FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

New Agreement Will Strengthen Collaboration Between the Two Agencies

July 19, 2022

Tags: Consumer Protection | Competition | Office of Policy Planning | Bureau of Competition | Bureau of Consumer Protection

The Federal Trade Commission is joining with the National Labor Relations Board (NLRB) in a new agreement that will bolster the FTC's efforts to protect workers by promoting competitive U.S. labor markets and putting an end to unfair practices that harm workers. The new memorandum of understanding between the two agencies outlines ways in which the Commission and the Board will work together moving forward on key issues such as labor market concentration, one-sided contract terms, and labor developments in the "gig economy."

"I'm committed to using all the tools at our disposal to ensure that workers are protected from unfair methods of competition and unfair or deceptive practices," said FTC Chair Lina M. Khan. "This agreement will help deepen our partnership with NLRB and advance our shared mission to ensure that unlawful business practices aren't depriving workers of the pay, benefits, conditions, and dignity that they deserve."

"Workers in this country have the right under federal law to act collectively to improve their working conditions. When businesses interfere with those rights, either through unfair labor practices, or anti-competitive conduct, it hurts our entire nation," said NLRB General Counsel Jennifer A. Abruzzo. "This

MOU is critical to advancing a whole of government approach to combating unlawful conduct that harms workers."

The new agreement enables the FTC and the NLRB to closely collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority. The FTC is responsible for combatting unfair and deceptive acts and practices and unfair methods of competition in the marketplace. The NLRB is responsible for protecting employees from unfair labor practices which interfere with the rights of employees to join together to improve their wages and working conditions, to organize a union and bargain collectively, and to engage in other protected concerted activity.

The MOU identifies areas of mutual interest for the two agencies, including the extent and impact of labor market concentration; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; labor market developments relating to the "gig economy" and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers.

The agreement is part of a broader FTC initiative to use the agency's full authority, including enforcement actions and Commission rulemaking, to protect workers. The FTC has made it a priority to scrutinize mergers that may harm competition in U.S. labor markets. Research shows that these markets are already highly concentrated, and less competitive labor markets can enable firms to harm workers by lowering wages, reducing benefits, and perpetuating precarious or exploitative working conditions. The FTC is working with the Department of Justice to update the agencies' merger guidelines, looking to provide guidance on how to analyze a merger's impact on labor markets.

The FTC has also prioritized cracking down on anticompetitive contract terms that put workers at a disadvantage by leaving them unable to negotiate freely over the terms and conditions of their employment. The agency is scrutinizing whether some of these contract terms, particularly in take-it-or-leave-it contexts, may violate the law. At recent open Commission meetings the agency has heard concerns about noncompete clauses that have been imposed on some workers, and as a result it has opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition. It already has taken action to protect workers in several Commission orders, including:

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- Prohibiting 7-Eleven from enforcing anticompetitive noncompete agreements last year as part of an order remedying competition concerns stemming from 7-Eleven, Inc's acquisition of Marathon's Speedway subsidiary; and

- Prohibiting dialysis services provider DaVita, Inc. from imposing undue restrictions on kidney dialysis worker mobility as part of another FTC order remedying competitive concerns with from DaVita's proposed acquisition of the University of Utah Health's dialysis clinics.

In addition, the agency will continue to take action to stop deceptive and unfair acts and practices aimed at workers; particularly those in the "gig economy" who often don't enjoy the full protections of traditional employment relationships. The FTC's actions in this area include:

- Suing Amazon in 2021 for illegally withholding more than $61 million in tips from drivers for its Amazon Flex program. In that case, the FTC alleged that Amazon had made numerous promises to its drivers that they would receive 100 percent of their tips, but actually withheld tip money from its drivers for years. Amazon agreed to an FTC order requiring them to surrender the full amount owed, which the FTC paid to affected drivers;

- Suing Uber in 2017 for making deceptive earnings claims to potential drivers as well as deceiving them about the terms of a vehicle leasing program. The FTC alleged that the company touted median income levels in various cities that were greatly exaggerated and advertised lease and purchases prices lower than the prices actually available. Uber agreed to a federal court order requiring them to surrender $20 million that the FTC used to compensate drivers;

- Launching a proceeding to challenge bogus money-making claims used to lure consumers, workers, and prospective entrepreneurs into risky business ventures that often turn into dead-end debt traps;

- Putting more than 1,100 businesses that pitch money-making ventures on notice that if they deceive or mislead consumers about potential earnings, the FTC won't hesitate to use its authority to target them with large civil penalties;

- Suing online lead seller HomeAdvisor, Inc., alleging it used deceptive and misleading tactics in selling home improvement project leads to service providers, including small businesspeople operating in the "gig" economy; and

- Suing fast-food chain Burgerim, accusing the chain and its owner of enticing more than 1,500 consumers to purchase franchises using false promises while withholding information required by the Franchise Rule.

Workers who believe that their labor rights have been violated can call 1-844-762-6572 for assistance filing an unfair labor practice charge. Or they can contact their closest NLRB Field Office or submit a charge on the NLRB's website.

