emphasized the need for cooperation between the agencies, business, and the bar to accomplish effective reform.<sup>121</sup> Chairman Majoras specifically noted that additional procedural requirements, or expanded responsibilities for courts, could interfere with the agencies' ability resolve matters quickly, and increase overall burden.<sup>122</sup>

1. *Reduce the burden of seconds request by establishing a maximum number of employees whose files can be searched and limiting the number of years covered*

A number of witnesses and commentators proposed limiting the number of employees (or custodians) whose files are searched pursuant to a second request and limiting the time period covered for responsive documents.<sup>123</sup> The volume of documents produced in response to a second request is largely a function of the number of people covered and the length of period covered.<sup>124</sup> Accordingly, limits on both could significantly reduce the overall burden.

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<sup>120</sup> Majoras Statement, at 10, 12 (“The agencies can implement such flexible revisions readily through changes to their internal procedures” while “crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges”); March 21, 2006, Hearing Trans. at 24 (Barnett) (merger review process reform is “an issue that I do not believe can be fixed legislatively. It’s a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress.”); Barnett Statement, at 7-9.

<sup>121</sup> Barnett Statement, at 8; March 21, 2006, Hearing Trans. at 11-12 (Majoras).

<sup>122</sup> Majoras Statement, at 13.

<sup>123</sup> Statement of Mark D. Whitener, Antitrust Modernization Commission Assessment of U.S. Merger Enforcement Policy, Hart-Scott-Rodino Second Request Process, at 10 (Nov. 17, 2005) (“Whitener Statement”); ABA Comments re HSR Process, at 10 (“limiting the number of custodians is probably one of the most effective ways to reduce the burden of compliance”).

<sup>124</sup> FTC 2006 Merger Process Reforms, at 9-21 (Feb. 16, 2006) (noting “the strong relationship between search group size and investigation cost”); Trans. at 225 (Creighton) (“two of the really key variables . . . are the time period and, even more importantly, the number of custodians that we review”); Whitener Statement, at 8 (“[t]he number of people who are subject to the search is critical”).

The proposals, which could be implemented by agency practice, had three central elements:

- 1) An express limitation on the number of custodians that a second request could be required to be searched.<sup>125</sup>
- 2) An agreement by the parties to cooperate by providing organization charts and other identification of relevant employees.<sup>126</sup>
- 3) Provisions allowing for an expansion of the number of custodians searched only upon agency leadership agreement.<sup>127</sup>

#### Pros

- Such reforms will ensure that the agencies “still obtain the vast majority of the information that they need.”<sup>128</sup> Limiting the search can permit the agencies to take a quick look approach that focuses on “discrete issues,” but avoids production on issues that may not matter.<sup>129</sup> Indeed, DOJ has been able to close second request investigations with partial or no production using targeted production.<sup>130</sup>

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<sup>125</sup> Whitener Statement, at 10 (also suggesting “rigorously adher[ing] to” a two-year period for responsive documents); Trans at 241-48 (various) (discussing proposal by Commissioner Jacobson); IBA Comments, at 27-28 (suggesting setting a numerical cap on the number of people whose files must be searched pursuant to a second request); Merger Streamlining Group Comments, at 7 (suggesting “limiting Second Requests to focused time periods, locations and core personnel that would be expected to yield the core relevant documents,” and doing so before negotiations over scope).

<sup>126</sup> Whitener Statement, at 11-12; Trans. at 226 (Creighton) (“cooperation by the parties really is indispensable for us to be able to engage in any kind of meaningful reduction in the number of custodians searched”); Kramer Statement, at 16 (noting important role or cooperation between the private bar and enforcers); *see also* Deborah Platt Majoras, Chairman, Federal Trade Commission, Reflections on My First Year, Remarks before the 2005 ABA Annual Meeting, at 10 (Aug. 6, 2005) (“if we do not have a reasonable level of assurance that parties are dealing in good faith, new rules and process reforms will be, I fear, dead-on-arrival”); *cf.* Trans. at 230 (Whitener) (good faith important with or without reform).

<sup>127</sup> Whitener Statement, at 12-14 (would allow for deviations in “extraordinary circumstances,” as determined by a “very senior agency official”); Business Roundtable Comments, at 13 (recommending that the cap be expanded only on express authority of the Assistant Attorney General or the Chairman of the FTC); *see also* Trans. at 243 (Jacobson) (proposing to require court order for further discovery).

