

Report to Congress Regarding Merger Review Procedures

Submitted By
Federal Trade Commission

June 19, 2001

The Federal Trade Commission ("Commission") submits this report to Congress pursuant to Public Law 106-553, concerning reforms to the Commission's premerger review procedures under Section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended by Public Law 106-553.⁽¹⁾ Public Law 106-553, which the President signed into law on December 21, 2000, directed the Commission and the Assistant Attorney General of the Department of Justice to "conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay," and to report to Congress within 180 days after enactment as to: "(I) which reforms each agency has adopted under this subparagraph; (II) which steps each has taken to implement such internal reforms; and (III) the effects of such reforms."⁽²⁾

In response to the legislation, the Commission and its staff have undertaken the following initiatives:

- approved interim rules to implement the legislation;
- amended the Commission's Rules of Practice to incorporate procedures for modifications or clarifications of requests for additional information and documents ("second requests");
- amended the Commission's Rules of Practice to incorporate procedures for expedited agency review of disagreements between merging parties and agency staff regarding second request modifications or compliance;
- reviewed internal processes to eliminate unnecessary burdens and undue delays;
- implemented a procedure for a systematic status-check on the progress of negotiations on second request modifications;
- begun steps to address concerns regarding the production of information from electronic systems;
- begun to consider a number of additional steps further to reduce burdens and delay.

These initiatives are described below.

1. The Commission, with the concurrence of the Assistant Attorney General for Antitrust of the Department of Justice, approved interim rules regarding premerger notification, effective February 1, 2001, to implement the new legislation.⁽³⁾ The interim rules include changes that are necessary to implement the changes in premerger reporting requirements

contained in the legislative amendments, as well as several previously proposed administrative changes that enable the Premerger Notification Form to be completed and processed more easily.

2. To eliminate unnecessary burden and undue delay arising from requests for additional information or documentary material (commonly referred to as "second requests") relating to transactions subject to the premerger notification requirements, the Commission amended its Rules of Practice to incorporate procedures for modifications or clarifications of such requests.⁽⁴⁾ Newly added Rule 2.20 (b)(1)-(3) requires the following: (a) every second request must inform the recipient of the right to discuss modifications or clarifications of the request with an authorized representative of the Commission; (b) an authorized representative of the Commission shall invite the recipient to a second request conference to discuss the second request and the competitive issues raised by the proposed transaction, to the extent then known, and confer about the most efficient way to obtain relevant information and documents; the conference will ordinarily take place within five business days of issuance of the request, unless the recipient declines the invitation or requests a later date; and (c) an authorized representative of the Commission shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation.⁽⁵⁾ (See [Attachment 1.](#))

3. Pursuant to Section 7A(e)(1)(B) of the Clayton Act, added by Public Law 106-553, the Commission amended its Rules of Practice to incorporate procedures for expedited internal agency review of disagreements between merging parties and agency staff concerning second request modifications or compliance.⁽⁶⁾ Section 7A(e)(1)(B) of the Clayton Act provides in pertinent part: "(i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by [a recipient of a request for additional information or documentary material] to determine - (I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or (II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person." Accordingly, the Commission has amended its Rules of Practice to add Rule 2.20(b)(4), which provides that the General Counsel of the Federal Trade Commission shall hear such petitions, prescribes the procedures for the review, and requires the General Counsel to render a decision within 10 business days after receiving a petition. (See [Attachment 1.](#))

4. The Commission's Bureau of Competition undertook a further internal review of merger review processes to eliminate unnecessary burdens and undue delays. Such reviews are an ongoing process and a regular part of the Bureau's management practice. In response to Public Law 106-553, the Bureau reviewed second requests issued by the Commission during fiscal years 1999, 2000, and the first quarter of fiscal year 2001. The review included interviews with members of the private bar who represented recipients of second requests issued during this period; interviews with FTC staff attorneys involved in

the investigations; and reviews of the second requests to assess the degree to which they conformed to, or differed from, the agencies' model second request, and the reasons for such variances. The Bureau also sponsored a panel discussion among several private practice attorneys and corporate counsel with extensive experience with the merger review process, which FTC staff were encouraged to attend.