The memorandum of understanding was signed by FTC Chair Lina M. Khan and NLRB General Counsel Jennifer A. Abruzzo.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Press Release Reference

FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

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PROTECTING AMERICA'S CONSUMERS

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FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

New agreement establishes formal collaboration between agencies on issues affecting workers

September 21, 2023

Tags: Consumer Protection | Competition | Bureau of Competition | Bureau of Consumer Protection

The Federal Trade Commission and the U.S. Department of Labor (DOL) signed a new agreement that will bolster the FTC's efforts to protect workers by promoting competitive U.S. labor markets and putting an end to unfair, deceptive, and other unlawful acts and practices, as well as unfair methods of competition, that harm workers. The new memorandum of understanding (MOU) between the two agencies outlines ways in which the FTC and DOL will work together on key issues such as labor market concentration, one-sided contract terms, and labor developments in the "gig economy."

The MOU builds on the FTC's recent efforts to increase collaboration on issues facing workers, including the FTC's recent MOU with the National Labor Relations Board as well as the FTC's enforcement policy statement related to gig work.

"This agreement with the Department of Labor is part of our whole-of-government effort to protect workers from unlawful business practices," said FTC Chair Lina M. Khan. "Deepening our partnership with DOL will ensure that we can work collectively to tackle illegal conduct that suppresses wages, reduces access to good benefits and working conditions, and stifles economic liberty for workers across the economy."

"Protecting workers on the job and promoting fair markets requires a level playing field," said Solicitor of Labor Seema Nanda. "What's unfair for workers is also unfair for law-abiding employers, and this partnership will help both of our agencies combat unlawful behavior, such as misclassification and contract provisions that restrict accessible opportunities to our growing workforce. The Department of Labor is committed to ensuring equity and improving job quality for all workers, and we will not hesitate to enforce the laws that protect workers' rights. We look forward to working with the Federal Trade Commission to hold employers accountable and empower workers."

The new agreement enables the FTC and DOL to closely collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority. This MOU is in line with the President's Executive Order on Competition, which affirms the importance of enforcing antitrust laws to combat abuses of market power, including in labor markets.

The MOU identifies areas of mutual interest for the two agencies: collusive behavior; the use of business models designed to evade legal accountability, such as the misclassification of employees; illegal claims and disclosures about earnings and costs associated with work; the imposition of one-sided and restrictive contract provisions, such as non-compete and training repayment agreement provisions; the extent and impact of labor market concentration; and the impact of algorithmic decision-making on workers.

The agreement is part of a broader FTC initiative to use the agency's full authority, including enforcement actions and Commission rulemaking, to protect workers. The FTC has made it a priority to scrutinize mergers that may harm competition in U.S. labor markets. Research shows that these markets are already highly concentrated, and less competitive labor markets can enable firms to harm workers by lowering wages, reducing benefits, and perpetuating precarious or exploitative working conditions.

The FTC has also prioritized cracking down on anticompetitive contract terms that put workers at a disadvantage. The Commission is considering a proposed rule that would ban noncompete clauses in employment contracts, and has taken action to protect workers in several Commission orders. These include actions against Anchor Glass, Ardagh Group, Prudential Security, I-O Glass, 7-Eleven, and DaVita.

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In addition, the agency will continue to take action to stop deceptive and unfair acts and practices aimed at workers, particularly those in the "gig economy" who often don't enjoy the full protections of traditional employment relationships. The FTC's actions in this area include: cases against Amazon, Uber, HomeAdvisor, and Burgerim; an ongoing rulemaking to challenge bogus money-making claims; and a notice of penalty offenses sent to more than 1,100 businesses that pitch money-making ventures.

The memorandum of understanding was signed by FTC Chair Lina M. Khan and Acting Secretary of Labor Julie A. Su.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about consumer topics and report scams, fraud, and bad business practices online at ReportFraud.ftc.gov. Follow the FTC on social media, read our blogs and subscribe to press releases for the latest FTC news and resources.

Press Release Reference

Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices

FTC to Crack Down on Companies Taking Advantage of Gig Workers

Contact Information

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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

November 3, 2023

The Honorable Thomas P. Tiffany
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Tiffany:

Thank you for your letter seeking information about the Federal Trade Commission's merger enforcement program. I take seriously the responsibility of Congress to provide effective oversight over federal agencies on behalf of the American people, and I welcome the opportunity to engage with Members of Congress about the FTC's efforts to protect our citizens from illegal mergers and excessive consolidation.

I am fully committed to ensuring that the Commission vigorously enforces the statutes it is charged with administering, including through blocking unlawful mergers and acquisitions. Ensuring that our approach to merger enforcement is rigorous and keeping pace with new market realities is a top priority, and policing conduct in digital markets is a key area of inquiry, given the high stakes for the American public.

As part of that effort, the FTC worked for over a year with the Antitrust Division of the Department of Justice to revise our merger guidelines, which we published in draft form in July 2023. The draft Merger Guidelines are deeply rooted in the text of our statutes, in controlling law and precedent, and in Congress's deep commitment to robust enforcement. Anchoring our reform efforts in these core principles will bring antitrust more squarely within the rule of law. Faithfully enforcing the antitrust laws will necessarily involve taking action against dominant firms, some of which are among the wealthiest and most powerful companies in the world. These companies are often able to marshal enormous resources to try to dissuade enforcers and defend FTC charges in administrative and judicial proceedings. But upholding the rule of law requires that we administer our statutes without fear or favor.