<sup>128</sup> Whitener Statement, at 12.

<sup>129</sup> Trans. at 282 (Kramer); *see also* IBA Comments, at 28 (important to limit employees whose email must be searched as electronic documents create large portion of burden).

<sup>130</sup> Trans. at 282 (Kramer).

- Numerical limits in civil litigation have been a positive experience.<sup>131</sup>

### Cons

- Looking at files from 15 to 30 custodians may be too limiting.<sup>132</sup> For example, the government might need to look at files from significantly more custodians in cases involving multiple product or geographic markets.<sup>133</sup> A preferable alternative might narrow the search to “senior management” and “product managers—product sales managers, or product marketing managers.”<sup>134</sup>
- In unilateral effects cases, documents from multiple sources regarding different customers may be valuable.<sup>135</sup>
- Developments in the investigation may evolve and take unexpected turns that would require searches of more custodians.<sup>136</sup>
- Providing an “accurate organization chart” could prove very difficult in large corporations.<sup>137</sup>
- Two years might be too short for economists looking for “natural experiments.”<sup>138</sup>
- The approach will postpone some discovery on the merits. Accordingly, absent a right to obtain additional discovery before trial, the agencies would not be in a litigating position.<sup>139</sup>

The FTC announced in its February 2006 reforms that it was adopting limits of the type proposed.<sup>140</sup> In general, FTC second requests will be limited to 35 custodians if the parties

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<sup>131</sup> IBA Comments, at 28.

<sup>132</sup> Trans. at 246-47 (Creighton, Kramer).

<sup>133</sup> Trans. at 226-27 (Creighton) (problem of multiple product or geographic markets); Trans. at 243 (Collins) (multiple products); Trans. at 223 (Kramer) (multiple product markets).

<sup>134</sup> Trans. at 223 (Kramer).

<sup>135</sup> IBA Comments, at 28 (but noting that a sampling may suffice and that it should not be necessary to produce every relevant document).

<sup>136</sup> Trans. at 245-46 (Creighton) (investigative process is “iterative” and “issues evolve”).

<sup>137</sup> Trans. at 244 (Collins).

<sup>138</sup> Trans. at 224 (Kramer).

<sup>139</sup> See Trans. at 237-38 (Kramer). *But see* Whitener Statement, at 12 (courts can be expected to provide “a reasonable period for post-complaint, pre-hearing discovery”); ABA Comments re HSR Process, at 10 (providing agencies a “second bite” at discovery for a transaction that is headed to litigation could “reduce the incentive for the agencies to make their second requests so broad and all encompassing”).

promptly provide organization charts and makes available other information to permit the FTC to determine the group of custodians to be searched.<sup>141</sup> The number of employees to be searched may be increased only by direction of the Director of the Bureau of Competition, after both the agency and the parties have an opportunity to present their views on the need for expanding the search.<sup>142</sup> As mentioned above, as a “quid,” the FTC requires that the parties agree to complete their response 30 days prior to certifying compliance (or reach a mutually acceptable “rolling production” agreement) and, in the event of litigation, propose (jointly with the FTC) a scheduling order that allows for at least 60 days of discovery.<sup>143</sup> The purpose of this “quid” is to provide incentives to the parties and FTC staff “to agree to the types of investigation schedules that often promote faster resolution of the core issues, more accurate decisions by the agencies, and fewer litigation challenges to transactions.”<sup>144</sup>

In addition, the FTC has adopted a presumption that the relevant time period for documents requested in a second request is two years, although staff may enlarge the period when necessary to analyze competitive effects.<sup>145</sup>

DOJ is considering the adoption of similar reforms.<sup>146</sup>

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<sup>140</sup> FTC 2006 Merger Process Reforms, at 9-21.

<sup>141</sup> *Id.* at 9-10.

<sup>142</sup> *Id.* at 11.

<sup>143</sup> *Id.* at 15-16, 18-19.

<sup>144</sup> *Id.* at 16. The FTC maintains that these “quids” are not an effort to enlarge the time frames set forth in the HSR Act. It notes that it is “relatively rare” for merging parties not to use “rolling productions” and that merging parties commonly enter into timing agreements under which they delay certifying substantial compliance and/or refrain from triggering the 30-day clock when there is a chance of avoiding litigation by allowing the agency more time to complete its investigation. *Id.*

<sup>145</sup> *Id.* at 19.