Based on comments received from private attorneys who participated in the review, the Bureau's study indicates that the merger review process works reasonably well, particularly under the circumstances that prevailed during the study period,⁽⁷⁾ but room remains for further improvements. The procedural reforms adopted by the Bureau in April 2000, such as second request conferences and guidelines for responding to requests for modification, reflected the generally prevailing practice among most Commission merger attorneys. Codification of those reforms in the Commission's Rules of Practice should reinforce adherence to those practices.

The study revealed that second request conferences are not always held within five days of the issuance of a second request, but this is because the respondent often requests postponement. Commission staff often disclose the general issues raised by a transaction even before a second request is issued. The study also revealed that Commission staff generally send a prompt initial response to requests for modification of a second request, but negotiation of such requests, and ultimate resolution, may take considerably longer. While staff makes modifications promptly in many cases, the circumstances of a particular transaction, such as the size and complexity of the merger or the degree to which the staff is already familiar with the markets at issue, can affect the speed at which issues can be narrowed and modifications can be granted. The pace of negotiations also can be affected by the recipient's responsiveness to the staff's requests for information it would need to assess the importance of the evidence that the company proposes to exclude from production, and the burden that would be involved in producing it. While recipients' counsel generally recognize that the timing and feasibility of modifications can depend significantly on the circumstances of the transaction, some also expressed concern that the modification process has taken too long in some cases.

With respect to the internal process for reviewing disagreements between staff and second request recipients concerning modifications or completeness of compliance, some private counsel indicated that moving the review function to an official without direct responsibility for enforcement recommendations - the Commission's General Counsel - added credibility to the process. To date, the new review procedure has not been used, but one attorney stated that he would have invoked such a procedure had it been available at the time the second request to his client was outstanding. Actual use of such review procedures may be limited, however, as several private attorneys expressed concern that a petition for review could damage relations with the investigating staff.

The agencies' model second request, which is the basis for all second requests issued by the Commission, appears generally to work well.⁽⁸⁾ Some private counsel did, however, express concerns about certain aspects of some information requests, such as the burdens of responding to requests for quantitative data intended for use in econometric analysis in

certain cases, requests that the respondent prepare maps that show the geographic scope of competition in certain retail and petroleum industry mergers, and requests for information stored in electronic information systems.

5. Based on the above-described review of second request processes, the Bureau of Competition is considering possible ways of further expediting the merger review process and reducing burdens. As the first step, the Bureau is implementing a procedure for a systematic status-check on the progress of negotiations on second request modifications at or around 20 days after issuance. This will enable the Bureau to ensure that these negotiations are completed as promptly as possible.

6. The Bureau of Competition also is undertaking steps to address concerns raised by private parties regarding the production of information stored in electronic systems. As the first step, the Bureau conducted a training seminar led by a consulting firm with substantial experience in advising private firms on techniques for responding to electronic discovery. The seminar gave the staff additional insight into the concerns of second request recipients and provided information on possible ways of focusing electronic discovery to obtain important information while reducing burdens. The Bureau anticipates additional training in this area. The Bureau also plans to make procedural modifications to the model second request to elicit information that will facilitate negotiation of limitations on electronic discovery. These modifications will seek to ensure that these negotiations involve the representatives of the company who are most knowledgeable about its electronic information systems.

7. No new initiatives have yet been identified to address concerns regarding production of data for econometric analysis, or maps for geographic analysis in certain retail and petroleum industry mergers. A number of other possible initiatives have been under consideration, but decisions were deferred pending further review by the agency's new Chairman and new Bureau management. The Commission remains committed to further reduction of unnecessary burdens and delays, and expects that additional appropriate reforms will be adopted.

8. It would be difficult to assess the effect of new procedural changes until we gain substantial experience with them, but the situation will be carefully monitored.

Attachment 1

16 C.F.R. § 2.20 provides as follows:

Sec. 2.20 Petitions for review of requests for additional information or documentary material.

(a) For purposes of this section, "second request" refers to a request for additional information or documentary material issued under 16 CFR 803.20.

