



## MEMORANDUM

From: Mergers Study Group  
To: All Commissioners  
cc: Andrew J. Heimert and Commission Staff  
Date: May 5, 2005  
Re: Mergers Study Plan

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### Issues Adopted by the Commission for Study

- A. Has current U.S. merger enforcement policy — including as expressed in the *Horizontal Merger Guidelines* — been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?
- B. Do the *Horizontal Merger Guidelines* accurately reflect how the federal agencies analyze mergers?
- C. Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions?
- D. 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?

### Questions for Public Comment

#### Federal Antitrust Merger Enforcement Policy Generally

1. Has current U.S. merger enforcement policy been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets? Please identify specific examples, evidence, or analyses supporting your assessment.

#### Transparency in Federal Agency Merger Review

1. Several commenters in the first phase of the Commission’s work advised that the Commission should address whether there is sufficient transparency in federal antitrust enforcement policy. Do the *Horizontal Merger Guidelines* provide informative guidance to merging parties regarding the likely antitrust treatment of their transactions, and do they appear accurately to reflect actual current FTC and DOJ enforcement practices (for

example, with respect to market definition and concentration threshold presumptions of antitrust concern)? Please support your response with specific examples.

2. Should the federal antitrust enforcement agencies provide more guidance regarding their enforcement policies, including when they decide not to challenge a transaction?

#### Efficiencies in Merger Analysis

1. Do the U.S. courts and federal antitrust enforcement agencies adequately consider efficiencies in merger analysis? Please identify specific examples, evidence, or analyses supporting your assessment.
2. What types of efficiencies should be recognized in antitrust merger analysis and in what circumstances should they be considered or not considered in determining the legality of a merger? Should courts and agencies evaluate claims of efficiencies? What should be the burdens of production and proof for establishing efficiencies?
3. What is the appropriate welfare standard to use in assessing efficiencies — a consumer welfare standard, a total welfare standard, or some alternative standard?

#### The Hart-Scott-Rodino Pre-Merger Review Process

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.

#### **Hearings**

- Four panels of approximately two to three hours each.
1. Assessment of Merger Enforcement Policy
    - FTC and DOJ representatives
    - Scholar(s)

- Practitioner(s) experienced with merger review
  - Business community representative(s) experienced with merger review
2. Transparency in Federal Merger Enforcement
- FTC and DOJ representatives
  - Scholar(s)
  - Practitioner(s)
3. Treatment of Efficiencies in Merger Enforcement
- FTC and DOJ representatives
  - Scholar(s)
  - Practitioner(s) experienced with efficiencies in merger review
  - Business community representative(s) experienced with efficiencies in merger review
  - Foreign enforcement official or practitioner
4. HSR Second Request Review Process
- Current and former FTC and DOJ officials
  - Practitioner(s) familiar with both the U.S. HSR and non-U.S. merger investigation processes
  - Business community representative(s)