<sup>146</sup> Trans. at 248 (Kramer); *see also* Barnett Statement, at 9 (“[s]hortly, I expect the Division to announce further revisions” to the HSR process); Kramer Statement, at 16.

2. *Limits on the length or scope of second requests.*

Several commenters proposed limiting the number of specifications in a second request.<sup>147</sup>

In addition, commenters called for the agencies to identify their specific concerns and demonstrate how each specification would lead to the information necessary to resolve those concerns.<sup>148</sup> As noted above, the FTC had adopted reforms to provide for better communication of economic theories of competitive harm and the data that would prove useful in evaluating them, to reduce the burden of data requests.<sup>149</sup>

3. *Adopt an approach more like the EU second phase*

A number of witnesses and commenters opined that adopting a merger review process like that used by the EU would not be an improvement over the current HSR process. In general, the EU merger review process has avoided the large document productions that have occurred frequently in response to second requests.<sup>150</sup> In addition, the EU sets a specific deadline of 90 days for the second phase of the investigation, which can be extended for brief periods under

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<sup>147</sup> ABA Comments re HSR Process, at 10 (limit “the number of document requests and/or interrogatories” permitted in a second request); Business Roundtable Comments, at 13 (limit the second request to no more than 20 specifications (including subparts), unless the Assistant Attorney General or the Chairman of the FTC authorizes a greater number).

<sup>148</sup> Business Roundtable Comments, at 14 (a second request should include a written statement of the “specific competitive concerns presented” and “the relation between those concerns and each specific request for additional information”); Merger Streamlining Group Comments, at 7 (the agencies should give their reasons for not clearing the transaction and should “tailor their requests for additional information more narrowly to the issues genuinely meriting in-depth review”); *see also* IBA Comments, at 27 (A second request should contain a specification only where there is “good reason to believe that the issue is likely to raise serious anticompetitive concerns.” The initial review period should be sufficient for the agency to develop information to determine which issues meet this standard, and such a restriction will “counter any temptation to request information when there [is] no real competitive concern.”).

<sup>149</sup> FTC 2006 Merger Process Reforms, at 21-23.

<sup>150</sup> Trans. at 236 (Whitener).

specified conditions, resulting in an essentially fixed period for review.<sup>151</sup> (By comparison, the HSR system has no fixed date for termination—the parties may close 30 days after certifying compliance with the second request, absent an injunction, unless they have entered into a timing agreement or otherwise agreed with the FTC or DOJ to an extension of the HSR waiting period.)

The International Chamber of Commerce suggested that the United States should adopt a “defined time frame” for the second request phase.<sup>152</sup> It specifically commended the approaches of the EU and Canada, both of which provided for an overall maximum review period of approximately five months.<sup>153</sup>

Witnesses appearing before the AMC generally did not support adopting a fixed period for review, for reasons summarized below.

- EU-style time limits would not be a significant improvement. The average second request review (other than those leading to litigation) “hasn’t been excessively long” over the past three years—between about three to five months.<sup>154</sup>
- A fixed time frame could result in “gaming” of the system by merging parties, such as by submitting large document productions all at once shortly before the period ends.<sup>155</sup>
- Parties have strong incentives to move expeditiously through the process; additional constraints will only “add to the burden,” unless the second request burden itself is lessened.<sup>156</sup>

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<sup>151</sup> EC Merger Regulation, Art. 6(1)(b).

<sup>152</sup> ICC Comments, at 2.

<sup>153</sup> *Id.* at 2-3 (also discussing a recommendation for a 30-day maximum initial review period followed by a four-month maximum second phase review period provided in the Recommended Framework for Best Practices in International Merger Control issued by ICC and the Business and Industry Advisory Committee to the OECD (October 2001)).

<sup>154</sup> Trans. at 278 (Kramer). However, some commenters indicated that the second request process takes approximately six months. See *supra* at 15, n.80.

<sup>155</sup> Trans. at 284 (Kramer); Trans. at 280 (Creighton) (time limits should be triggered by full production).

<sup>156</sup> Trans. at 278 (Wales); Trans. at 277 (Whitener) (timing triggers make sense for U.S. system).

