FEDERAL TRADE COMMISSION

In the Matter of:

MERGER BEST PRACTICES WORKSHOP
SAN FRANCISCO

JUNE 5, 2002  
901 Market Street  
San Francisco, CA

The above-entitled matter came on for hearing, pursuant to notice, at 12:05 p.m.
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WELCOME

MR. KLURFELD: My name is Jeffrey Klurfeld and I have the honor and privilege of being the Director of the Western Region of the Federal Trade Commission, and I'd like to cordially invite you to our Merger Best Practices Workshop which we are having here in San Francisco.

So again I thank you very much for coming here. We are looking forward to your sharing your views. We are very interested in listening to what you have to say. Thank you.

INITIAL WAITING PERIOD

MR. WIEGAND: Our first topic this afternoon is the use of the initial waiting period, and Allison Davis is going to speak to this subject. And we asked her to come because a merger case that we worked on several years ago in this office, she was very energetic about wanting to accomplish a lot during the initial waiting period and we have really taken her approach and used it in other matters, so there was no better person to have speak on it than Allison.

MS. DAVIS: Thank you, John.
I did a little outline, just jotted down some ideas, I want to make sure that there's enough copies up here, and I'm -- there's not going to be enough copies for everyone, but I'm happy to provide copies later, it's just some way to give myself a road map so I don't talk for too long because that would be my wont.

The initial waiting period is really important for a couple of reasons. And we were talking last night about doing -- what are the problems, what are the issues that can up during the initial waiting period and what can the agency do and what can the private bar do to help facilitate a more efficient review process during that 30 days.

And I think the big problems and issues is delay, of course, your clients are always saying, "When are you going to close?" The biggest question is, "When do you think we'll get early termination and when can we get out of here?"

Uncertainty by the agency about how to address the antitrust issue, do they want more information, do they want a second request, do they need outside information, will an economist help, how best can we get information to them, it seems...
like an unending problem of who's going to get clearance to review it -- thank you, Senator Hollings.

And what I call the guise, a fishing expedition in the guise of an antitrust issue, we've had several second requests that had nothing to do with the transaction itself, it had a lot to do with the agency wanting to learn more about a market and use the transaction to do that.

And also it's important that the agency and the parties match the urgency and the timing. If it takes three weeks for clearance to come and then they have to question, it's good for the agency to realize that we'll probably want to fly to Washington the next day to meet with them and the economist and everything else.

So that being said, what can we do to help push this forward and make it more efficient? What can we do to rise this to best practices?

And I think there's two sides, of course, because there's two sides to the parties, there's the agency side and the practitioner side, and you'll see that the second page of my outline, if there's enough to go around, has ways that I think we can help from the private bar.
But let's talk a little bit about some solutions and suggestions, and I'm just going to put them out there because I'm sure people have opinions about these.

But at or prior to the filing it would be good to have some procedure for a preliminary inquiry. Now I have used this on an informal basis by calling somebody that I knew and said, "I'm going to submit this, I think it's going to raise some red flags, I don't think there's some constraints, what do you suggest I do? Who else maybe should get a copy of the HSR, who would like a white paper, who do you think -- where do you think I should go with this?"

It's good to be able to have a procedure, to have a preliminary inquiry because you've got a statutory time period and you can cheat a little bit by putting some time on the front end. It happens in situations, for example, where the parties figure out that there might be a red flag but there's really no constraint, so it's important to get information to the agency. They want a decision in the first 30 days and they want to make sure that it happens that way, and how can that -- how can we bring that about. A little preliminary
inquiry could help.

There's some mechanism we need to get the analysis done quickly, what's the most efficient way to get to the point where we need to be, and then the idea of jurisdiction, which I think has been beaten to death and I'm not going to go into it.

If the inquiry comes late, I have had some inquiries -- and I call them inquiries because they don't become second requests, you know, until after some negotiations -- it comes like the third week, it's important for the agencies to understand that at that point your client is apoplectic, and so there has to be some accommodation I think. Early face-to-face meetings are really important, in my view, it's trying to define and narrow the issue as fast as possible to stay within the 30 days.

And the fishing expedition that I'm referring to is, I had a transaction held up for about 90 days while we gathered information off the internet and provided it to the agency -- it was not anybody here, it was not an FTC inquiry -- but we were astonished at the end of the day that they asked no information about the parties themselves, they were only making inquiries about the market.
It had to do with the green power market in California. And everything we gave them was public document, everything we gave them we did research, but it was nearly everything on the internet and it took us about 60 days to get it through. They said, "Thank you very much, this is all very interesting, and now you can close your transaction." I was, like, "What? What is this? Why am I doing this?" We're happy to provide you, you know, an information service and do the research, but don't do it on the time line, the transaction time line.

You know, come to us in some informal proceeding or have a workshop like the wonderful workshop the FTC had on deregulation of the electricity market a couple of years ago in Washington, that was fantastic.

Gather people together and find out about information and markets, but don't do fishing expeditions during my initial waiting period.

Then you come to the second request issue, and you can go two ways, you know, you can go into the formal second request or you can have the alternatives, you could trigger another 30 days, which I have found works for me in transactions.
where I don't believe there's any antitrust problem, but there is an explanation that may be required with the agencies. And so I'm, like, work with me, let's just go another 30 days and then let's continue on a negotiated informal basis.

It would be good to know from the agencies how severe they see the problem to know if that's a worthwhile road to take, or if we should really go into the second request and spend our time negotiating in that vein, because that takes us in a whole different direction.

So it's again, it's go -- it's defining issues, it's trying to figure out where the concerns really are. The more narrow you get the faster the solution and the more effective I can be in providing information.

And sometimes it just takes another 30 days to narrow the issue. Sometimes the agency's just not going to know and it's going to take you some amount of time -- we had an issue in the tech area, and so again this was justice, but we -- it took us 30 days to explain the issue, and that was okay. We used people, we used technicians to talk to the reviewers and spent a little time bringing them up to speed, and once they understood what the issues
was and the technology that was there, and once I understood it, we could explain why the concerns weren't really there, that there wasn't any constraint.

And that's very valuable. I think it's valuable in the short term to get the transaction done, it's also valuable in the long term because it helps the reviewer stay up to speed in different emerging areas in the marketplace.

And I just want to spend two minutes, because this is a two-way street, I think there's a lot that the private bar can do to help the process. I think there's four main things you can do, but the main, the biggest thing you can do is -- to be prepared is don't be surprised by an inquiry, always anticipate an inquiry. You can look and see at your -- look at your transaction, talk to your business people, look at the structure of the market as you go into it. Make sure that you've got substantive antitrust analysis as part of the checklist when you go into a transaction.

And then if you see something that may raise a red flag, that may be a constraint, or that may be a full-blown problem, then be proactive and get it -- get with the other side, get with
somebody in the agencies and get the issue out on
the table as soon as possible. Don't sit there and
go, well, maybe they won't notice, maybe they won't
care. And sometimes they don't care, but at least
if you put it out there it's a lot better.

And in the first place, I think that it
enhances your ability to deal with them if you get
the problem out on the table immediately. You also
save yourself some time, you are able to prep, at
that point you've got your economist, you've got
your documents lined up, you kind of know where
you're going and so you're taking the best
advantage you can of the initial waiting period.
It's how to stretch that 30 days and give yourself
a little more time and a little more flexibility.

And be sensitive and aware of the
constraints of the reviewer that you have.
Understand, you know, what kind of things are
bearing upon them. Don't just come in and say, "We
have got to close. You don't understand my
client's urgency, the economics of this thing are
all going to go, or my client's going to go down
the tubes, or I've got to..." You know, have some
sensitivity on both sides about what's going on
with everyone.
And then lastly, just remain flexible. Remain flexible. Don't put your back up. Understand that there's a couple different ways to go and keep your options open.