Since I joined the FTC as Chair in June 2021, the Commission has taken action against at least 38 mergers. In ten of them, the Commission authorized staff to file an administrative complaint or seek a preliminary injunction in federal court to stop the merger pending the administrative trial on the merits.[1] In five of these mergers, the parties abandoned their merger plans after the Commission issued its complaint.[2] In one, the parties significantly altered their deal and sold off assets to maintain competitive markets in response to Commission litigation.[3] In another, the parties agreed to a consent order prohibiting them from engaging in the conduct alleged in the Commission's complaint and requiring them to submit to rigorous monitoring.[4] Another 14 of the 38 mergers were abandoned during the FTC's investigation,[5] for a total of 19 abandoned mergers during my tenure. In the remaining 14 mergers, the Commission ordered divestitures to prevent the mergers from resulting in harm, protecting competition in a wide range of markets such as gasoline, dialysis clinics, pharmaceuticals, medical devices, veterinary services, and farm stores.[6] A comprehensive chart detailing the Commission's merger enforcement actions from June 2021 to the present is appended to this letter as Appendix A.

By any measure, the FTC has been extremely successful with its merger enforcement program under my leadership, actively investigating illegal mergers and taking action to stop them before they can cause widespread harm to the consumers, small businesses, workers, and other market participants who count on us to enforce the antitrust laws as Congress intended. I am extremely proud of the FTC competition staff who work tirelessly to stop further consolidation that robs our economy of its dynamism and growth.

Market participants acknowledge that the FTC's work is deterring unlawful deals. For example, the head of mergers and acquisitions at Goldman Sachs recently stated, "We used to think of antitrust and the regulatory paradigm toward the middle or end of the deal. But now it's completely front-ended, and certain deals just can't get done."[7] And as a prominent investor noted:

> There's been a sea change in the regulatory environment over the past two and a half years since the Biden administration took office. We've moved from a relatively loose environment in terms of competition policy or antitrust—at least in the United States—to the most challenging one or tightest one that I can remember seeing. The new regulatory team—Lina Khan at the FTC, Jonathan Kanter at the Justice Department, and to some extent (until recently) Tim Wu at the White House—already have succeeded in dissuading a series of business combinations which would have gone ahead in a different environment. So they've already been successful that way. Those which have been shelved because of this new environment aren't visible—no one can see them or count them up—but I can assure you that there are a lot of them.[8]

As a law enforcer, I believe that firms should first assess whether a deal would violate the antitrust laws before pursuing it. The fact that the FTC's work is driving this type of deterrence is a real mark of success.

By choosing to focus on only a handful of cases, your letter paints an inaccurate picture of the FTC's merger enforcement program. As you detail in your letter, in the past year, a federal court denied an FTC motion for a preliminary injunction in two merger challenges, Meta/Within and Microsoft/Activision. While the Commission determined not to continue to prosecute its complaint against Meta/Within,[9] we are actively pursuing an appeal of the court's ruling in Microsoft/Activision before the Ninth Circuit to reverse significant errors in the district court's opinion. The outcome of this litigation has not yet been determined because the appeal is still pending.

A complete assessment of the FTC's success in stopping harmful mergers reveals that of the 38 mergers challenged during my tenure as Chair, 19 were abandoned, another 14 were settled with divestitures, and two are pending a final outcome.[10]

That leaves just one loss, Meta/Within. While I was disappointed by the outcome, I believe the Commission has a statutory obligation to bring law enforcement actions to halt unlawful mergers. And while the court ultimately did not grant a preliminary injunction, the court's opinion affirmed the validity of potential competition theories of harm, confirmed that antitrust law has an important role to play even in nascent markets with new entry, and relied on time-tested principles of market definition to find a market for virtual reality fitness apps. With these rulings, the court laid out a roadmap for future merger cases alleging digital markets or concerns related to the elimination of potential competition.

In fact, our enforcement record reveals that the Commission has been pursuing strong cases, well within established precedent and with solid facts and compelling economic analysis. In 19 instances, the merging companies made their own calculations about litigation risk and determined that they should abandon their plans rather than risk ending up in the same place after a lengthy and costly litigation. In another 14, the companies offered to significantly alter their deals and sell off assets to maintain a competitive market. They did not do so because they wanted to give the FTC a 'win;' they did so after their own assessment of the likelihood that the Commission would succeed in blocking their merger.

These cases are not just wins for the agency; each of them is a win for the American public. Not only do they prevent illegal mergers from happening or causing widespread harm to the American public, abandoned mergers and settled cases save millions in tax dollars that would otherwise be spent achieving the same outcome. From the Commission's perspective, those saved dollars—and years—can be deployed to other competition enforcement matters, including investigating other potentially problematic mergers. We must marshal our scarce resources to their best use in order to be good stewards of the money we are given by Congress to safeguard competition and prevent further consolidation. Just as important, an abandoned merger or settled deal protects those who would have otherwise suffered the harmful consequences of an illegal merger.

You also seek information related to two administrative cases, Altria/Juul and Illumina/Grail. Both of these matters were voted out on a unanimous basis by the Commission before I joined the FTC: specifically, all three sitting Republican Commissioners and two Democratic Commissioners voted to issue the complaint in Altria/Juul in April 2020, and the two sitting Republican Commissioners and two Democratic Commissioners supported the complaint in Illumina/Grail.