- A majority of ICPAC members declined to propose adopting fixed time limits on the second stage HSR Act review.<sup>157</sup>

#### 4. *Termination of HSR review to enter litigation*

Two witnesses suggested that the Commission consider ways in which the HSR process might be changed so that the few matters destined for litigation could avoid some of the burdens of the HSR process and proceed more quickly to court.<sup>158</sup> One witness suggested that parties might agree to a TRO and the agency would agree that any issues regarding the agency's need for additional evidence could be addressed in the context of civil discovery during the pretrial proceedings in court.<sup>159</sup> It is not clear whether any change in law would be required for the parties and agencies to adopt such an approach.

Mr. Collins suggested that parties might be permitted to “opt out” of the HSR process after some amount of second request production and certain time period, with agency management given some additional time to decide whether it wishes to challenge the transaction. However, he noted that “determin[ing] that enough information has actually been collected in the second-request investigation” would raise an “interesting question.”<sup>160</sup>

On the other hand, Ms. Creighton and Mr. Kramer argued that voluntary extensions of the second 30-day waiting period (after certification of substantial compliance) can help senior officials to obtain more information to determine whether a challenge is in the public interest.<sup>161</sup>

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<sup>157</sup> ICPAC Report, at 132.

<sup>158</sup> Sunshine & Wales Statement, at 17; *see also* Trans. at 241 (Collins).

<sup>159</sup> Sunshine & Wales Statement, at 17.

<sup>160</sup> Trans. at 241 (Collins).

<sup>161</sup> *See* Trans. at 254-56, 262 (Kramer); Trans. at 261-62 (Creighton) (the “request is coming often from senior staff or, in our case, the Commissioners, who are trying to reach a decision on the merits”). *But see* Trans. at 241 (Collins) (addressing problem by allowing an additional period for management review).

## Pros

- Parties who believe their deal is headed for litigation may be able to get to court more quickly.<sup>162</sup>

## Cons

- Even if staff appears inclined to litigation, agency management still may not have made up its mind, and truncating the HSR process might prevent them from weighing in.<sup>163</sup>
- It would be difficult to determine whether the agency has obtained sufficient information so that termination of the HSR process is justified.<sup>164</sup>
- Few cases go to litigation; creating new rules for limited instances is not sensible.<sup>165</sup>

### 5. *Have federal magistrates hear appeals of second request breadth*

Pursuant to the 2000 HSR Amendments, both agencies established internal appeals mechanisms that allow parties to dispute overly broad second requests. However, there have been few appeals of second requests through these internal appeals processes.<sup>166</sup> A number of commenters submitted that these processes “have not been successful,” or “[have] proved to be useless.”<sup>167</sup> Three commenters suggested that, instead of an internal appeals process, a federal magistrate hear appeals of second requests.<sup>168</sup>

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<sup>162</sup> Sunshine & Wales Statement, at 17; Trans. at 241 (Collins).

<sup>163</sup> See Trans. at 240 (Creighton).

<sup>164</sup> See Trans. at 241 (Collins).

<sup>165</sup> See Trans. at 238 (Kramer) (only four of the last 250 second request investigations have resulted in litigation at DOJ).

<sup>166</sup> *Id.*

<sup>167</sup> Business Roundtable Comments, at 14; ABA Comments re HSR Process, at 11 (In five years “the agencies have not, and perhaps cannot, create a credible internal second request appeals process”).

<sup>168</sup> ABA Comments re HSR Process, at 11; Business Roundtable Comments, at 14; ICC Comments, at 5-6 (emphasizing the importance of recourse to “a court or other independent arbiter”).

## Pros

- Federal magistrates should be able to handle such matters given that they “routinely resolve complex discovery disputes.”<sup>169</sup>
- The current process raises questions regarding impartiality.<sup>170</sup>
- There is a lack of transparency associated with the current process, which leads to an absence of a developed case law.<sup>171</sup>

## Cons

- Federal magistrates may lack “the expertise to resolve” HSR discovery disputes.<sup>172</sup>
- Congress opted for an internal appeals process over using magistrates when passing the 2000 HSR Amendments.<sup>173</sup>

### 6. Clarify the standard for “substantial compliance.”

The HSR Act establishes a standard of “substantial compliance” with the second request.<sup>174</sup> However, there is no guidance on the meaning of the term in statute, regulation, or case law.<sup>175</sup> What constitutes “substantial compliance” has never been litigated.