MR. WIEGAND: Thank you, Allison. People want to come up?

MR. KLURFELD: At the risk of committing an act of lese majeste, I think I committed an error in terms of not recognizing Mike Cowie's new title, which recognizes his considerable talents and the asset he is to the agency. He is an assistant director of the Bureau of Competition. So I apologize.

MR. COWIE: While we're doing the subject of titles, could we identify the speaker by their company, organization?

MS. DAVIS: Sure. I'm with Thelen, Reid, Wiele and Priest, I'm an antitrust lawyer there, I'm a litigator. We have national offices, been doing HSR work for about 13 years.

MR. HOFFMAN: Did anybody else want to say anything about the initial waiting period? Any comments about things that we could do better? Or that we do well? If you're going to comment just at least tell us who you are and --
MR. OLEANNA: Is there a move towards a more standard access letter, sort of for the initial letter that you get from the agency when they -- it's not clear it's determined a problem and they want customer list information, customer names, volumes, et cetera? It would be good if that was more standard, because I've gotten letters both from the FTC and DOJ in the past, like, two years that have been pretty different. And it's stuff that I try to drill into my business people to prepare during (inaudible) deal so that we have it, but when you then get a request that you didn't anticipate it's awfully hard to get that quickly.

MR. COWIE: That's a good question, and it's something we've thought about. Rhett, do you want to try that? Because there's been some thought we should have a model posted on our web site.

MR. KRULLA: We are internally, among the shops, exchanging drafts of initial access letters. With their October 2001 announcement DOJ has affirmatively indicated that they want to make greater use, more effective use of the initial 30-day waiting period, and we're discussing with them types of things that we routinely seek in the

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initial period.

Also emphasizing to staff that we need to be ready with those letters as soon as we get clearance, so it's not something we should be thinking about after clearance is obtained.

But they need to be focused on the industry we're dealing with, focused on the nature of the transaction, are there vertical issues, horizontal issues, is it a regulated industry, is it high-tech. So a standard form access letter I think would be problematic.

But a checklist of the types of things we will -- you can expect us to be asking for and the types of things you should be assembling, including the names of customers, contact people, phone numbers, addresses for top customers for the overlapped products.

Other routine things we ask for would be most recent business plans, any analyses of the acquisition, any industry -- or consultant studies or reports about the industry. Those would be -- and product brochures, if it's a product where a widget, we don't know what a widget is so give us something to show us what that is.

Those would be the key elements that we
would seek.

And also preliminary market share or competition share information in terms of what are the overlap products. If we ask for market share we get a debate, well, it's not a market, who knows what the market is, we don't track market shares. Well, most companies have an estimate of what the universe sales figure is.

And depending on the nature of the product, we'd also be interested in capacity and production figures, identify who the competition is, i.e. who are the people that do that stuff. And do you have estimates of what their capacities are, what their production is, what their sales are, and from that we can calculate market shares. Or maybe you don't have those figures but you do have market share guesstimates, and then we can talk later about what the basis of those is and how reliable they are.

MR. COWIE: Gil, do you regret having asked that question? Because it sounds like Rhett wants a C-O (inaudible).

MR. OLEANNA: That's the other question, is the concern is that (inaudible) suggested (inaudible).

MR. KRULLA: We try to keep these short,
the time frames are shorter than for a second request. But in any given transaction we may have had another transaction in the industry say four years ago, we may want to go back and look at what the competitive environment was prior to and following that transaction, so there may be a particular reason in that first 30-day period to look more deeply at a particular case.

MR. HOFFMAN: Anybody else have any thoughts on the initial waiting period? Or we can turn and talk a little bit about the second request itself. Mike, I'll lay it on the table.

MR. COWIE: Well, the main purpose here is to get criticism and this certainly won't -- we deal with the subject of the content and scope of the second request, that's an area where I expect some of you have some concerns or criticisms or recommendations.

Are there issues concerning the second request instructions, the type of information we're asking for, the nature of the records we're asking for that any of you think is overly burdensome and not worth the effort? We'd be interested in hearing about that.

MR. SUTIS: Bob Sutis from Hewlett Packard.
Certainly back-up detail systems are, from Hewlett Packard's point of view I think asking for backup e-mail system tapes is pretty much an idle exercise. There is no way to search those backup archive systems by the nature of those systems, and so you spend an enormous amount of time and energy in trying to produce those systems for almost no return.

MR. COWIE: Well, why we maintain that, what we're encountering, Bob, are situations where companies are becoming more sophisticated at imposing involuntary e-mail deletion programs. So in other words, employees have no choice but to see their e-mail every two or three months be deleted. So we're facing situations where companies have two or three months of live e-mail, that's all, yet they're telling us they have these backup tapes where someone's taken a picture every three or four months of everything they have and then maintaining them.

MR. SUTIS: I suppose I have two comments. First is, you know, there may be companies -- and I've worked for Hewlett Packard for a long time so I'm unfamiliar with the practices of a lot of the other companies -- but I doubt that their e-mail
traffic essentially is evaporating in 60 to 90
days. Maybe their in-box or their delete trays in
their e-mails systems, but certainly not their
personal holder and a lot of records that are
stored on their C drives or on their company
servers. So I think that plenty of information's
still available.

And I still would think that the backup
tapes -- and it would have to be perhaps on a case-
by-case situation if you did find somebody who is
erasing every form of e-mail communications after
60 or 90 days as a matter of company policy, I
still think that, except in those situations, that
there's very little return for looking at backup
tapes.

MR. HOFFMAN: Karen did you -- Karen
Silverman from Latham & Watkins I know had a couple
things to say about the second request.

MS. SILVERMAN: More generally, but also
about some of the electronic process in production
and the backup systems for a minute.

But just to finish Bob's point, I think one
of the challenges, too, with the electronic
productions and the backup systems is the
(indiscernible) and the details is going to differ
by company. And I know that even with companies divisions will very often have different systems in place.

One of the things that we have recently encountered is that on big productions where there's a continuing obligation to produce (indiscernible) current within 30 days, every time you take a snapshot of that system you're capturing sort of what came before, and so there's a lot of detail in programming associated with sorting, to producing a current production and then sorting out the material that's unique.

So what you need to do is work with the agencies about -- in terms of what they actually need to see, what they're really interested in getting at, whether it's a limited number of sources or whether it's a particular kind of document.

But to technically comply with the obligations of the continuing second request production requirement -- and this gets to the instruction about how current your production has to be at the end -- it just raises all sorts of new sort of practical problems when you throw in the electronic production piece of it, because it's not
static. And it's not just a question of somebody not throwing their material away, it's a question of the system taking the damn picture over and over again and sort of recapturing all the same information.

So I would commend to those agencies taking a sort of broad and creative view, and maybe soliciting more practical experience from folks about how they've specifically solved that problem.

It's confounded several clients of mine lately, not actually the FTC, but probably delayed an ultimate production by about a month just dealing with that issue on -- so.

MR. HOFFMAN: Well, is that issue, for example, eliminating the requirement that people update (indiscernible) records? Or, I mean, do you have any sort of general best practice type of idea that we should do?

MS. SILVERMAN: I think that arriving at a cut-off date that if, if anything's updated that it's updated for a limited number of sources identified up front so that you're not dealing with sort of a wholesale production each time. And it's really just a volume of records issue.

And the problem is, if anybody's ever done

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this -- and several colleagues back here have done
too much of it -- but if you read an e-mail,
they're just time-consuming to process from a
review standpoint, and so it's a little bit of the
waterwheel problem, which is you have to read them
backwards and to print them out and decide whether
this stream went left or right and how is it going
to read from the last one and so forth. So, I
mean, it just raises unique issues.

So I would confine the updating requirement
to a limited number of sources or a time frame that
is sensible, or a topic that's searchable in the
subject line, or some -- it'll be a very practical
solution but -- and it will probably need to be
customized by event. But it's worth giving it some
attention.