In Illumina/Grail, the Commission ruled—in a unanimous decision—that Illumina's $7.1 billion vertical acquisition of Grail is likely to substantially lessen competition in the U.S. market for research, development, and commercialization of multi-cancer early detection tests.[11] As is their right, the companies have appealed the Commission's decision and order to a federal appellate court, and the Commission has stayed its order until the Fifth Circuit has resolved the appeal.[12]

In Altria/Juul, while the matter was on appeal to the Commission, the parties decided to terminate their relationship and noncompete agreement related to Altria's 2018 investment in Juul Labs, Inc. In addition, since the complaint had been filed, there had been significant changes in the regulatory environment as well as the market positions of Altria and JUUL. These significant market developments both completely unwound the transaction that was at the heart of the Commission's complaint and lessened the concerns that had animated its filing in April 2020. On March 21, 2023, Altria moved to have the Commission take official notice of the unwinding of the initial deal as well as to withdraw the case from adjudication.[13] The Commission took official notice of the unwinding of the transaction and related agreement with Juul and granted Altria's motion to withdraw the case from adjudication.[14] On June 20, 2023, the Commission dismissed its complaint, finding both changed facts outlined above and the public interest in conserving scarce agency resources counseled against continuing the litigation.[15] With the complaint dismissed, the case is over because the parties have terminated the conduct that was the primary basis for the complaint.

Effective and efficient merger enforcement is more than just a numbers game. In the same way that a prosecutor who racks up high numbers by going after numerous low-level mobsters may be less effective than a prosecutor who successfully captures the boss, the efficacy of antitrust enforcement cannot be captured solely through numbers. But when discussing the FTC's merger enforcement efforts, it is important to start the conversation from a fair accounting of the FTC's accomplishments. I am committed to continuing this vital work for the American people and to vigorously enforcing our merger laws for their benefit.

With regard to your specific requests:

1. **The amount of funds spent on litigation in each of the aforementioned cases. (Microsoft/Activision; Meta/Within; Altria/Juul; Illumina/Grail; Amgen/Horizon)**

See Answers to Questions 2 and 3 below.

2. **The amount of staff hours spent on the aforementioned cases.**

The FTC does not maintain records on the number of hours staff works on each matter, including litigations.

To provide some perspective, the Commission manages its limited resources by assigning staff on a priority basis, often moving staff off other work or investigations to work on litigation. Litigation matters are among the highest priority work we have, given that we have an obligation to the court to prosecute a case with dispatch. FTC staff often work on multiple matters at the same time, especially senior-level managers. Sometimes, members of the litigation team have been part of the team investigating the merger, working for many months on the same matter, while others join the litigation team closer to the time the Commission authorizes the litigation.

The number of staff assigned to a litigation at the time of filing a complaint is reflected in the pleadings, though it can vary significantly over the life cycle of an investigation. For instance, the FTC's federal court complaints list FTC attorneys as counsel of record in each proceeding: 20 in Microsoft/Activision;[16] 14 in Meta/Within;[17] 22 in Illumina/Grail;[18] and 19 in Amgen/Horizon.[19] In each of these cases, the team investigating the original transaction was generally smaller than the team ultimately assigned to litigate. In these four cases, the

Commission also initiated administrative litigation, and each FTC attorney appearing before the Administrative Law Judge files an appearance in the specific proceeding. According to the docket in each of these matters, 16 FTC attorneys filed a notice of appearance in Microsoft/Activision;[20] 13 in Meta/Within;[21] 11 in Illumina/Grail;[22] and three in Amgen/Horizon.[23] For these dual track cases, it is often the same attorneys who are assigned to work on both the federal court and administrative proceedings. In Altria/Juul, which was an administrative proceeding without a related federal court injunction action, 16 FTC attorneys filed a notice of appearance, although some later withdrew from the litigation team.[24] For administrative proceedings, the FTC's Administrative Law Judge and his staff also spend time on litigation matters, working some portion of their time on each case that is pending during the same period of time.

In addition to competition lawyers, our competition enforcement work, including litigation, is supported by many other lawyers, paralegals, economists, technologists, and other support staff throughout the agency. As reflected in the most recent Congressional Budget Justification, the FTC has 265 Full Time Equivalents (FTE) devoted to Merger and Joint Venture Enforcement,[25] but an additional 176 FTE support that work. These staff work throughout the agency, and some of them, for instance in the Office of General Counsel, directly support our competition litigation. Some portion of these staff members' time would be attributable to casework, including litigation, but the FTC does not maintain the data necessary to do that on a case-specific basis. In most if not all of our litigation matters, the FTC is outspent and out-numbered by the defendants.

3. **A list of outside experts, including their affiliate organizations, in each of the aforementioned cases and the amount paid to each expert and their affiliate organizations.**

As required by law, the FTC posts each of its contracts for outside services on usaspending.gov. The following chart contains contract information related to each case, as well as the contract amount allowed under the contract, the expert and their employer. For the two cases that are still pending (Microsoft/Activision; Illumina/Grail), the contracts are open and more money could be paid out under the contract.

Matter	**USASpending.gov Contract Link(s)**	**Expert Name/Firm**	**Potential Award Amount***	**Outlaid Amount***
Microsoft/Activision	29FTC122C0062 (economic expert) 29FTC123C0037 (survey expert)	Robin Lee/Bates White, LLC Rebecca Kirk Fair/Analysis Group Inc.	$3,425,000 $1,204,985	$2,757,241 $224,886
Meta/Within	29FTC122C0048 (economic expert)	Hal Singer/Christina Caffara/Keystone Strategy LLC	$2,457,479	$2,457,479
Altria/Juul	29FTC120C0026 (economic expert)	Dov Rothman/Analysis Group Inc.	$1,799,985	$1,799,985

