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October 28, 2005

Via Express Mail and E-mail

Antitrust Modernization Commission
Attention: Public Comments
1120 G Street, N.W.
Suite 810
Washington, DC 20005

Re: Comments Regarding Dual Federal Merger Enforcement

Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response its request for public comments regarding specific questions relating to Government Enforcement Institutions.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Donald C. Klawiter

Donald C. Klawiter
Chair, Section of Antitrust Law

Comments of the Section of Antitrust Law
of the American Bar Association
in Response to the
Antitrust Modernization Commission's
Request for Public Comment
Regarding Government Enforcement Institutions

The Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission (the "Modernization Commission") in response to its request for public comment dated May 19, 2005 regarding specific questions relating to Government Enforcement Institutions selected for study by the Modernization Commission. These comments address the Modernization Commission's questions regarding dual federal merger enforcement. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Summary of Comments

The Modernization Commission posed two categories of questions concerning two topics. The first category concerned whether merger enforcement should continue to be administered by both the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("Antitrust Division" or "DOJ"). The second concerned the interagency merger review "clearance process" for transactions reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").

With regard to the first question the Antitrust Section believes that there are pros and cons both to dual and single agency enforcement, but there does not appear to be a compelling rationale for altering the existing two-agency framework. Dual merger enforcement has been a staple of merger antitrust enforcement for more than 90 years, and the federal enforcement regime is generally considered effective. There is no clear indication that the reallocation of merger enforcement authority to one antitrust agency would lead to cognizable benefits in the administration of the antitrust laws. To the contrary, there is considerable question as to whether it would instead compromise enforcement.

With regard to the second question, the Antitrust Section believes that the FTC's and DOJ's inability to make all clearance decisions within the first nine business days of the HSR Act waiting period, as it is their stated policy to do, is unacceptable. Agency fights over which will get to review a transaction waste taxpayer dollars and impose costs and delays on the transaction parties. As the agencies' attempts to manage this process on their own have not been successful to date, the Section believes that the Modernization Commission should make recommendations to fix this problem, including potentially by recommending changes to the HSR Act to mandate a clearance deadline. Specifically, the Section urges that the Modernization Commission advocate that Congress amend the HSR Act to require the clearance of all transactions reportable under the Act within nine business days of notification and that the legislation include a mechanism to hold the agencies to that deadline.

Comments

Antitrust Modernization Commission Issue #1: Should merger enforcement continue to be administered by two different federal agencies? What are the advantages and disadvantages resulting from having two different federal agencies reviewing mergers? Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated?

In 1914, Congress created a second antitrust enforcement agency (the FTC) in response to industrial consolidation.[1] Supporters of section 5 of the FTC Act "wanted a new agency that would prosecute if the Department [of Justice] faltered," and in creating an administrative body with adjudicatory authority, Congress addressed at least a partial distrust of the courts "to construe a flexible antitrust standard."[2] Accordingly, the FTC was designed to function as an expert body in antitrust law, capable of assessing and adjudicating the competitive effects of complex transactions.[3]

In establishing the FTC, however, Congress left fully intact the Justice Department's civil enforcement authority, and afforded the Department the authority to challenge the same practices under both the Sherman Act and Clayton Acts. "The result . . . was dual jurisdiction under the Clayton Act."[4] This dual enforcement scheme has survived for more than 90 years, through numerous antitrust legislative modifications and various recommendations and reports from congressionally-appointed committees and outside bodies.

Our comments proceed from the premise that there is no particular reason to believe that either federal antitrust agency is more effective than the other at merger enforcement, and that the two agencies have done much to harmonize their enforcement efforts and to minimize substantive differences. Nonetheless, we address whether the public would be better served by having only one federal merger enforcement agency.

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[1] *See* William Kovacic, Marc Winerman, Edward Cox & Ernest Gellhorn, "The First 90 Years: Promise and Performance" (transcript), Sept. 22, 2004, at 25, *available at* www.ftc.gov/ftc/history/transcripts/040922transcript001.pdf ("During a merger wave that began in 1898, there were often mergers, where five or more firms united at once.").