(b) Second request procedures. (1) Notice. Every request for additional information or documentary material issued under 16 CFR 803.20 shall inform the recipient(s) of the request that the recipient has a right to discuss modifications or clarifications of the request with an authorized representative of the Commission. The request shall identify the name and telephone number of at least one such representative.

(2) Second request conference. An authorized representative of the Commission shall invite the recipient to discuss the request for additional information or documentary material soon after the request is issued. At the conference, the authorized representative shall discuss the competitive issues raised by the proposed transaction, to the extent then known, and confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. The conference will ordinarily take place within 5 business days of issuance of the request, unless the recipient declines the invitation or requests a later date.

(3) Modification of requests. The authorized representative shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation. A request for additional information or documentary material may be modified only in writing signed by the authorized representative.

(4) Review of request decisions. (i) If the recipient of a request for additional information or documentary material believes that compliance with portions of the request should not be required and the recipient has exhausted reasonable efforts to obtain clarifications or modifications of the request from an authorized representative, the recipient may petition the General Counsel to consider and rule on unresolved issues. Such petition shall be submitted by letter to the General Counsel with a copy to the authorized representative who participated in the second request conference held under paragraph (b)(3) of this section. The petition shall not, without leave of the General Counsel, exceed 500 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and any appendices containing only sections of statutes or regulations, and shall address petitioner's efforts to obtain modification from the authorized representative.

(ii) Within 2 business days after receiving such a petition, the General Counsel shall set a date for a conference with the petitioner and the authorized representative.

(iii) Such conference shall take place within 7 business days after the General Counsel receives the petition, unless the request recipient agrees to a later date or declines to attend a conference.

(iv) Not later than 3 business days before the date of the conference, the petitioner and the authorized representative may each submit memoranda regarding the issues presented in the petition. Such memoranda shall not, without leave of the General Counsel, exceed 1250 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and appendices containing only sections of statutes or regulations.

Such memoranda shall be delivered to counsel for the other participants on the same day they are delivered to the General Counsel.

(v) The petitioner's memorandum shall include a concise statement of reasons why the request should be modified, together with proposed modifications, or a concise explanation why the recipient believes it has substantially complied with the request for additional information or documentary material.

(vi) The authorized representative's memorandum shall include a concise statement of reasons why the petitioner's proposed modifications are inappropriate or a concise statement of the reasons why the representative believes that the petitioner has not substantially complied with the request for additional information and documentary material.

(vii) The General Counsel shall advise the petitioner and the authorized representative of his or her decision within 3 business days following the conference.

Endnotes:

1. Section 7A of the Clayton Act was added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (commonly known as the HSR Act); the implementing rules, 16 C.F.R. Parts 801, 802, 803, are commonly known as the HSR Rules or the Premerger Rules.

2. Public Law 106-533, section 630(c), 114 Stat. 2762 (2000).

3. 66 Fed. Reg. 8679-8721 (2001) (amending 16 C.F.R. Parts 801, 802, 803). The Commission solicited and received public comment on the interim rules, and will consider the comments before issuing final rules

4. 66 Fed. Reg. 8721-8722 (adopting interim rule 16 C.F.R. § 2.20, effective February 1, 2001).

5. The Bureau of Competition earlier adopted these procedures in a directive to staff in April, 2000. The Commission has now formally codified these procedures in its Rules of Practice.

6. 66 Fed. Reg. 8721-8722 (adopting interim rule 16 C.F.R. § 2.20, effective February 1, 2001).

7. The period covered by the study experienced a particularly high level of merger activity, and Commission staff was hard-pressed to keep pace.

8. Some counsel stated that the model second request, which is drafted in generic terms to cover a broad range of products, should be modified before issuance to fit the characteristics of particular transactions or industries. The staff endeavors to do that whenever appropriate. Other counsel suggested that second requests that are drafted to elicit industry- or transaction-specific information tend to require the production of more information, and that efforts should be made to reduce the burden. Both of these kinds of situations will continue to receive scrutiny by the Bureau before second requests are issued. Some counsel also expressed concern about the effort required to prepare a "privilege log" for documents withheld from production under a claim of attorney-client privilege. The instructions for the preparation of a privilege log require the company to provide information to enable the staff to assess the claim of privilege. The Bureau will look for possible ways to ease the burden.