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<sup>169</sup> ABA Comments re HSR Process, at 11.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (referencing arguments made by the antitrust agencies and citing comments of Senator Leahy on Passage of S. 1854, 146 Cong. Rec. S10920-21 (daily ed. Oct. 24, 2000)).

<sup>173</sup> *Id.*

<sup>174</sup> ABA, *The Merger Review Process*, at 194. Mr. Collins argued that parties could, under 15 U.S.C. § 7A(e)(2), submit a statement of reasons for non-compliance, and arguably start the waiting period. Trans. at 268 (Collins). However, he admitted that parties were not adopting this approach out of their own reluctance to litigate. *Id.* at 271 (Collins); *see also* Trans. at 274 (Creighton) (agency regulations may bar such an approach (citing 16 C.F.R. § 803.3)).

<sup>175</sup> ABA, *The Merger Review Process*, at 194. There has been only one reported decision involving a dispute over whether parties have substantially complied with a second request. *Id.* (citing *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,976 (D.D.C. 1988)). In *McCormick*, the company declared that it was in substantial compliance and would close once the waiting period ran. The FTC obtained a TRO enjoining the closing, pending compliance with the second request; the court held, without discussion, that the company was not in substantial compliance with the request.

Several commenters recommended that standards for substantial compliance be better defined. The Business Roundtable, for example, argued that the parties should be deemed to have substantially complied with a second request unless “the agency is materially impaired in its ability to conduct a preliminary antitrust review.”<sup>176</sup>

7. *Expand personnel devoted to merger review*

Neither DOJ nor the FTC believes that staff size causes significant delays in the merger review process. Although Mr. Kramer suggested that increased staff size would help meet a commitment to running investigations quickly, Ms. Creighton testified that some aspects of the second request review process, such as gathering data and conducting economic analysis, will take time regardless of the number of staff committed to an investigation.<sup>177</sup>

8. *Reduce back-up tape retention requirements*

One commenter (the IBA) recommended that the requirement to produce responsive documents on back-up tapes should be “eliminated in virtually all cases,” arguing that this “significantly increases the cost” of compliance.<sup>178</sup> According to the IBA, documents found only on back-up tapes are presumably not used by the companies themselves in the ordinary course of business and are therefore likely to produce little (if any) additional probative evidence.<sup>179</sup>

The recent FTC reforms include a provision that significantly reduces the obligations to produce documents on back-up tapes – the parties may elect to preserve backup tapes for two

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<sup>176</sup> Business Roundtable Comments, at 14; U.S. Chamber of Commerce Comments, at 15 (calling for “establishing objective standards for determining compliance with a second request”).

<sup>177</sup> Trans. at 264-65 (Kramer); Trans. at 266 (Creighton).

<sup>178</sup> IBA Comments, at 29.

calendar days chosen by the staff and the FTC will require a party to produce documents contained on backup tapes only if responsive documents are not available through more accessible sources.<sup>180</sup>

9. *Reduce the burden of preparing and producing economic data*

Several witnesses and commenters identified burdensome data requests as a “challenging problem.” In particular, several commenters recommended that requests for data that are not kept in the ordinary course of business should be either reduced or used only in rare circumstances.<sup>181</sup> More generally, because the agencies generally have an understanding of the econometric analysis they intend to conduct, the agencies should limit requests to data required to perform that analysis.<sup>182</sup> As noted above, the FTC had adopted reforms to address the burdens imposed by data requests.<sup>183</sup> These include providing better communication of economic theories of competitive harm and the data that would prove useful in evaluating them.<sup>184</sup> In addition, the FTC will request information on how the party maintains responsive data, negotiate negotiating with the parties, and in the event that the party believes that the request remains too

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<sup>179</sup> *See id.*

<sup>180</sup> FTC 2006 Merger Process Reforms, at 24. The Model Second Request covers responsive documents on all backup tapes, but production of information from them is often unnecessary and very burdensome, so the FTC frequently modifies the requirement. *Id.*

<sup>181</sup> U.S. Chamber of Commerce Comments, at 15 (calling for “reducing the number and scope of interrogatory requests calling for the submission of financial/economic data not kept in the ordinary course of business”); Business Roundtable Comments, at 13 (“[r]equests for econometric data not kept in the ordinary course of business should not be standard” but rather determined by agency management); *see also* Trans. at 245 (Creighton) (noting the FTC has “wrestled with” but does not “have a lot of good answers for” the problem of burdensome data requests).