MR. COWIE: Karen, are you referring to a
situation where you were telling the companies to
cease deleting e-mail when the system is
overloading, or are you just talking about --

MS. SILVERMAN: Well, that --

(The parties simultaneously speak.)

MR. COWIE: -- searches in general?

MS. SILVERMAN: Well, that's part of the
problem. And also different systems are capable of
different backup functions.

And there are people sitting here who know a lot more about than I do but -- some of whom have designed these systems.

But they -- there's a requirement not to delete which sort of creates this accretive problems (inaudible) behind it. But there's also the problem that on any given person's drive they're keeping threads and strings that are sort of lesser-included.

And we've come up with some interesting filter solutions for instance, where it's possible where you can have the system match up files so it can tell when you have a duplicate e-mail and just sort of delete one and produce the other, so you can compare...

And we've negotiated -- again, this was with Justice -- we ended up negotiating sort of a methodology for presuming that e-mails were duplicates of one another and sort of excluding them. Because otherwise if you cc 20 people you're going to get it 20 times and --

MR. COWIE: Right. And we ought not to care about those people because there is --

MS. SILVERMAN: Right.
MR. COWIE: -- for other types of duplicates the argument has been made that I want to know what was in his files --

MS. SILVERMAN: And that -- right.

(The parties simultaneously speak.)

MR. COWIE: -- and when I'm deposing a CEO or the V.P. of marketing I want to know what was in his files, therefore need to produce the duplicates for the --

(The parties simultaneously speak.)

MS. SILVERMAN: And my feeling is if you can come up ahead of time with some stipulations that say, listen, if the re line, if the cc line says that you were copied on the e-mail and it didn't actually come out of your in-box, let's assume you got it.

MR. COWIE: Right. Yes.

MS. SILVERMAN: You can probably get stipulations along those lines.

You can probably arrive at a list of filter terms so that if you were to run a generic search for everything having to do with, you know, green widgets, plus about 40 other terms, you're going to get most of the e-mail you care about, you're not going to get the softball schedule and, you know,
some of these high school play obligations and things like that.

MR. COWIE: Right.

MS. SILVERMAN: Because all that stuff has to be printed and read. I mean, and it's just enormously burdensome.

So, I know it's a topic for other speakers, but I think there are some standard sort of parameters that could be --

MR. COWIE: Yeah. Well, we could have a standard --

(The parties simultaneously speak.)

MR. COWIE: -- second request saying it's unnecessary to produce duplicates in the case of e-mail. For non-e-mail --

MS. SILVERMAN: Right.

MR. COWIE: -- there's been some debate for the reasons I've stated. But just thinking out loud it's hard to articulate a reason why you would need duplicate e-mail given that you have a very clear record of who are the recipients.

MS. SILVERMAN: And I think it's -- the systems are -- many of them capable of, if you compare the recipients, the date and the size of the file and the subject line, you can pretty
quickly identify almost mechanically where you have duplicates on your hands. So if you can come up with some rules of operation on that I think it would help.

And the other thing, we're generally on the second request, what's interesting to me is that -- and the model second request is a huge improvement over where we were.

What's -- what has occurred, though, over the last couple of years since it was really generated again, is that it continues to grow with the times, as it should, but nothing is ever taken out. So you can actually -- if you've been practicing long enough -- you can see, like, the deal you did in 1998, you know, sort of reflected in these generic terms.

I think depending on how you have used the initial waiting period and how focused you know your issues to be the second request -- which always looks the same anyway -- is more or less frustrating. Right? If you have spent the, you know, the first 30 or 60 days narrowing issues you are still going to get the complete second request from beginning to end, in my experience.

That it's very infrequently the case that
the agency would up-front any -- they'll invite you in to modify and they will be prepared to modify, but the operative document, and the document that will determine when you're in compliance and when you can actually start clocks running on doing your deal, is the same document we all see all the time, and you can pull it up off the web this afternoon.

What changes are the definitions, first. I will tell you that when a second request comes in there's a parlor game that we play, and we compare it to the model and figure out sort of where we are to be surprised, and what's different about this, and we probably read too much into the differences between the model and the actual request that comes over. But frankly, there aren't usually that many differences.

The model is a great tool for educating and preparing clients, particularly in deals where you know you're going to get an investigation. It's a great device to use to help them understand sort of what the breadth of their obligation is going to be, and even start preparing for it in some instances. Many instances.

But that's it, when it arrives it is still a -- I don't want to say it's a meaningless
document, but until you really understand the
definitions and how specifically they are going to
apply to your case and your parties and the
individuals identified, it's sort of inoperable.

You know, and so we'll get to modifications
in a little bit, but some of my recommendations for
best practices really go to the modification
process, because I don't know that you can get
around the need for a broad second request given
the agency's --

MR. HOFFMAN: Well, let me ask you about
that.

Should we abandon them all, or should we
have it just as an educational or structuring tool
for people to look at in advance, but when we
actually do a second request, assuming that it's in
a situation where we've had some first 30-day
communications and perhaps it's an industry we know
a little about, you know, should we be doing second
requests that are really just narrowly focused on
whatever the issues are at the time?

And one of the ways this comes up is we've
heard -- we started to hear that, you know, the
agency uses the second request process to not only
get everything that we need to make our decision,
but also to get everything that we need to litigate in the, frankly, extremely unlikely event that things actually ever go in front of a judge.

And one possible suggestion is that we restructure the second request to not seek those litigation-type things but instead to focus in on just the stuff that we look at internally.

MS. SILVERMAN: From a -- and I think, I think that would be a step in the right direction, to actually -- particularly where there has been aggressive use and productive use of the 30-day waiting period, to have that reflected in some respect in the operative document and, you know, the subpoena.

And one of the reasons is this breadth and fishing expedition and litigation interests, you know, concerned.

The other is just the straight-up compliance and timing concern, which is that you are not done until the second request is complied with, whatever that ends up meaning, in whatever way, shape or form it emerges from the modification process, so that it becomes the tool that both sides use to control the clock as much as it does to control the analysis and the investigation.
And we've had some interesting -- I think the staff has lately become pretty creative in how it gets here or depart from the actual model second request, you know, we've been through deals where we have completed the investigation and no one ever referred again to the second request after the day it arrived, because we were answering separate questions that actually did go to the substantive issues, but as a result nobody ever knew when we were done. You know what I mean?

And so we would -- there was a very unsettling -- I mean we had a very good relationship with staff, it worked in that instance because we talked and we understood, you know, the crux (phon) and the -- and the expectations for the crux and everybody lived up to their representations in that regard. But we had to advise the client that they were taking it on faith that, you know, on day X, you know, we'd be determined to be finished with the production.

It didn't come because we --

(The parties simultaneously speak.)

MR. HOFFMAN: -- when you gave that advice?

MS. SILVERMAN: And that has happened too.

But, I mean, so there's -- it shouldn't have to be
taken on faith. And I don't think it ought to be the device that we use to run the schedule.

And one of the recommendations I would have for the modification process would be to put calendar on there. I mean it doesn't have to -- you know, we can even do it binding or non-binding, but have a set of expectations and dates set out where, you know, if we produce, you know, on June 1 we can be expecting to, you know, at meetings on June 15 and, you know, we're -- or whatever, you know, we draw one and sort of set out a calendar that everybody can start to work with and build into their own internal plans.

You know, one thing, as I was talking to some of our folks internally about this that was sort of so notable to me is that the fact of the matter is that when you go to pull documents from your client and review documents from your client the 18-page second request is easily reducible to one page. You know, spec seven or whatever it is, it says "All documents related to competition in the following 17 ways," is all documentation related to competition, right? I mean that's what you tell your young attorneys, that's what you tell your client and that's what you collect and
produce.