Matter	USASpending.gov Contract Link(s)	Expert Name/Firm	Potential Award Amount*	Outlaid Amount*
Illumina/Grail	29FTC121C0017 (economic expert) 29FTC121C0024 (efficiencies expert) 29FTC121C0026 (regulatory expert)	Fiona Scott Morton/CRA International, Inc. Dov Rothman/Analysis Group Inc. Amol Navathe/Analysis Group Inc.	$1,343,876 $609,498 $243,365	$1,343,876 $609,498 $243,365
Amgen/Horizon	29FTC123C0040 (economic expert) 29FTC123C0041 (industry expert) 29FTC123C0057 (medical expert) 29FTC123C0058 (medical expert) 29FTC123C0063 (industry expert)	David Sibley/Coherent Economics LLC Aaron Kesselheim Herbert S. B. Baraf Kimberly Cockerham/Cockerham Eye Consultants, Professional Corporation Surya Singh/Singh Healthcare Advisors LLC	$2,036,235 $246,000 $234,000 $204,000 $242,000	$770,822 $-- $30,200 $20,000 $--
*from USASpending.gov (as of 11/3/2023)				

These figures are generally in line with the amounts paid toward expert expenses in the Commission's most recent unsuccessful merger challenges.

Matter	USASpending.gov Contract Link(s)	Expert Name/Firm	Potential Award Amount*	Outlaid Amount*
Jefferson/Einstein (2020)	29FTC119C0080 (Economic Expert) 29FTC119C0203 (Efficiencies Expert)	Loren Smith/Compass Lexecon LLC Christine Hammer/Cornerstone Research INC	$2,948,334 $2,151,986	$2,820,703 $2,151,986
Evonik/Peroxychem (2019)	29FTC119C0079 (Economic Expert)	Dov Rothman/Analysis Group INC	$1,260,186	$1,168,627
Steris/Synergy (2015)	FTC15H5065 (Economic Expert)	Gary Roberts/CRA International, Inc.	$1,501,065	$1,501,065
*from USASpending.gov (as of 11/3/2023)				

4. **The amount of funds spent on outside counsel, if any, in each of the aforementioned cases.**

The FTC did not contract for any outside legal services in any of the five cases.

5. **All recommendation memorandum prepared by FTC staff that discuss each of the aforementioned cases.**

   Staff recommendations are nonpublic and protected by the deliberative process privilege.

Sincerely,

Lina Khan

Lina M. Khan
Chair
Federal Trade Commission

[1] Press Release, Fed. Trade Comm'n, FTC Sues to Block IQVIA's Acquisition of Propel Media to Prevent Increased Concentration in Health Care Programmatic Advertising (July 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sues-block-iqvias-acquisition-propel-media-prevent-increased-concentration-health-care; Press Release, Fed. Trade Comm'n, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat; Press Release, Fed. Trade Comm'n, FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers (Mar. 9, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-acts-block-deal-combining-two-top-mortgage-loan-technology-providers; Press Release, Fed. Trade Comm'n, FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc. (Dec. 8. 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc; Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within; Press Release, Fed. Trade Comm'n, FTC Sues to Block Merger Between Utah Healthcare Rivals HCA Healthcare and Steward Health Care System (June 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-utah-healthcare-rivals-hca-healthcare-steward-health-care-system; Press Release, Fed. Trade Comm'n, FTC Sues to Block Merger Between New Jersey Healthcare Rivals RWJBarnabas Health and Saint Peter's Healthcare System (June 2, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-new-jersey-healthcare-rivals-rwjbarnabas-health-saint-peters; Press Release, Fed. Trade Comm'n, FTC and Rhode Island Attorney General Step in to Block Merger of Rhode Island's Two Largest Healthcare Providers (Feb. 17, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-rhode-island-attorney-general-step-block-merger-rhode-islands-two-largest-healthcare-providers; Press Release, Fed. Trade Comm'n, FTC Sues to Block Lockheed Martin Corporation's Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne; Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.
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[5] When the parties publicly announce that they are calling off their transaction, the Commission may issue a statement to that effect. Press Release, Fed. Trade Comm'n, Statement Regarding Berkshire Hathaway Energy's

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[7] Remarks of Avinash Mehrotra on CNBC, *Client Sentiment and Recent M&A Data Give Us Optimism in Deal Activity, Says Goldman's Mehrotra* (Sept. 13, 2023), https://www.cnbc.com/video/2023/09/13/client-sentiment-and-recent-ma-data-give-us-optimism-in-deal-activity-says-goldmans-mehrotra.html.

[8] Remarks of Roger Altman on CNBC, *There's Been a Sea Change in the M&A Regulatory Environment, Says Evercore Founder Roger Altman* (Mar. 6, 2023) https://www.cnbc.com/video/2023/03/06/theres-been-a-sea-change-in-the-ma-regulatory-environment-says-evercore-founder-roger-altman.html.

[9] *See* Order Returning Matter to Adjudication and Dismissing Complaint, *In re Meta Platforms, Inc.*, Docket No. 9411 (Feb. 24, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09411commorderdismisscomplaint.pdf.

[10] In addition to Microsoft/Activision, the other pending matters are ICE/Black Knight, Amgen/Horizon, and IQVIA/Propel Media.

[11] *See* Opinion of the Commission, *In re Illumina, Inc.*, Docket No. 9401 (Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[12] *See* Decision and Order Granting Respondents' Application for a Stay Pending Judicial Review, *In re Illumina, Inc.*, Docket No. 9401 (Apr. 24, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionordergrantingstay.pdf.