[2] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 74,76 (2003).

[3] *See* Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1320 (1982).

[4] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 92 (2003).

I. Rationale for Reconsideration of Dual Merger Enforcement.

At the core of the issue set forth by the Antitrust Modernization Commission is whether dual merger enforcement currently serves consumer and business interests. While the substantive merger enforcement policies of both agencies are in harmony, there remain inherent differences in the two enforcement schemes. Indeed, the statutory standards and adjudicative processes of the two agencies are different. These differences raise, at a minimum, the possibility that merging parties in different industries will face disparate hurdles. Thus, a weighing of pros and cons is appropriate to determine whether dual merger enforcement should continue and, if not, to which agency merger enforcement authority should be assigned.

A. Criticisms of dual enforcement.

Critics of dual enforcement note that it imposes unnecessary costs on merging parties, consumers, and the federal government, including:

1. The potential for inconsistent treatment of transactions arising before the two agencies;

2. Waste of government resources, both in terms of duplicative functions carried out at both agencies and in terms of the efforts expended by the two agencies to harmonize policy and to allocate cases between them;

3. Significant and unwarranted delay in merger review that is caused by the agency clearance process; and

4. Diminution in credibility with foreign governments – at a time when international antitrust standards are converging and the United States is very much engaged in promoting effective antitrust enforcement in developing nations, the dual merger enforcement scheme may inhibit the United States' international credibility.

Each of these costs is discussed in more detail below.

1 <u>Dual merger enforcement can lead to disparate treatment</u>.

Although there is disagreement about the magnitude of differences between the agencies, it is clear that merging parties face different hurdles at each agency, both in terms of the enforcement process and remedial possibilities.

As a general matter, merging parties before the FTC must focus on convincing at least a majority of the voting commissioners to allow a proposed transaction, whereas at the Department of Justice the focus is, ultimately, on just one individual (the Assistant Attorney General).

Moreover, there are occasional differences in agency enforcement policies and priorities. With respect to remedies, for example, the most notable difference concerns the use of "up front buyer" remedies by the FTC, versus "fix-it-first" remedies at the DOJ.

There is also a potential difference in the way the agencies handle litigated merger cases. The DOJ litigates both preliminary and permanent injunction actions in merger cases in federal court and must accept the determination of the district or appellate court that ultimately decides the fate of the transaction. The FTC litigates preliminary injunction actions in federal court under the standard set forth in section 13(b) of the FTC Act, but litigates permanent injunctions before the agency. The standard for preliminary relief under section 13(b) is different than the traditional preliminary injunction standard, although there are disagreements as to the practical effects of this difference. At a minimum, merging parties are exposed to different adjudicative schemes based on which agency reviews their transaction. These differences are discussed in greater detail in the Antitrust Section's comments on Differential Merger Enforcement Standards.

2. Dual merger enforcement results in duplication of government functions and expenditure of additional resources.

The existence of two merger enforcement agencies inherently results in some amount of administrative duplication. Accordingly, as when two companies merge, the consolidation of federal merger review into one agency likely would generate certain administrative efficiencies. While the amount and magnitude of such cost savings is unknown, it presumably is small in proportion to the total federal merger enforcement budget. Nonetheless, the elimination of duplicative functions should contribute to more efficient merger enforcement at the federal level.

Additionally, the agencies today spend time, effort and resources attempting to coordinate their enforcement policies and priorities, and in determining which agency will review a given transaction. These resources also would be saved by consolidating merger enforcement into one agency.

3. Agency clearance disputes can impose substantial delay and costs on the merging parties.

In addition to the agency resources that must be devoted to the clearance process, disputes between the agencies over clearance can cost merging parties substantial time and expense. When a clearance dispute expends all or a significant portion of the initial HSR waiting period, merging parties can find themselves unfairly burdened by the delay.

