

Mergers-HSR Discussion Outline

Note: Italicized text is based on questions on which the Commission requested comment from the public.

I. *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?*

- [1] Recommend no changes to the current HSR reporting thresholds.
- [2] Recommend that current HSR reporting thresholds be increased.
- [3] Recommend that current HSR thresholds be decreased.
- [4] Recommend no change to the current HSR report form.
- [5] Recommend that the agencies adopt an optional “long form” initial filing that would allow merging parties to elect to make a more comprehensive initial filing in exchange for which the agencies would commit to concluding an investigation within a set period of time, e.g., five months.
- [6] Recommend that the agencies adopt a “short form” initial filing that would allow the merging parties to submit less extensive information initially than currently required, but with an obligation to make a fuller filing upon the request of the agencies, with an extension of the applicable waiting period.
- [7] Recommend statutory change that specifically allows the merging parties voluntarily to extend the thirty-day waiting period.

II. *Should any changes be made to the HSR “Second Request” process currently used by the FTC and DOJ?*

- [8] Recommend no changes to the HSR Second Request process.
- [9] Recommend that the agencies adopt reform(s) to reduce the burdens placed on parties by the HSR Second Request process they currently use.

If so, those reforms should include:

- [a] Recommend that DOJ adopt limits on the number of the custodians required to be searched and the time period covered by the request similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms.
- [b] Recommend that the agencies limit the number of specifications in a second request to a predetermined number (e.g., 20).
- [c] Recommend that the agencies adopt a fixed time within which to complete their second-request investigation, or that Congress amend the HSR Act to establish a fixed time.
- [d] Recommend that the agencies adopt a procedure or a standardized agreement by which the parties and the agencies could agree to terminate a second-request investigation without certifying substantial compliance,

and proceed to litigation in district court with a reasonable discovery schedule, or that Congress amend the HSR Act to establish such a procedure.

[e] Recommend that the agencies promulgate a policy or regulation establishing a standard for “substantial compliance.”

[f] Recommend that DOJ adopt limits on back-up tape retention similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms.

[g] Recommend that the agencies implement procedural reforms to reduce the burdens of complying with requests for data that are not kept by the parties in the ordinary course of business.

[h] Recommend that DOJ implement procedural reforms to reduce the burden of complying with requests for data like those adopted by the FTC in its 2006 Merger Process Reforms.

[i] Recommend that the agencies implement procedural reforms to reduce the burden of translating foreign language documents.

[j] Recommend that the agencies, when issuing a second request, provide the parties with a statement as to the competitive concerns about the transaction that led the agency not to close the investigation and to issue a second request.

[k] Recommend that the agencies implement procedural reforms that allow the parties’ economists to have improved access to the agencies’ staff economists’ models and data.

[10] Recommend that the HSR Act be amended to permit parties to appeal directly to a federal district court magistrate judge any claims of unreasonable burden in a second request.

[11] Recommend that the HSR Act be amended to permit the agencies to make public the fact that a transaction has been notified as well as subsequent significant milestones in the investigation.