So I think that a lot of the language that's there is unnecessary. I mean I know why it's there and I know that, you know, that there are competing interests in the agency, but it would be helpful to get a little recognition of that when you're coming up with the definitions that are really going to inform how you go about making that a reality. Because otherwise you're just, you know, it's infinite.

And so the model is useful there to, as I say, instruct your clients that they have a very serious issue, but in terms of how it's going to get done it almost bears no, you know, resemblance ultimately, so it swallows itself.

You know, and like I said, I have been very pleased lately with the ability to work with staff on modifications and to creative solutions, they're given very open to understand, you know, the technical electronic problems and were -- you know, it's unreasonable to have to search, you know, 40 people who all have basically the same job, we can use the sampling technique or -- I mean, they're being a little bit more creative and flexible in how that goes down, and then ultimately what the

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size and shape of the second request ends up being, so...

MR. HOFFMAN: Thanks.

MS. SILVERMAN: Okay.

MR. COWIE: Any other comments on the subject of the content and scope of the second request? Alec, you must have something to say.

MR. CHANG: I think what Bruce said is actually very interesting and definitely a step in the right direction, because again, if we go back to the underpinnings of this, it's to give the agencies notice that if there is going to be a problem they have time to go to court and do something about it.

It's not necessarily to give the agencies time to wrap up their case and figure out who their witnesses are going to be, know where they want to file, know which theories, which arguments are going to be the primary arguments, which argument is going to be their secondary arguments. But, you know, HSR is a notice, it's a notice but not a precomplaint discovery, precomplaint preparations. So I mean I think that's a very positive and a good thought. Because the second (inaudible) need to be modeling the -- everybody expects to get
the model because it becomes a negotiating point, it becomes a leverage point, which goes to timing which can catch on.

And so if we can, if agencies are willing to focus and live by the model, then that -- I think what that means is that the agency who has the seed lawyers will be using the first 30 days, just as defense counsel typically try to use the first 30 days (inaudible).

MR. HOFFMAN: Shall we turn to negotiation?

NEGOTIATING MODIFICATIONS TO SECOND REQUEST

MR. KRULLA: The HSR review process, the second request process, as we view it is an educational process to help advise staff in determining whatever further investigation at any point in time is warranted, whether we can with some degree of confidence close out the investigation after we've received some quantity of documents, information, document questions answered, whether there's a problem that can be solved through a consent to a remedy, in which case we need to know that we have the documents and information sufficient to identify the problem and sufficient to give us confidence and let us represent to the Commission that the proposed fix
fixes the problem.

And then there are those cases where we then need to litigate the matter. And when we present the initial investigation of the matter to the Commission, say, "Well, we have to be in court tomorrow, we need to get a TRO, that TRO will be good for 20 days, assuming it's 10 days ---- again for 10 days, and then we need a preliminary injunction order. The Commission's going to ask us, "What evidence do you have in hand?"

Now in one scenario, as suggested today, we can tell the Commission, "Well, what we got was enough to tell us that we should be doing something but, frankly, looking at some of the legislative history, taking it out of context, we didn't think that we needed to start preparing our case until we got into court."

MR. COWIE: Alec Chang told us --

MR. KRULLA: Yes. So Alec's assured me that in the next 20 days I could (inaudible) my investigation.

MR. CHANG: Discovery (inaudible) in those 20 days, as any other litigee would have, and I don't know why necessarily the Federal Trade Commission should be somehow a special class.
MR. KRULLA: Well, again, the whole process of the second request, and this is a preamble to negotiation, is to educate us. The goal as we see it is not compliance with the request, the goal is to get us the information we need.

We've got 30 days, or if clearance takes time out of that 30 days less than 30 days in a cash tender offer, in a bankruptcy proceeding 15 days, sometimes we renew that for 30 days. But we do what we can in drafting the second request within the time we've got, that's an absolute statutory deadline; the second request is only valid if it issues in a timely manner.

So we issue that but at that point if we haven't succeeded in sorting out the issues, disposing of the issues say in the first 30 days it's timely to sit down with the parties, figure out what the issues are, what is the most relevant information and documents to address those issues and see if we can't in this triage process put this matter in the category of transactions that don't warrant further investigation.

What would also be welcome, and if we look at a transaction where there are multiple products at issue, it may be that five products lend
themselves to disposal relatively quickly. During the second request we didn't have enough confidence to eliminate those, we can eliminate those.

Then there's one or two products where there's a clear fix that can be -- deal with the problem. And there may be an inkling on our part, maybe a recognition on the part of counsel undisclosed to us that the parties are prepared to fix that problem.

And then there's that other one out there where the parties say, "Well, you may have an antitrust concern but we're not willing to fix the problem." So we're at an impasse. And when we're at an impasse and where the path at the end of the road is we've got to go to court, then notwithstanding procedures for getting discovery and litigation, we have to show the Commission -- D.O.J. has to show the Assistant Attorney General that they've got a case. They'll ask, "What is your case?" and we have to have that case in hand to be able to demonstrate to our decision-makers that they should send us into court.

And so I think the -- considering what the scope and breadth of the needed modifications are in order to get through the process, the earlier
firms come to the recognition that they may have to fix a problem they'd rather not fix the earlier we can shortcut the process and get to the bottom line, which is do we have the documents and information we need to identify the problem and to ascertain that the fix is correct.

When we go into a second request process where from day one the parties say, "There's no problem in any area, we defy you to find one, and we're not particularly going to help you understand the industry, help you understand where the problem is because we think -- we don't think you're going to be able to develop that record." And the only thing the parties are offering is, "But I need modifications, there are all these burdens in the second request and I need them modified because it costs too much for me to find these documents and you don't need these documents anyway because you would only need them if you go to court and there'll be plenty of time in the 20-day period to get discovery, and it would take us months and months to produce those now, but in the 20 days we assure you we'll do what we can to get them to you under the circumstances."

Well, we're looking at a confrontational
scenario that we can address that through a negotiated modification of request. That the earlier the parties come to recognition as to where is this headed, is this -- "Hey, look, I've dealt with you before, I think I can show you there isn't a problem," well, show me, I'm here to be shown. And I can't present a case to the Commission that's not a case.

But in conducting the investigation, if I'm looking to assemble the documents and information not only that will guide me in ascertaining is there a problem, is there not a problem; not only to ascertain whether should a fix arise out of the blue, and it often arises in the 11th hour, is that fix adequate.

But also I've got to prepare my case, and that's the direction I'm going when the agenda on the table is only, "Look, we need a modification to this request, I'm not going to talk to you about substantive issues. I don't think you're going to be able to make your case at the end of the day, please grant me concessions and modifications. We'll be as reasonable as we can be under the circumstances."

MR. HOFFMAN: In terms of talking about
proposals from our side, from the private bar side, about what to do with the negotiations, Eva, I know that you are prepared to start the private bar view on that.

MS. ALMIRANTEARENA: (Inaudible) take total responsibility for the entire private bar. But --

MR. HOFFMAN: I said start.

MS. ALMIRANTEARENA: Start. I did have two quick comments. Oh, Eva Almirantearna from Howry, Simon, Arnold and White. Sorry about the spelling.

I wanted to make a comment both on what I call the data request or interrogatory side and then on the document request side.

My experience generally with negotiating modifications with the FTC has not been a bad one, so I'll start out with that.

But I do -- I have had the experience of receiving the second request, I've had data requests or interrogatories that really look more like the wish list of the economists in how they want the data recorded, all the different ways, they want it cut this way and that way. And you take that second request to the business people at the client and they look at you and say, "We don't keep it that way, we don't know anyone who keeps it
"that way," and it creates a real frustration and a real disconnect. And it creates for a lot of time in the negotiation process to go back and say, "You know what, we don't keep it this way."