The clearance process is discussed in greater detail in Issue #2 addressed by these comments.

4. Dual merger enforcement can lead to a diminution in international credibility.

The federal government expends substantial time, effort and resources on cooperative programs designed to promote efficient and effective competition policy in various nations and regions around the world. It has been argued that this mission is undermined by the fact that the United States has two overlapping merger enforcement agencies at the federal level. Indeed, federal enforcers participating in foreign competition programs often are called upon to explain why there are two agencies in the United States. Rarely, if ever, is it recommended that a developing nation adopt a dual enforcement system and this "do as we say, not as we do" approach to advising foreign sovereignties may diminish U.S. credibility.

B. Support for dual enforcement.

Supporters of dual enforcement argue that it can benefit consumers, in that:

1. It creates enhanced flexibility in enforcement – if one agency is overburdened by other responsibilities or priorities, its sister agency can handle the overflow;

2. It allows each agency to specialize in certain industries/areas of the economy, which can allow for more efficient regulatory review;

3. It provides additional balance in the federal enforcement scheme, with one executive branch agency and one congressionally-mandated agency; and

4. It provides the opportunity to "lab test" new ideas and developments in enforcement policy, priorities, and mechanisms in one agency before adopting them government wide.

Each of these benefits is discussed in greater detail below.

1. <u>Dual merger enforcement reduces burdens on one agency and allows for greater flexibility</u>.

If one of the two antitrust agencies were either abolished or stripped of its ability to review transactions under section 7 of the Clayton Act, there is some concern that federal merger enforcement could suffer, particularly when the remaining agency is tasked with specific non-merger projects or priorities. Having two agencies with overlapping responsibility allows for greater flexibility in handling the merger workload, and also provides a "check" on the specific enforcement priorities and policies of each agency at any given time.

Merger enforcement sometimes has been described as the "bread and butter" of the federal antitrust agencies: routine work performed in substantial quantities, but often not a "hot" topic or priority. The existence of two distinct enforcement bodies helps to ensure that sufficient resources remain allocated to merger enforcement. Although a single agency presumably would possess the combined enforcement resources of both agencies, proponents of dual enforcement contend that a single agency may be more susceptible to reallocating too many of those resources away from mergers to non-merger projects or priorities assigned by the President, Congress, or the agency head. By contrast, the existence of separate agencies with separate managements (and to some extent separate constituencies) provides greater assurance that, if one agency must divert merger resources to non-merger priorities, the other will be available to "take up the slack."

2. <u>Dual merger enforcement allows for agency expertise</u>.

With only infrequent exceptions where transactions affect multiple markets, the FTC and DOJ have accumulated expertise in different industries. The FTC, for example, historically has reviewed all mergers in the oil and gas, pharmaceutical and computer hardware industries, while the DOJ has reviewed all mergers involving telecommunications, steel manufacturing and airline industries. This considerable institutional experience with certain industries, according to some, enables each agency to more quickly focus on the critical competitive assessment for any individual transaction. While the consolidation of federal merger review staff into one agency conceivably would unite all such expertise under one roof, a certain amount of higher level managerial and institutional expertise may be lost in the process.

3. Two merger enforcement agencies may allow for greater balance in the federal enforcement scheme.

Because the terms of office for FTC Commissioners are staggered and last seven years under statute, some believe that the FTC is less susceptible to rapid changes in direction and philosophy, in contrast to the DOJ, where the Assistant Attorney General is replaced at least as often as changes in administration. This may shield the FTC from as rapid changes in political philosophy in the short- and long-term, especially because the agency must also have at least two of five sitting commissioners with a political affiliation different from that of the party of the President. Thus, the peculiar composition of the FTC may allow for greater continuity in merger review.