<sup>182</sup> IBA Comments, at 30.

<sup>183</sup> FTC 2006 Merger Process Reforms, at 21-23.

<sup>184</sup> *Id.* at 22-23.

broad, allow the party to meet with a Director or Deputy Director from the Bureau of Competition and the Bureau of Economics.<sup>185</sup>

10. *Limit the requirement to translate foreign-language documents*

The cost of translating foreign-language documents into English can be particularly onerous.<sup>186</sup> Two commenters suggested that the agencies limit translation mandates to documents of “key corporate decision makers” and those relating to businesses or product lines most relevant to the competitive concern.<sup>187</sup>

D. Transparency

Several groups offered proposals for reforms to improve the transparency of the review process.

1. *Provide the parties with a statement of competitive concerns with the second request*

Two commenters proposed that, when issuing a second request, the agencies should “give the merging parties their reasons for not clearing the transaction within the initial review period.”<sup>188</sup> Alternatively, a second request should include a written statement of the “specific competitive concerns presented.”<sup>189</sup>

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<sup>185</sup> *Id.* at 23.

<sup>186</sup> ICC Comments, at 6 (citing ICPAC Report, at 141).

<sup>187</sup> Business Roundtable Comments, at 13; *cf.* ICC Comments, at 6 (encouraging the Commission to explore how the practice of providing summaries of documents, and limit production of full translations, can reduce the burden on the parties).

<sup>188</sup> Merger Streamlining Group Comments, at 7; *see also* ICC Comments, at 4 (at the beginning of a second stage review, the reviewing agency should give the parties, orally or in writing, “a short but clear statement of the competitive concerns that cause the agency to undertake further investigation”)

<sup>189</sup> Business Roundtable Comments, at 14.

As noted above, the FTC had adopted reforms to address the burdens imposed by data requests.<sup>190</sup> These include providing better communication of economic theories of competitive harm and the data that would prove useful in evaluating them. In addition, the staff will request information on how the parties maintain responsive data, negotiating with the parties based on information provided to reduce the burden of data requests.

2. *Provide parties with increased access to economic models and data*

Some observers have criticized the lack of transparency by the agencies regarding the economic theories they are pursuing. In particular, the parties' economists are often limited in their ability to counter the models being developed by staff economists because of concerns regarding the confidentiality of third-party information.<sup>191</sup> Econometric analysis is highly sensitive to the assumptions, techniques, and data used, and it would contribute to "truth finding" if there could be more open and extensive discussion among economic experts for the government and the parties concerning such analysis. To address this concern, one witness proposed to allow staff to discuss the specifications of the models (and supplying alternate specifications) with the parties' economists, and allow them to review the resulting estimates (but not the underlying data).<sup>192</sup>

3. *Provide public notice that a transaction has been notified to the agencies under HSR*

One commenter suggested that the FTC and DOJ should report on their web sites each transaction for which they have received filings and the key stages of their investigations.<sup>193</sup> The

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<sup>190</sup> FTC 2006 Merger Process Reforms, at 21-23.

<sup>191</sup> Trans. at 280 (Creighton) (data sharing is a serious difficulty).

<sup>192</sup> Trans. at 279-82 (Kramer, Collins).

<sup>193</sup> IBA Comments, at 3-4, 8-15.

principal purpose of these notices would be to provide procedural transparency, and thereby enhance the ability of third parties to provide comments and information to the agencies regarding the transaction.<sup>194</sup> Although some transactions can be confidential, in general “the benefit of publicizing the fact that a transaction is being examined outweighs the parties’ commercial interests in being able to keep their transactions secret.”<sup>195</sup> Indeed, several other jurisdictions make public the existence of pre-merger notifications.<sup>196</sup>

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<sup>194</sup> *Id.* at 3-4, 6 (emphasizing the key role that third parties can play in review and the importance to “the legitimacy of the process” of giving them an opportunity to comment).

<sup>195</sup> *Id.* at 11-12 (suggesting ways that the parties could delay formal notification).

<sup>196</sup> *Id.* at 10 (identifying EU, Austria, and the United Kingdom).