[13] Respondents' Motion to Withdraw Matter from Adjudication to Discuss Settlement, *In re Altria Group, Inc.*, Docket No. 9393 (Mar. 21, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0075-altria-groupjuul-labs-matter.

[14] *Id.*, Order Taking Official Notice and Withdrawing Proceeding from Adjudication (May 4, 2023).

[15] *Id.*, Order to Return Case to Adjudication, Vacate Initial Decision, and Dismiss Complaint (June 20, 2023).

[16] *See* Complaint for a Temporary Restraining Order and Preliminary Injunction, *FTC. v. Microsoft Corp.*, No. 3:23-cv-02880 (N.D. Cal. 2023), https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/FTC-v-Microsoft/FTCComplaint.pdf.

[17] *See* Complaint for a Temporary Restraining Order and Preliminary Injunction, *FTC v. Meta Platforms, Inc.*, No. 3:22-cv-04325 (N.D. Cal 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf

[18] *See* Complaint, *FTC v. Illumina Inc.*, No. 3:21-cv-00800 (D.D.C. 2021), https://www.ftc.gov/system/files/documents/cases/illuminagrailfedctcomplaint.pdf. This case was subsequently transferred to the Southern District of California, and the court dismissed the complaint without prejudice on June 1, 2021. *FTC v. Illumina Inc.*, No. 3:21-cv-00800 (S.D. Cal 2021), https://www.ftc.gov/system/files/documents/cases/illuminagrailjudgmentdismissal.pdf.

[19] *See* Complaint, *FTC v. Amgen, Inc.*, No. 23-cv-3053 (N.D. Ill. 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2310037amgenhorizoncomplainttropi.pdf.

[20] *See In re Microsoft/Activision Blizzard*, Docket No. 9412 (F.T.C. 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

[21] *See In re Meta/Zuckerberg/Within*, Docket No. 9411 (F.T.C. 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter.

[22] *See In re Illumina, Inc., and GRAIL, Inc.*, Docket No. 9401 (F.T.C. 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter.

[23] *See In re Amgen, Inc. and Horizon Therapeutics plc*, Docket No. 9414 (F.T.C. 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/231-0037-amgen-inc-horizon-therapeutics-plc-matter.
[24] *See In re Altria Group/JUUL Labs*, Docket No. 9393 (F.T.C. 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0075-altria-groupjuul-labs-matter.
[25] *See* FED. TRADE COMM'N, FTC CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2024 at 55, https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Statement Regarding Illumina's Decision to Divest Grail

December 18, 2023

Tags: Competition | Bureau of Competition | Merger | Vertical | vertical restraint | Health Care | Medical Equipment and Devices

Illumina, Inc. announced it would divest Grail, Inc. following a U.S. Court of Appeals for the Fifth Circuit decision that supported the Federal Trade Commission's determination that the acquisition threatened competition in the market for cancer detection tests.

Federal Trade Commission Bureau of Competition Director Henry Liu issued the following statement:

"This is a major win for the FTC as it works to protect competition in health care. Illumina's decision to unwind its acquisition of Grail ensures the market for cancer detection tests remains competitive and delivers a choice of high-quality tests for patients and physicians, ultimately saving lives.

The Fifth Circuit's unanimous ruling in this case recognizes how vertical deals can threaten competition and provides a clear roadmap for future cases. The ruling is also a victory for patients who need affordable, high-quality quality cancer detection tests. I applaud FTC staff for their dedication to this case and effort to ensure this critical health care market remains competitive."

The FTC challenged Illumina's acquisition of Grail in March 2021 alleging the deal would diminish innovation in the U.S. market for multi-cancer early detection (MCED) tests while increasing prices and decreasing choice and quality of tests.

In April 2023, the Commission issued an opinion and order reversing the Administrative Law Judge's dismissal of the proceeding and requiring Illumina to divest Grail. In June 2023, Illumina petitioned the

Fifth Circuit to review the Commission's order and opinion, and the Fifth Circuit heard arguments in the case in September 2023.

On December 15, 2023, the Fifth Circuit issued an opinion in the case finding that there was substantial evidence supporting the Commission's ruling that the deal was anticompetitive. The Fifth Circuit vacated the Commission's order and remanded it for further proceedings based on the standard the Commission applied when reviewing one aspect of Illumina's rebuttal evidence. On December 17, 2023, Illumina then announced it would divest Grail.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Press Release Reference

FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail

FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market

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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
Regarding the FY2022 HSR Annual Report to Congress
Commission File No. P110014

December 21, 2023

The Commission recently submitted to Congress an annual report on the Federal Trade Commission and Department of Justice's administration of the Hart-Scott-Rodino Act ("HSR Act"). We thank the staff of the FTC's Premerger Notification Office and the DOJ's Antitrust Division, who prepared the report and led the charge in tackling the record number of merger filings the agencies received.

The Fiscal Year 2022 HSR Annual Report reflects the challenges the agencies continue to face in effectively reviewing mergers in the modern economy. This is not a question of paperwork; mergers affect the everyday lives of all Americans. In thousands of comments from market participants spanning farmers, nurses, musicians, physicians, engineers, pharmacists and others, the antitrust agencies have heard directly from Americans across the country about how consolidation affects—and all too often harms—their daily lives.