Meanwhile, the DOJ may be better able to implement quickly the policies and priorities of a new administration. Thus, the existence of two federal enforcement agencies may serve to create a balance, with one designed to adapt expeditiously to the enforcement priorities of the executive branch and the other providing stability and a potential forum for opposing views.

Similarly, the FTC, pursuant to the FTC Act, is well positioned to administer and enforce remedies, and to conduct post-merger litigation, through the administrative litigation process set forth in the FTC Act. The agency's Administrative Law Judges (and Commissioners) have the opportunity over time to accumulate significant experience in adjudicating the legality of mergers under the Clayton Act. The Antitrust Division, on the other hand, must prove its cases before the federal courts. The judiciary thus can serve as an effective check on the potential for federal antitrust enforcers to overreach.

4. Dual merger enforcement allows for creative solutions to advance merger review to be "laboratory tested" at one agency.

It is not uncommon for one of the two agencies to develop new rules, procedures or substantive evaluations that later are adopted by the other agency to the benefit of antitrust enforcement. In other words, competition between the two agencies leads to innovation and efficiency; the DOJ and FTC also may serve as restraints on each other's tendencies towards either bureaucratic inertia or unbridled innovation. For example:

- The DOJ issued its October 2004 Remedies Policy setting forth in great detail its philosophy on merger remedies, which has spurred new discussion on the necessity of some merger practices, including fix-it-first remedies.[5]

[5] United States Department of Justice Antitrust Division, *Policy Guide to Merger Remedies* (October 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

- The FTC has actively engaged in a program of "transparency," publishing rationales not only for its enforcement decisions, but also for its decision not to pursue enforcement action in recent mergers, including Brown & Williamson, Genzyme/Novazyme, Federated/May Department Stores, and Cruise Lines.[6]

- The DOJ in 2001 undertook efforts to streamline the merger review process through a broad merger process initiative.[7]

- The FTC and DOJ, separately and combined, have held hearings on the intersection of intellectual property and antitrust, publishing important transcripts and papers from such hearings.[8] The FTC has also undertaken a comprehensive effort to work with the Food & Drug Administration to harmonize rules governing the introduction of generic drugs with solid competition fundamentals.[9]

II. Alternatives to Dual Federal Merger Enforcement: Allocation of Merger Enforcement Authority to One Agency.

If merger enforcement *were* to be consolidated into one agency, the question of "which agency?" would need to be answered. Allocation of enforcement authority exclusively to either of the agencies has both potential benefits and costs. A few of these are outlined below.

A. Alternative #1: Allocate Merger Enforcement to the FTC.

1. Allocation to the FTC would place merger enforcement within one "expert" administrative/adjudicatory body.

As noted above, Congress intended to establish in the FTC an "expert" antitrust agency, particularly well-suited to handling complex antitrust issues. The FTC's administrative adjudicatory powers are well-suited to the review and prosecution of consummated mergers, and its ability to seek preliminary relief in federal district court

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[6] Commission Statements on these and other matters are available at the FTC's web site, http://www.ftc.gov.

[7] United States Department of Justice Antitrust Division, *Merger Review Process Initiative*, *available at* http://www.usdoj.gov/atr/public/9300.htm.

[8] *See, e.g.*, *FTC/DOJ Hearings to Focus on the Implications of Competition and Patent Law and Policy*, FTC and DOJ Press Release (Feb. 6, 2002), *available at* http://www.ftc.gov/opa/2002/01/iphearings.htm.

[9] *See, e.g.*, Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf; *Statement of FTC Chairman Supporting FDA's Final Generic Drug Rule*, FTC Press Release (June 12, 2003), *available at* http://www.ftc.gov/opa/2003/06/030612murisstmtgdr.htm.

provides the agency with all the tools necessary for effective merger enforcement. While changes may be made relating to the agency's use of the administrative process, the basic enforcement framework is in place.

2. The FTC can ensure some level of political balance.

Again as noted above, because the FTC is a commission comprising members of both political parties, it may be in a better position (as the sole merger enforcement agency) to provide a balanced enforcement agenda.