And I think one of the problems that has developed is that once it is written in the second request as "this is what we want" then it becomes "you must have it then this way because this is how we would like to see it." And it's a little psychological shift there that takes place.

And I guess I'm not sure what the solution to that is. I mean ideally it would be a good start for there to be more discussion between the staff that's writing the second request and the parties that are receiving the second request about how data is actually kept. And not so much that you're not going to give it to them but how can you cut it in your database and how can you report capacity, and what capacity can we report before the second request is issued.

If that's not possible then I think that there should be some more strict deadlines on the staff's responding to requests for modifications in that area, because you're not asking them to eliminate a product or eliminate a geographic area
or eliminate a category of documents, but literally coming in and saying, "This is how our data is kept," and if you believe us then there should be a modification of how you're going to get the data. That's on the data side.

On the document request side I think the age-old problem of we really don't want to produce a million documents in every second request, and the tension between what the agencies need and what the parties need to conduct an efficient merger review is problematic.

And my personal experience has been that at the end of the day, in most of the cases that I've worked on, the documents that are important or useful or are going to establish the case are a very limited number of documents, and they usually come from a limited universe of executives or people on the org chart. And even if you produce a million pages a lot of times the universe of documents that are important are 500.

And I guess one thing that I would be interested in seeing is the FTC, and DOJ for that matter, conducting some kind of retrospective on some of their old cases either that they've litigated or that they've recommended a case, to
sort of see how many documents did we ask for, how many documents did we get, and at the end of the day how many documents -- and from whom, who's files -- did we use to convince the Commission, and then did we actually use litigation.

And that if there -- you know, maybe after conducting something like that there would be less of a sense that I need to get two million because who knows what's in there, knowing that, you know, generally we all tend to recognize which documents are the important ones, and who's going to keep them. And is a e-mail from one salesperson to another sent five years ago really going to be a make-or-break on any particular merger case.

MR. HOFFMAN: Let me ask you this though. Let's assume that we could probably all agree that in 95 percent of cases the stuff that's important is the stuff that comes from say the top 20 people in the company. So it seems to me that what you're really talking about is that we use as a standard procedure rolling productions that start at the top of the org chart and then work their way down if we need them.

But the downside to that, it seems to me from a party's perspective, is that that could
extend the length of the second request if it turns out that we think that we're going to need to get further and further into the org chart because you're not out there preparing at once, everyone is being searched or searching incrementally and producing incrementally. I mean, it seems to me like that would probably be an efficient process and produce a lot less documents and still enable us to make good decisions most of the time, but also as a tradeoff to the parties, in that they might face a longer back-end --

MS. ALMIRANTEARENA: Sure. And I think that's a huge tension, because most of the time you are under incredible pressure to substantially comply. And clients aren't really in to this whole, "Well, we'll just give them now," they just want the clock to start on the government's end usually because they have reasons to want to move forward, business reasons to want to move forward. But I mean sometimes -- and again, I don't think this is a solution, but for many of us --

MR. HOFFMAN: (Inaudible) have a solution -

(The parties simultaneously speak.)

MS. ALMIRANTEARENA: I've changed the

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rules. No. But a lot of us are paying for the sins of the few, if that makes any sense. I mean for every one case that's litigated or every one case that's challenged there may be 15 transactions where the scope of what's being produced is probably much broader because you're worrying about, you know, that one...

The thing is, this is my sense of what the universe of important documents are in every case, but I just don't know whether there's ever been any empirical work done, or anything done that would actually -- people would look and say, "Oh, wow, you know, we haven't been missing the smoking guns." So that's my two cents on that topic.

MR. SUTIS: At least from Hewlett Packard's point of view and in a large-scale transaction, I would not like to see a rolling production starting at a managerial level and working down out of sight because the logistics of gathering documents is enormous if you've got to keep visiting a site. A negotiated, you know, site-by-site or entity-by-entity discussion with the agency about whose documents to produce is the most efficient I think for both parties.

MS. SILVERMAN: To echo sort of what both
of you are saying, I think one of the frustrations is that we each, from a private standpoint, have our own perspective on what's occurring, and how the sense of the agency has a much broader sort of vista.

And the impression that I get is that of the 12 important modifications that you eventually get and negotiate six to eight of them are standard. Right? And they go to scope, they go to whether documents related to it we're discussing are going to be produced, they go to sort of how are we actually going to produce the statistical information that are (inaudible).

But what would help the negotiations I think go forward quickly would be to have the staff show up with sort of a checklist of here are the things you're going to want to talk about, as opposed to making it seem like a treasure hunt each time. I mean, you walk in with -- and I have the letter on my word processor that says "make sure you ask about X, Y, Z." You know, but you do feel like you're (inaudible) because as it's written on the second request it comes out as a very broad statement. And that's the, that's the bracket against which you have to work.
And if there were a little bit of up-front acknowledgment I think on the part of the agencies that -- not just that you're welcome to come in and talk about modifications, but we understand that they were loaded scopes, they were (inaudible) depth as well to breadth, that sampling is on the table and you don't have to ask for it, but it's a reasonable thing to be discussing with a view to regional sales departments that all more or less look the same. The electronic universities to be addressed, whatever that is. I think that would go a long way to sort of getting everybody off to the right sort of thing and (inaudible) negotiating.

And I would add a calendar that, you know, again whether it's something that's -- it can't be strictly bound or binding, but setting expectations up front about so now that we know where we have to go and what we have to do, here's how we sort of see it rolling out. Or, you know, we'll stay in touch about the following trees or watershed events. Or we can get documents to you, the first round of core documents to you -- we'll collect them from everybody, but during the course (inaudible) on X date we'll follow up with Y date.

You're going to want to talk about how, you
know, the standard second requests -- is it 30
days? No, it's 14 days or something? Your
production has to be current within 14 days. I
don't think I've ever done one, with the exception
-- you know, there are a couple specs that are
updated, but you always have to ask for that.

I mean that -- you know, either changing
the model request or, or we're coming to the table
saying we recognize that it's not workable because
you've got (inaudible) employees.

MR. HOFFMAN: Well, with that one, should
we change it to say something like, for example, if
you agree with a rolling production you won't have
to update anybody provided that you comply within a
certain period of time, like six months, so things
don't get too stale? Or should we abolish the
requirement entirely, as long as you substantially
comply within a set period of time? Or does that
create negative incentives?

MS. SILVERMAN: I don't know if that
creates negative incentives, but even having a menu
of options would be better. Because I don't know
that any one solution is going to fit every
transaction. I mean, that's one of the things that
makes the practice interesting, is that they're all
different. But having a menu of sort of acceptable, sort of this has worked in the past, maybe we can improve on it here sort of options that both parties bring to the table, as opposed to putting all the burden on private parties (inaudible) and start complaining right out of the blocks. Because I think everybody understands that we're not there to complain, we're there to make it fit the actual organization (inaudible) sort of comply list.

So, and that's the data point I think, which is that everybody knows you -- you know, they're going to get data but it's not going to get -- it's never been enough for them so far as I...

MS. ALMIRANTEARENA: And quite frankly, you know, there's a real downside to this that creates -- the business people, the client really then starts saying, "Well, what's wrong with those people in government? Don't they understand how our industry works?" and it creates a sort of bad feedback with...

MS. SILVERMAN: Yeah.

MS. ALMIRANTEARENA: But on this issue of how -- what to do about the rolling production, I mean the whole issue of committing to a rolling...
production or giving that up or -- it's just very
difficult, because every deal people are going to
have very different reasons for why they can or
can't roll --

(The parties simultaneously speak.)

MR. HOFFMAN: -- as a possibility that you,
you know, that you're rolling, you don't need to
update because it creates a difficult situation
where you produce the files of this group of people
maybe from this site, or these executives, but then
you're later -- you're going to have to update
them, so in a way you sort of get penalized for
producing certain people early.