Against this backdrop, the agencies remain committed to faithfully enforcing the antitrust laws. In fiscal year 2022, the FTC and DOJ together filed 50 merger enforcement actions. This represents the highest level of enforcement activity in over 20 years.[1] The 24 merger enforcement challenges the Commission brought in fiscal year 2022 are the second-highest in the last ten years.[2] These enforcement actions preserved competition in numerous sectors of the economy, including consumer goods and services, pharmaceuticals, healthcare, high tech and industrial goods, and energy. The number of litigation complaints and abandonments has likewise increased over years past. The Commission filed six litigation complaints in fiscal year 2022, a near doubling of the prior ten-year average of 3.2 complaints per year. The seven abandonments in fiscal year 2022 are similarly higher than the ten-year average of 5.4 transactions.

In recent years, there has been unprecedented growth in the scale, volume, and complexity of mergers. Since the HSR Act was passed in 1976, deal volume has soared.[3] Firms

[1] In 2001, the FTC and DOJ brought 55 merger enforcement actions in total.
[2] In 2020, the Commission brought 28 enforcement challenges. The Commission has generally averaged about 22 merger enforcement challenges per year over the prior ten years.
[3] While the 1976 House Report for the HSR Act estimated that the statute would "requir[e] advance notice" for approximately "the largest 150 mergers annually[,]" the agencies today often receive more than 150 filings each month. *See* Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya Regarding Proposed Amendments to the Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules (Jun. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_

have been proposing transactions at a rapid pace, with the number of reported transactions more than doubling over just the last decade.[4] The number of transactions reported in the last two years alone represent the highest announced transaction volumes for U.S. firms in over 20 years.[5] The 3,152 transactions reported in fiscal year 2022 remain more than 62% above the prior ten-year average.

Transactions have also grown increasingly complex, in both deal structure and potential competitive impact. Investment vehicles have changed, alongside major transformations in how firms compete in today's economy.[6] The size of mergers has likewise substantially grown. The number of HSR filings with transactions exceeding one billion dollars has more than tripled over the last decade and is over seven times greater than levels from 20 years ago.[7] And very large deals account for an increasing amount of the agencies' investigational resources. Over the past 20 years, billion-dollar deals have gone from accounting for under a quarter (24.5%) to well over half (55.3%) of the agencies' Second Requests.

We are deeply grateful for funding increases Congress has provided to the FTC over the past two fiscal years and proposed in the fiscal year 2023 spending bills. However, even with these increases, fully resourcing the FTC's competition mission—especially merger review—has been a challenge. For instance, our headcount remains well below what is needed to meet the volume of proposed deals. Over the past ten years, the absolute number of HSR filings has nearly doubled, but the number of employees we have in our Bureau of Competition has stayed almost flat. FTC staff work tirelessly to meet the enormous demand of enforcing the laws against unlawful mergers, but the Commission has been forced to make difficult triage decisions and forego meritorious investigations. Additional resources would better equip the Commission to fully pursue its mandate and protect the public from unlawful mergers.[8]

The stakes here are real for the American people. We have heard from a wide breadth of people about how consolidation directly threatens their ability to live stable and secure lives. An organization representing more than 200,000 nurses told us that hospital consolidation had reduced options for employees, and that the resulting "threat of being blacklisted from further hiring in a system that controls many of the hospitals in the area makes workers afraid to file

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joined by commrs slaughter and bedoya on the hsr form and rules - final 130p 1.pdf (quoting H.R. REP. No. 1373, 94th Cong., 2d Sess., at 11 (1976)).

[4] 3,152 transactions were reported under the HSR Act in fiscal year 2022, while 1,326 transactions were reported in fiscal year 2013.

[5] The agencies previously saw a record number of HSR merger transactions reported between 1996 (3,087), 1997 (3,702), 1998 (4,728), 1999 (4,642), and a record high in 2000 (4,926).

[6] *See* Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro Bedoya in the Matter of EQT Corporation (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf.

[7] In fiscal year 2002, 85 transactions exceeded one billion dollars; in fiscal year 2012, 156 transactions exceeded one billion dollars; and in fiscal year 2022, 611 transactions exceeded on billion dollars.

[8] Congress created private treble damages actions under the Clayton Act to ease the burden on government enforcers, including by deterring anticompetitive mergers before they leave the boardroom. *See* California v. Am. Stores Co., 495 U.S. 271, 284 (1990) ("Private enforcement of [Section 7] was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."). However, the antitrust plaintiffs' bar brings comparatively few private Section 7 cases. *See* Kevin Hahm et al, *Recent Private Merger Challenges: Anomaly or Harbinger?*, ANTITRUST, Sum. 2021, at 91 (running table identifying only 89 private merger challenges from 2000-2023).

complaints, organize their workplace, or leave before the end of a contract."[9] A healthcare startup told us that healthcare mergers have made it extremely difficult for patients living in rural areas to access critical services for mental health.[10] A writer explained to us that mergers across Hollywood have meant that compensation for scripts is a fraction of what it was 15 years ago—even for writers who produce major hits.[11] Farmers explained how decades of consolidation across poultry, cattle, and dairy markets has meant that growers and producers make less even as consumers pay more.[12]

The FTC will continue endeavoring to faithfully discharge our statutory obligation and protect the American public from unlawful mergers. But the HSR Act must be modernized for today's economy. For one, the statutory timelines laid out in the HSR Act have not kept pace with the surge in volume and complexity of transactions. The HSR Act gives the agencies 30 days to determine whether a deal warrants close investigation, and then another 30 days after parties certify they have 'substantially complied' with the inquiry. These timelines were set in an era where lawmakers expected the agencies would receive around 150 merger notifications per year—rather than 150 notifications per month, as the agencies now routinely receive.[13] Accordingly, these timelines are challenging in ordinary times given the agencies' tight resources, and the recent deal surge has further underscored their inadequacy. FTC staff are routinely at the mercy of merging parties granting extensions of the statutory deadline so that staff has the necessary time to review the transaction. But it should not be merging parties that get to determine the amount of time FTC staff has to review mergers and do the work required by law.[14]

The updates that FTC and DOJ have proposed to the HSR Form are similarly overdue.[15] Ensuring that merging parties are furnishing enforcers with information that is probative as to the competition implications of transactions will equip our staff to pursue more efficient and effective investigations.