3. The FTC is a more cumbersome body than the Antitrust Division.

The "balance" noted above is not without cost. The Commission, by its very nature, may prove slower and more cumbersome than the Antitrust Division, particularly in responding to changes in enforcement policy at the executive level.

B. Alternative #2: Allocate Merger Enforcement to the DOJ.

1. The Antitrust Division is more nimble and can more quickly adopt policy changes.

The Antitrust Division is more nimble by nature than the FTC. There is but one ultimate decision maker (the Assistant Attorney General) and the agency employs a pyramidal organization. Accordingly, it is better able to adapt to changes in policy at the executive level.

2. The DOJ has a more streamlined decision-making process.

Because the chain of command is linear, matters can proceed quickly and there is less room for "surprises." There also is a greater ability for staff to communicate informally with the key decision makers.

3. Through DOJ enforcement, the adjudicatory function would be vested fully in federal courts.

Exclusive allocation of merger enforcement to the Antitrust Division would have direct ramifications on merger litigation because all federal merger actions would then be brought before the federal courts. This outcome would ignore that Congress created the FTC, in part, because it distrusted judicial determination of complex antitrust questions.[10]

It is worth noting that a decision to vest merger jurisdiction exclusively with either agency would require certain legislative changes. At a minimum, legislation would be needed to divest the non-merger agency of its enforcement authority, and to modify HSR notification requirements. In

[10] *See, e.g., Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986).

addition, careful consideration should be given to whether any structural changes would be needed to ensure the efficacy of the surviving enforcement agency. Finally, if merger enforcement were transferred exclusively to the FTC, additional legislative provisions would be required to expand the Commission's jurisdiction to encompass the handful of industries and entities over which it currently has no enforcement authority.[11]

III. Conclusion

Dual merger enforcement has both benefits and drawbacks. However, the drawbacks do not seem so large as to compel any change in the status quo of dual agency enforcement, particularly because vesting merger enforcement within a single agency would have its own set of drawbacks.

[11] *See*, *e.g.*, 15 U.S.C. § 21 (excluding certain regulated industries from FTC jurisdiction); 15 U.S.C. § 45 (limiting jurisdiction to "persons, partnerships or [for profit] corporations," and thus excluding non-profit institutions).

Antitrust Modernization Commission Issue #2: Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?

I. The Current Clearance System Must be Fixed.

While there may be no compelling reason to eliminate dual agency enforcement of the merger laws, there is a pressing need to fix the system by which merger matters are cleared between the agencies. The Antitrust Section often has raised and reiterated its concern regarding delays in the clearance process.[12]

All too often clearance is substantially delayed during the initial HSR Act waiting period, resulting either in Second Requests being issued because the reviewing agency is left with insufficient time to review the matter, or in the merging parties being forced unnecessarily to withdraw and re-file their HSR notification forms in order to trigger a new, post-clearance, initial waiting period.

Under a 1995 agreement between the agencies, HSR merger matters are supposed to clear to one agency or the other within six business days of the HSR filing in most cases, and in all cases within nine business days.[13] Yet, too often, this does not occur. Recognizing this failure and the need to improve the clearance process, the agencies in 2002 formalized a new agreement by which they allocated jurisdiction over mergers and other matters between the agencies on an industry-by-industry basis.[14] Although the Antitrust Section supported this effort as "good government," the agreement was abandoned a few months later in the wake of Congressional pressure. Thus, the process has continued to operate sub-optimally, with clearance too often delayed for a critical portion of the initial review period.

A revised system is required to ensure that all matters are cleared within nine business days of HSR filing, and to provide transparency in the clearance process. Only then will consumers and businesses be assured that mergers will receive adequate initial review.

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[12] *See, e.g.*, American Bar Association Section of Antitrust Law, *2001 Report of the Task Force on the Federal Antitrust Agencies* (2001), *available at* http://www.abanet.org/antitrust/transition/index.html; American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2004* (2005), *available at* http://www.abanet.org/antitrust/comments/2004/federal_at_enforcement.html.