MS. ALMIRANTEARENA: In my experience,
there's only very few specs that anyone really
wants updated, and they're usually from very few
people. And that is the truth.

I mean why do you need to have the last 14
days for every person? Or, usually it's only
certain people in certain jobs and about certain
topics and that's -- everybody, sort of you know
that, and so going in you know you're probably
going to negotiate that almost, because why would
they care what the person wrote in the last 14 days
about the org chart. You know, things like that.
So that I think that there's -- I think what Karen's saying is that some of this stuff, you sort of look at it and you're like, "Okay, well, I know I'm going to have to go in and get that," but, you know.

MR. COWIE: How realistic do you think it is that there will be meaningful dialogue about the form of data the company maintains within the initial 30-day period?

MS. ALMIRANTEARENA: Well, I mean, if you got clearance on day two you could have a lot of dialogue. I mean, I don't know. You know, it's a very hard line to walk.

I don't know if there's been any dialogue, but I do think that not having any has a big downside.

Now I realize it's a timing thing -- right? -- like why talk to you about it before --

(The parties simultaneously speak.)

MS. ALMIRANTEARENA: -- second request, we can just talk to you about it afterwards, after the second request is issued.

MR. COWIE: But you're trying to issue the second request, and I say to you, bring your controller in to tell me about your cost
accounting, financial accounting systems, you know, what do you say in response?

    MS. ALMIRANTE ARENA: Well, the thing is in most -- I think they're -- in most transactions you pretty much know whether the staff is going to --

    (The parties simultaneously speak.)

    MS. ALMIRANTE ARENA: -- the staff is going to recommend it or the staff is not. I mean there are some places where you're in the middle, but most of the time either people understand it's coming or it's not coming. And so how much of the initial waiting period you're -- you know, you spend trying not to get one, and in some cases you know you're going to get one anyway, so that also varies.

    I mean I would rather spend the time in the initial waiting period trying to narrow the scope of the request or tailor the scope of request that I know I'm going to get, because I'm not going to, probably not to convince you not to give it to me. So it also depends on what my transaction is like.

    MS. SILVERMAN: And I think some of those questions are built in or -- listed in the order (inaudible) explicitly be (inaudible) in this access letter process, or this up-front -- you
know, how do you -- put in a neutral term -- and
how do you keep sales data. And you may be at that
stage answering for 17 divisions of which three end
up being of any competitive significance.

But then when the second request arrives it
just reflects a little bit more --

(The parties simultaneously speak.)

MS. ALMIRANTEARENA: -- it's a request to
you, to the company as opposed to a request to the
world.

MS. DAVIS: I think the concern, too, is
the same thing I said in the initial waiting
period, and it happens all the time, is you want to
get to the issues faster. So, you know, if you can
narrow down what it is you want in the form that
you want to prior to the second request is good
because it gets you to the solution faster.
Anything that pushes it forward faster is going to
be better.

ELECTRONIC RECORDS AND FINANCIAL DATA

MR. HOFFMAN: The next sort of topic we
have deals with electronic records. I shouldn't be
surprised, especially here in San Francisco, that
most of what we've been talking about in general is
dealing with electronic records and e-mails and so
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forth. So, you know, I think this is an issue which kind of cuts across all of the boundaries of the second request and, as a result, I don't want to really limit it to just talking about electronics.

I mean some of the points that we've thought about in the context of how electronics have affected the second request process deal with whether searching for electronic documents creates substantially different circumstances for companies than the traditional search for physical documents. For example, do you use term searches? And, if so, what should the agency's role be in responding to people's request to use specific kinds of connector-type, you know, West Law-type searches as opposed to physically reviewing everything that exists on a company's server.

What do you do about backup and archive materials, which we have already touched on but we're always glad to hear more about.

What do we do about legacy systems when companies have done significant changes in the systems that they're using. And some things may or may not exist any more or less degraded form on old versions of software the company no longer uses for
but that fall within the time period of the second request.

And also in sort of related way, production formats. You know, what should we be doing about people giving us things, whether the documents originally lived as electronic documents or paper. You know, people giving us stuff either in electronic and images and OCR'd or text-searchable of old document form, or printing electronic documents out and giving them to us in paper, or giving us live files.

I've recently had an experience where we had a production that involved a tremendous number of live, active files. In other words, the original Word documents in Word, e-mail in Microsoft -- you know, I had this -- you know, everything seems to be Microsoft. Excel, the spreadsheets.

But there's sort of an infinite variation in the way things can be produced to us, so I wanted to lay those on the table, but also keep the discussion open for anything that you all want to address in terms of -- I guess this really primarily deals with modifications, but anything in the second request process.
I know that Bob Sutis from Hewlett Packard and Alec Chang from Skadden had some thoughts on these topics, so I guess what I'd like to do is start by asking if either of them want to address this point, or any of these points specifically, and then go on to anything else that anybody wants to add.

Bob or Alec?

MR. SUTIS: Maybe the two of us could do a little point-counterpoint here, simply work on the same deal but do parallel sides of the same deal.

MR. HOFFMAN: That would be great.

MR. SUTIS: So from Hewlett Packard's point of view, we negotiated with the agency to produce everything electronically, and we produced about three and a half million documents at the end of the day electronically. And it was -- about 86 percent of our production was electronic versus paper. And in the paper -- and everything in the electronic (inaudible) chip image so it was full-text searchable, and we agreed with the agency that if any training was necessary we would offer that training to staff that were examining the documents.

For the paper documents we decided not to
OCR the documents. There is a procedure for taking
all those paper documents, turning them into OCR
images, but the search ability of them is a
reliability of only like 60 or 65 percent.

MR. HOFFMAN: Well, we were told the other
day that the error rate on OCR'ing is only 10
percent. But what that means is one out of every
10 letters is wrong. So when you think about what
that means in the document it's really not too
good.

MR. SUTIS: Yeah. And for the paper
production -- and in a large part the paper
production is duplicative of (indiscernible), at
least in our experience, of what (inaudible)
electronic document and it's origin. People print
out a version of something, tuck it into a paper
file. There aren't a lot of newly-created paper
documents that are floating around HP.

MR. HOFFMAN: Bob, you guys did this, if I
remember right, with an outside vendor who set up
essentially a web site. Am I correct about this,
that things could be -- that the agency could
access, had secure access to sort of one side of it
and you guys had access to the other side? Is that
right?
MR. SUTIS: Correct. We loaded everything
on a server and then the agency, Rhett and his
team, just examined it privately at their leisure.

MR. HOFFMAN: Is this a practice that you
would recommend us using a lot in the future? Was
your experience with this good or were there things
that --

MR. SUTIS: Oh, yeah, absolutely. It would
be -- we used a company called S.B. Technology,
based out of Los Angeles and San Francisco, and
they have several Gibson, Dunn and Crutcher,
including a president 12 years in litigation, Adam
Bendell for Gibson and Dunn, so we felt pretty
confident in their production capabilities, and so
they did an outstanding job of it.

MR. COWIE: Do you have a sense of how the
cost compares with doing an old-fashioned paper
production?

MR. SUTIS: Well, I think it's dramatically
lower. And Hewlett Packard will probably be
getting Mr. Chang's bills for the other side
(inaudible) portion of this transaction very soon
(inaudible). We're fairly confident that it's a
tremendous cost-savings.

Maybe Rhett has any thoughts on the use of
the documents, especially being full-text searchable on the remote server.

MR. KRULLA: I think in this experience getting electronic copies of documents was a positive experience for us, it was very (inaudible).

We've had some cases in the past where we've gotten productions on CD and we try to access the documents, they don't open up, they want a soft-pointer, and the clock is running. It has just been a mess. So I think as the technology evolves, as these contractors develop experience, capabilities and provide these kind of services, I think it's going to work more and more.