[13] *Federal Trade Commission Announces New Joint Hart-Scott-Rodino Merger Review Procedures With the Department of Justice*, FTC Press Release (March 23, 1995).

[14] *DOJ and FTC Announce New Clearance Procedures for Antitrust Matters*, FTC and DOJ Press Release (Mar. 2, 2002).

II. Problems with the Current System.

A. In many merger investigations, the system does not work well enough or fast enough.

For most mergers under the HSR Act, the investigating agency has an initial period of 30 days to determine whether additional information is required. A Request for Additional Information (known as a "Second Request") issued at the end of this 30-day period typically imposes substantial costs and burden on the merging parties and delays consummation of the transaction for weeks, or even months. Just the fact of a Second Request can affect market confidence in a transaction closing and thereby affect valuation, financing, and other deal dynamics. Thus it is imperative that the reviewing agency be in position to make an informed decision about whether to issue a Second Request.

Because the reviewing agency cannot even begin to investigate formally a proposed transaction until it has obtained clearance, delay in the clearance process can substantially affect the quality of the government's investigation during the initial 30 day HSR waiting period. Agency clearance is based on an assessment of each agency's prior "expertise" in analyzing the products and industries likely to be affected by the matter in question. Pursuant to a process formalized between the agencies during the early-to-mid 1990s,[15] the agency seeking to investigate a merger must first request clearance from the other agency. If that request is contested, the agencies begin a series of informal discussions (typically at the staff and lower managerial levels) to determine whether clearance issues can be resolved in the early stages. If the agencies cannot agree as to which possesses the stronger expertise, they exchange written "claims" of expertise. Claims of prior expertise are assessed generally on the bases of (1) the relevance of the product(s) previously investigated to the current matter; (2) timing of the prior investigation(s); and (3) the substantiality of the prior investigation(s). Each agency has designated one or more clearance officers who discuss the merits of the exchanged claims. If the dispute cannot be resolved by the clearance officers, matters are "bumped up" to higher levels of agency management.[16] On occasion the head of each agency will become involved in an attempt to settle a clearance dispute. Finally, if all else fails, the agencies will submit matters to an independent third party who will make a recommendation as to which agency should conduct the investigation on the basis of the written claims and a short oral argument.

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[15] *See, e.g.*, *Department of Justice, FTC Streamline Jurisdiction Procedures*, DOJ Press Release (Dec. 2, 1993) (announcing agreement to govern clearance procedure); *Federal Trade Commission Announces New Joint Hart-Scott-Rodino Merger Review Procedures with the Department of Justice*, FTC Press Release (Mar. 23, 1995) (announcing expedited timeframe for clearance under which most HSR reportable mergers would clear within six business days of the HSR filing, and all would clear within nine business days).

[16] At the FTC, matters typically are bumped up to either the Director or Deputy Director of the Bureau of Competition. At the DOJ, matters are bumped up to a Deputy Assistant Attorney General.

When clearance disputes arise, a merger often is not cleared to one agency or the other to begin its investigation until well into the 30-day period. This puts the investigating agency at a significant disadvantage in making the initial 30-day determination whether to clear the merger or issue a Second Request. This in turn can lead to ill-advised Second Requests, imposing unnecessary costs and delay on the merging parties. Alternatively, the merging parties may decide to withdraw and re-file their HSR notifications, subjecting themselves to a new 30-day waiting period merely because the investigating agency did not receive clearance to begin its work on time.

Any new system must include hard timelines for clearance to be resolved early within the initial waiting period. The Section believes that the agencies' 1995 pronouncement that most matters will clear within six business days of HSR filing, and that all matters will clear within nine business days strikes the right balance between the agencies' wish to have the investigation assigned to an appropriate legal team and the parties' and the public's right not to have transactions unduly delayed. But as experience since 1995 has shown, the agencies' self-imposed deadlines have not imposed sufficient discipline: in some, often significant, transactions, the agencies fail to meet them. Accordingly, the Section believes that the Modernization Commission should propose either legislative or other remedies that will mandate a clearance decision at the end of the ninth business day.

B. The current system is unduly cumbersome and lacks transparency.

The current clearance system employed by the agencies involves an elaborate series of steps that must be undertaken by each agency when clearance is contested, including multiple "bump up" layers of discussion and decision-making which slow the process. Moreover, until clearance is resolved, the reviewing agencies typically have little or no contact with the merging parties. Thus, the parties often are in the dark with regard to the state of clearance discussions, and have little ability to predict when clearance will be obtained, much less to determine how best to proceed before the investigating agency. A revised system must streamline the bureaucratic procedures to enable the agencies to resolve disputed matters in a timely fashion, and should provide some manner in which merging parties can monitor the process.

C. Changes in industries (including convergence of technology) can make prior expertise less relevant and can cloud the clearance process.

Increasingly, clearance disputes arise in industries in which differing products or technologies have converged. In such cases, it is often unclear which agency has the greater prior expertise. Both agencies "dig in their heels" to claim the converged ground. Yet, in such industries (i.e., those that have undergone significant recent change), prior expertise (and "old ways of thinking") may be less relevant to investigatory efficiency, and thus it may be less important which agency investigates.

D. The current system encourages unproductive, strategic behavior by the agencies.

Because clearing one matter "cedes" expertise, and thus future matters within the same industry, to the other agency both agencies naturally are reluctant to clear a merger to the other. Thus, any system under which prior expertise plays an important role in determining clearance creates incentives to dispute clearance claims. Moreover, such a system makes it substantially less likely that the agencies will avail themselves of one of the advantages of dual enforcement – flexibility in resource allocation. When diversion of a matter to the other agency has future repercussions, managers at both agencies are less likely to relinquish their matters voluntarily.

III. Alternatives to the Current System.

As indicated above, the Antitrust Section believes that the agencies' attempts to fix the clearance dispute problem through voluntary initiatives have not proved sufficient. Therefore, the Section recommends that the Antitrust Modernization Commission advocate some form of mandatory clearance process, including having Congress adopt legislation to ensure that matters are cleared within nine business days after the parties submit their HSR notifications. In addition, and in support of a "hard" deadline, the Section believes other measures should be considered.

A. The agencies could be required to enter into a more definitive clearance allocation.

As long as there are significant areas of overlapping jurisdiction between the agencies, there are likely to be occasions for significant clearance disputes. One option is to make more definitive assignments of responsibility between the agencies in order to reduce the opportunities for conflict. The agencies attempted to do exactly this in 2002 but were met with significant resistance from Members of Congress. While the success of any future effort to "revive" the 2002 clearance agreement would likely depend upon support from Congress, it is certainly possible that key Members of Congress could be persuaded to lend their support to such an initiative.

Although a definitive clearance agreement could be effective in eliminating many future clearance disputes, implementing such an agreement could involve some disruption at the agencies. There may be some benefits to consolidating personnel with expertise in a given area in the agency to which that area of responsibility is assigned.

Moreover, given the dynamic nature of most markets and industries, the efficacy of any such clearance agreement should be reviewed periodically by the agencies and Congress, with realignments and redefinitions implemented as needed. This would, of course, require the development of some workable mechanism for reviewing the agreement and implementing changes. One option may be to require that the agencies submit to Congress for approval every five years a report containing their coordinated proposed revisions. Requiring such a report would place the onus upon the agencies to resolve in advance any disputes relating to agreement revision. Congress would have the choice of adopting or rejecting the proposed amendments.