I think also as we learn often in our side, or DOJ, it should be possible for the agencies to receive material in electronic form or in CD form in a form we're -- we'll have confidence that we can in fact access it.

So that involves, again back to rolling production or (inaudible) modification, involves not a dump on the last day of materials that we may or may not be able to access, but samples of material or rolling production so that we can report back to the submitting companies on how it's
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working, what problems we're having, and if we have
some assurance and the companies are going to work
with us in enabling us to access that material then
we will be much more comfortable in experimenting
and saying, you know, we don't want hundreds of
boxes, you know, our hallways and move toward the
electronic format.

MR. SUTIS: And one of the things we did, you just reminded me, is our I.T. characters worked
with the I.T. staff of the agency to make sure that
the marriage of their capabilities and the database
(indiscernible) tools the agency wanted to use
matched what we put on the servers so that, you
know, the access from the agency point of view is
seamless.

MR. KRULLA: Yeah. Our I.T. people are
available and eager to work with the companies'
I.T. people to make sure that we get a seamless
production.

MR. SUTIS: One just issue on scope, and
then I'll pass to Alec. One of the issues that
came up in this particular production was that when
you search a particular person's files what do you
do if they throw information on a web site. You
know, marketing department, we have something like
1500 internal web sites at HP or so and a lot of people have access to web sites, and that can just become a mushroom cloud of difficulty if you want all the information from a particular person or all the information they may have access to. And so we worked through that issue and negotiated with the agency as to what we had to produce from those web sides.

MR. OLEANNA: Well, what do you do about the fact that the content of those internet web sites (inaudible) HP and CSCO are constantly changing? That makes historical production pretty difficult -- and it's pretty easy for individual contributors to upload stuff to a web site.

It seems to me that that makes it awfully hard to make representation to the agency (inaudible) providing the complete web site for the entire period searched.

MR. SUTIS: We simply negotiated with the agency and explained the problem, that that was impossible because those web sites are ephemeral and they are not archived, and so we could only produce what was requested from what we had in our possession at the time that the second request came in and forward --
(The parties simultaneously speak.)
MR. COWIE: -- that may be another reason
to rethink the refreshing (cross talk).
Bob, did you have any complications in
dealing with our traditional instructions on
sorting and the like? In other words, the
documents are organized by individual and indicate
which specification is --
MR. SUTIS: I'm sure the attorneys that did
the work did, but I didn't have any.
MR. HOFFMAN: On that note, Alec, you did
that work? Because I think you did that work --
(The parties simultaneously speak.)
MR. CHANG: I did that work.
On the Compaq side our production was more
of a traditional nature, occasional paper and
touching on everything we've talked about today,
modifications and everything was done very
traditionally. Staff was very responsive and
proactive and helped us, you know, take products
off the, sort of the potential interest list, and
so we did narrow as time went on.
We were fortunate in one regard that timing
was not the primary issue. This transaction,
unlike many others, had some extra (inaudible).

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If I can go back to the one that Legacy systems and what will you do about -- how you think about Legacy systems from, say from components of a company that a current party may have acquired four years ago but falls within the time period, one suggestion there is if there's a Legacy system and it hasn't been -- you know, if nobody's sort of gone into it in three years or in two years, well then it may not be that helpful to you, just as if it's not useful to the business people on an ongoing basis. Then what somebody else thought about four years ago and nobody's looked at since, you know, shouldn't really have much dispositive sort of use to anybody today. So that's just one thing on the Legacy system.

So on the idea about as parties and as the technology improves so that there can be increased production electronically, what would be helpful also is to have some more standardization sort of across shops. You know?

And obviously this will take time, as individuals become more comfortable with and more facile with the technology and what they can and can't get and what they can and can't do, you know, whether something comes across by e-mail or we
produce it, and DVD or in some kind of CD or something like that, consistency and some generalized standards would help, would help the parties quite a bit.

MR. SUTIS: I just remembered one thing on the electronic production, too, that was really helpful. I think we certified the compliance about January 14th or so and then after that we produced at least two or three more white papers. And I think the benefit, from HP and from the agency in both producing and reviewing those came almost exclusively from a electronic production, so that we were able to -- you know, we got really expert at string searches and pulling up relevant documents to produce information to give to the agency and that they would be able to review it.

MR. COWIE: Alec, consistency across shops is certainly an important objective. With -- on electronic records there was a practical problem that, you know, there are old-school people who want, you know, to get green post-its and pink post-its and yellow post-its, and they want to see the paper. So there's...

MS. SILVERMAN: From the private site --
it's Karen again -- you know, I think a menu of options is still a valuable thing. Because I, I don't -- I mean in your instances, because of the volume and everybody sort of knew what the investigation was going to be like, I mean that made some sense.

I think there have definitely been episodes that I've been involved with where I would be concerned -- well, first of all, just the review of the documents on line is more difficult for the attorneys who are doing it. So you end up very often printing it out anyway so that you can have your team of people reading things consistently. Because we try to review consistently as --

(The parties simultaneously speak.)

MR. COWIE: -- that's a question, an issue to be explored. Some of the people who did the review on HP Compaq reported that was actually quite friendly, it was in internet protocol language. And as I understand it, it was sorted by individual and you have the title, so if you want to look at, you know, vice president of this product line you would --

(The parties simultaneously speak.)

MS. SILVERMAN: -- and I could see how it'd
work. No, no, and I see, I see a great opportunity for utility there, but I don't know that it's going to fit again all situations.

And for instance, we had a situation recently where we had a -- we had two review rooms going, one was the hard-copy stuff and the other one was a bank of computers where they were doing the computer review but they could still be talking to each other about making consistent calls about what was in, what was out, what this meant, what that meant. So you still have to do a very collective review. And it may or may not work in all instances.

The other thing I'm a little concerned about is that if we default to the electronic production there is a chance that a dynamic will develop where the thought is, "Well, listen, you're just getting it to us in bits and bytes so you can produce everything." You know, I mean it takes the pressure off, you don't want to know your records, you know, in your hallway, and that's a good discipline, I mean because you don't want to know your own records. And I'm a little worried that if it just means another CD --
MR. HOFFMAN: We don't want them on our server either, necessarily. Of course they're doing it on a separate web site --

(The parties simultaneously speak.)

MS. SILVERMAN: Yeah. I mean so I think it -- we just need to be a little bit careful about how that plays out from a practical standpoint.

MR. CHANG: At the same time I think we also need to be -- and this goes some to Mike's problem -- we need to be careful that -- this transaction was again kind of a unique one because you had two computer companies who weren't afraid of the technology themselves and, and HP could do a lot of this work.

Nonetheless, out there in the real world there's still lots of industries and companies whose computer systems are surprisingly primitive, and so they're not going to be able to provide quite so easily, you know, and getting you all the marketing materials or all the financial materials, and it is surprising and frustrating when we run across those kinds of companies and those kinds of industries, but it's still going to happen for some time until, you know, the technology really takes over. Just as
it'll take time for folks at the FTC and folks at various other firms to stop using the yellow post-it for this and the pink post-it for that --

(The parties simultaneously speak.)

MR. COWIE: Just so the record's clear, HP Compaq is not by any means the only paperless production. We've had a number of notable oil industry deals where we've had parties do paperless productions.

MR. HOFFMAN: There have been a series of internet mergers recently but it's not --

(The parties simultaneously speak.)

MALE VOICE: But it's not just high-tech, though, we've had some more traditional industries proceed that way as well.

MR. OSTRAU: Mark Ostrau from Fenwich & West.

I think that the more time we spend talking about electronic mail and electronic production is best here. Because the reason Silicon Valley -- I mean, it is probably not an overstatement to say 90-plus percent of the documents are going to be electronic, and a huge part of them are electronic mail where the burden of reviewing and producing is

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enormous. And really from the clients' perspective they just want to know how much this is going to cost, and they want to figure out how to get you the information in the most efficient way possible. And it strikes me that we kind of have only gone halfway with the technology.

The notion of, the option of word searching and gnashing our teeth about doing it is incredibly antiquated. Everyone word searches. That's what Google is. That's what Lexis is before that. And that's the way, if we've got -- if everything's in electronics that's the way people should think and people should do their searching and think about how to do -- how to arrive at the right terms and do that. And I don't think we should be afraid of that because that's really the way it works.

MR. HOFFMAN: Let me pose a couple scenarios to you and to everybody and see what you think.

Term-searching obviously -- you know, for example a private practice, I -- we get very aggressive about people who were doing research for me who are only relied on West Law term searches because they constantly fail to find critical cases because some court somewhere would decide to use
all synonyms for the terms they searched.

And we have had investigations recently where, for example, we discovered that a company had a practice of only referring to their competitors by their stock-ticker symbols which, you know, knowing that -- you know, if you knew that in advance it would be quite easy to ascertain with a term search, but it could be pretty darn hard, you know, to find that if you were just doing a term search. So there's obvious risks in term-searching.

Now the agency can do a number of things here. For example, people could come to us with a request for a formal modification that says if we conduct a term search using the following terms and the following connectors, and if you're doing cost platform searching, using the following engine or whatever you want to do to search, that will be deemed substantial compliance regardless of what it produces.

Or parties can come to us and say, "We would like to do term searches using these kinds of terms and connectors, what do you think? Let's work together to try to get it as best we can, but we're not going to ask you to grant a modification
saying that this is necessary enough because you don't necessarily know from, you know, the agency" -- it's almost impossible for the agency to know, at least at the outset, whether those terms are really going to be the right ones. I mean, there are some ways you can address that but, you know, those are two ways you could approach term searches.

Another one of course would be -- and I know some shops that have done this in cases -- saying, "We won't accept term searches and, well, being that you're not in substantial compliance if we discover that you've done a term search rather than physically reviewing everything that's resident on the servers."

So how should we -- you know, which of those three should we use as a model? Or is it one of these situations where you're not going to be really able to tell at the outset?

MR. OSTRAU: Well, I can tell you that the third choice is be careful what you wish for. Because what I know people would do is just give you everything because it's too expensive to go through and pull out the --

MR. COWIE: No, I thought that -- I thought

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the third choice was do --

(The parties simultaneously speak.)

MR. COWIE: -- but don't tell them you did

a --

(The parties simultaneously speak.)

MR. OLEANNA: This is Gil Oleanna from

CSCO, that's C-s-c-o if anybody's interested.

Let me make a point about the term searches and what you know at the time that you're negotiating the term searches.

Presumably at the time of negotiating with term searches, assuming that it's day 29, is you've already gotten some documents from the company. You've gotten your field documents, you've gotten the transaction documents, the actual contract, and you've gotten the 4-C documents. By that point you have a pretty good sense of the vocabulary used within the A company and the B company to the point where you can have intelligent conversation with counsel for those companies about term searches.

So you're not totally operative on an FYI slate at that point, you've seen a fair amount of stuff on paper, you've gotten information from the industry, you can probably -- we could ask you what terms you would search out here, that would
probably do, and get information back.

So I think that that maybe offers a middle leg.

MR. HOFFMAN: So I mean the idea here is -- and I would limit this just to the first 30 days, you know, the more information that the parties can provide early on in terms of constructing a search and providing -- not just telling us but coming in and showing things, you know, these are sample documents, this is the way we talk about things, I would think that would certainly be helpful.

But I guess what I'll go back to is should our practice be -- you know, because we're doing, trying to construct some best practice ideas here -- should it be that we actually negotiate term searches as formal modifications or should it be that we work with and interact with the parties to get a term search as best they can, but we don't necessarily say that when you do this search it's compliance even if it actually turns up zero documents.

MR. SUTIS: Bob, again, at least for a large-scale production I go back to the statement I made earlier, and that is you really only go -- want to go to a person once.
So in your hypothetical number two, where you have a best guess and then we'll go back and see if we need more, there's this giant steamship that's moving and very hard to steer back and go get people, it's just enormously inefficient to do that.

So my only recourse in that case would be to gather everything from all those people anyway, do the term search and then see if you have more. So it's actually not a very helpful --

MS. SILVERMAN: And you can run tests. I mean, you can, you can try your filter list, see what you -- look at what it missed, review -- and, you know, for one or two people figure out of anything critical was overlooked and go back and either add those terms.

I mean, there are ways to, I think, get everybody comfort around the list and connectors and protocols, whether it's the, you know, the elimination of duplicates or the addition of certain terms or whatever it is. But you can look on a limited basis at the reject pile, if you will, to evaluate how good a job that it's doing. You know, until everybody's happy that it's doing a good job --
MR. CHANG: Yeah, Bruce, you know, that's really just a modification of your idea that, look, we'll agree on the search terms. If it yields one document that's substantial compliance; if it yields a million documents that's substantial compliance. Just rather than agreeing that that is sufficient, you know, up front, build into that process the test, you know, the test runs, the --

MR. HOFFMAN: I think it's very helpful. Because I mean I think from our perspective it puts a tremendous burden and risk on the staff to say agree at the outset that a particular term search is going to constitute substantial compliance. I mean, what happens if it comes back with virtually no documents, then the staff is virtually out on a limb, and I just can't imagine, you know, in the abstract agreeing to that. But the kinds of mechanisms you're suggesting might help.

MR. CHANG: I think staff have -- you know,
my experience is that we've done that. You know, where people have said -- we've come up with sort of a list of terms and circulated it, and this was at DOJ and they said, "Okay, that looks all right. But what about this and what about this," and they'll add -- you know, you can add people's names, and you add some more names, you run another, oh, little test and see what you get. And if it doesn't yield anything, on one hand, yeah, you add those names in -- right? -- but there are ways to get I think both sides comfortable, that you can come to a comfortable search --

(Multiple parties simultaneously speak.)

MR. SUTIS: -- you could also have a hybrid too, where there's some key people that you just know that you need to produce the entire file. And as we're moving down the organization to the lower functional-level managers of below you may want to accept a term search.

MR. COWIE: Is term searching of e-mail becoming the norm in private litigation, such as patent litigation say around here or --

VOICE: Yeah.

MR. FEINBERG: Ian Feinberg, Gray Carey, I do a lot of patent and other (inaudible)
litigation.

Essentially they're going to do a document production, you -- and you're working on electronic documents, e-mail or otherwise, you do word searches, there is no other way to do it.

And you often negotiate on the other side with archival issues as well, because sometimes each side has not just one generation for archival systems but sometimes several, and you have to negotiate among how far back you're going to go. And, frankly, what's possible, because it's not always possible to go back two or three generations, there is no way to search it --

(Multiple parties simultaneously speak.)

MR. HOFFMAN: -- punch cards still --

MR. FEINBERG: I haven't encountered punch cards but I have encountered stuff that nobody else has --

MR. COWIE: But you're saying in terms of archives with backup takes, that is an issue in private litigation?

MR. FEINBERG: You bet. Now I think that, particularly why the companies, they systemically archive. So, and there are backup -- and there are multiple types of backups
too. Some people do system-wide backups, they do flash backups

You have to understand what the other sides' information systems look like before you can have intelligent discussions about what's going to be searched on what search to implement. But that's the way it's done.

MR. COWIE: We've reached our end point. Thank you for your significant input.

As mentioned earlier, this will be posted on the web site and additional sessions in L.A., New York, Chicago and Washington. One other way you can participate further if you have the time and energy is by written submission. I think some bar association groups are preparing papers and we hope to publish some of them on our web site as well.

Thank you.

FEMALE VOICE: Is there a schedule for that publication?

MR. COWIE: There is no schedule. Our plan is to do it expeditiously.

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I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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