Even with a definitive clearance allocation, however, there will always be transactions that one or both agencies believe fall outside the allocation. Accordingly, clearance disputes are likely to continue, even if they are fewer than have occurred in the absence of a pre-agreed clearance allocation. Thus, the Section urges that if a definitive clearance agreement is established, the agencies must still be required to resolve any remaining clearance disputes within a specified time period.

B. Some mechanism for "automatic" resolution of clearance disputes could be adopted.

Another approach to solving the clearance problem would be to leave to the agencies how they wish to allocate transactions, but create a fallback decision mechanism if the agencies cannot resolve the issue themselves by the deadline. For example, the agencies could be required to randomly assign the matters if they have failed to resolve clearance by a given deadline, even if just by a "flip of a coin." A variation of this approach would be to invoke a "possession arrow," whereby unresolved cases would be assigned on an alternating basis between the agencies. Another variation would allow the acquiring person to choose which agency it would like to review the transaction when the deadline arrives without the agencies resolving a dispute.

There are some drawbacks to any of these approaches. In addition, it is not clear that the threat of random assignment would provide an adequate incentive for prompt agreement on clearance issues, as an agency might be motivated to drive the process to impasse for one deal looking ahead to the next. Randomness in assignment also may eliminate the benefits of prior expertise. On the other hand, this is one clear method to ensure that mergers would clear to one agency by the deadline.

C. The agencies could lose their right to issue a Second Request if clearance is not resolved within nine days.

Another option is that if the agencies failed to resolve clearance disputes within nine business days, they should lose their ability to issue a Second Request.

Several objections can be raised with regard to this suggestion. First, this approach may not incentivize the agencies to resolve clearance disputes more promptly, as each agency may be willing (at least in certain circumstances) to forego Second Request issuance to maintain turf. Moreover, while such a resolution could benefit the merging parties by allowing them to close their transaction even where the agencies cannot resolve their disputes, it is not clear that this solution benefits consumers, the ultimate constituency under the antitrust laws. If the agencies do not resolve their internal dispute within nine business days and no extended pre-closing review is allowed, potentially anticompetitive transactions would be allowed to close with no substantive antitrust review. Such an approach might not benefit the parties either, as the prospect of closing a transaction in the face of a civil investigation (as the agencies would still be permitted to launch) may not be attractive.

D. A multi-faceted approach to the clearance problem merits consideration.

One approach to resolving the present clearance problems that combines several of the elements discussed above would be to require:

- That all matters be cleared within nine business days of the initiation of the HSR waiting period;

- That a definitive clearance agreement be implemented demarcating lines of responsibility between the agencies as clearly as possible to reduce the need for clearance decisions;

- That the clearance demarcation agreement be reviewed by the agencies every five years, with proposed realignments and redefinitions submitted jointly to Congress for approval;

- That the agencies develop expedited measures to ensure clearance within the above-referenced time frame; and that they notify merging parties as soon as both agencies have requested clearance; and

- That some measure be adopted to eliminate any delay that might otherwise be incurred by the merging parties in the event the agencies fail to clear a matter within the mandatory nine business day time frame. As described above, any number of sanctions or automatic clearance procedures might prove useful in this regard.

There are undoubtedly other approaches to improving the clearance process; however, past experience suggests that process-related changes alone may not yield significant, long-term improvements in the system. Rather some combination of process changes, mandatory clearance time frames, and remedial measures for failure to clear matters within the mandatory time may be necessary to ensure improvement in the system.

IV. Conclusion

Although the Section does not believe the case has been made to eliminate dual FTC/DOJ enforcement of the merger law, the problem of clearance disputes which arises from that dual enforcement must be fixed. In too many cases, clearance is delayed unjustifiably and merging parties and consumers are exposed to substantial costs. The agencies should be required, at a minimum, to clear transactions by nine business days after the start of the initial HSR waiting period. This deadline should be supported with one or more of the methods outlined above to ensure that clearance disputes are reduced and/or eliminated at the nine business day point. In addition, the clearance system should be transparent, so that merging parties can identify hold-ups.