We are grateful to FTC staff for their thorough, diligent work to combat unlawful mergers and fulfill our agency's mandate to promote free and fair competition.

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[9] Nat'l Nurses United, Comment Letter on Fed. Trade Comm'n and Dep't of Justice Draft Merger Guidelines 2 (Sept. 18, 2023), https://www regulations.gov/comment/FTC-2023-0043-1485.
[10] Comment Submitted by Shohini Gupta, Regulations.gov (July 25, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0435.
[11] Comment Submitted by Jane Lee, Regulations.gov (July 26, 2023), https://www.regulations.gov/comment/FTC2023-0043-0477.
[12] Comment Submitted by Farm Action, Regulations.gov (Sept. 19, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1515.
[13] *Supra* note 3.
[14] *See* Statement of Comm'r Rebecca Kelly Slaughter Jointed by Chair Lina M. Khan and Comm'r Alvaro M. Bedoya (Feb. 10, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rebecca-kelly-slaughter-joined-chair-lina-m-khan-commissioner-alvaro-m-bedoya-0.
[15] *See* Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya Regarding Proposed Amendments to the Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules (Jun. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Competition Matters

Slack, Google Chats, and other Collaborative Messaging Platforms Have Always Been and Will Continue to be Subject to Document Requests

January 26, 2024

It should come as no surprise that companies and individuals that knowingly possess documents and information that may be relevant to an antitrust investigation must maintain that information under federal law and Commission rules. The responsibility to preserve documents exists across all types of media.

As workplaces have evolved, so too have the means by which workers communicate and collaborate. In many of today's companies, hard-copy documents and emails have been replaced by programs like Slack, Microsoft Teams, Signal, and Google Chats. While these applications represent new ways in which businesses collaborate, they are still company documents bound by the same preservation obligations that have always applied during government investigations and enforcement actions.

Specifically, many of these applications and programs allow, and sometimes automatically enable, destruction of communications and documents—sometimes known as ephemeral messaging. While documents created using these applications are and have always been covered by preservation letters, second requests, voluntary access letters, and compulsory legal process from the Commission, companies have sometimes failed to abide by their document preservation obligations for these methods of communication.

The Bureau of Competition and the Department of Justice Antitrust Division have reviewed and revised the language we use in preservation letters, second requests, voluntary access letters, and

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compulsory legal processto expressly state what has always been the case: that documents created using collaboration tools and messaging applications are included in those requests.

The revised language makes crystal clear that both ephemeral and non-ephemeral communications through messaging applications are documents. Companies that allow or provide applications with ephemeral messaging capabilities must continue to retain all relevant documents during government investigations and enforcement actions. Appropriate steps to retain relevant documents includes turning off automatic deletion and may even include stopping use of certain applications altogether. The changes also acknowledge that newer messaging applications might implicate employee-owned devices to a greater extent than past methods of communication and provide direction on employee-owned devices that are within the scope of Commission inquiries.

Where companies fail to preserve documents—regardless of what tools are used to create those documents—they may be breaking the law and subject to sanctions. Recent court decisions have found that companies that failed to preserve text messages, Google Chats, and Signal messages had spoliated evidence. Destruction of documents, including by use of ephemeral messaging applications, may result in either civil enforcement action or a referral to criminal prosecutors through the BC Criminal Liaison Unit. The better outcome for all, however, is for companies to take the appropriate steps to preserve documents in the first place, including those documents created in collaborative working environments and messaging applications.

The mission of the Bureau of Competition is to protect the public and competition, and discovery of relevant documents during an investigation or an enforcement action is fundamental to upholding that responsibility. The negligent or intentional destruction of documents through collaborative working environments and messaging applications frustrates this mission and, by extension, the public good. The Bureau of Competition's joint effort with the Department of Justice Antitrust Division to further companies' understanding of their document preservation obligations promotes efficient and effective investigations that ultimately protects consumers, workers, and competition.

Tags: Competition | Bureau of Competition

More from the Competition Matters

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New HSR thresholds and filing fees for 2024

February 5, 2024

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[Contract Terms That Impede Competition Investigations]

John Newman & Amy Ritchie, Bureau of Competition | June 16, 2023

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[Spring Meeting updates]

Holly Vedova, Bureau of Competition | March 31, 2023

Competition Matters

[BC's Criminal Liaison Unit is Off to the Races]

Holly Vedova, Director of the Bureau of Competition | March 24, 2023

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**REQUEST FOR ADDITIONAL INFORMATION
AND DOCUMENTARY MATERIAL
ISSUED TO [COMPANY]**

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Request for Additional Information and Documentary Material (the "Request") requires a complete search of "the Company" as defined in Definition D 1 of the Definitions, which appear after the following Specifications. If the Company believes that the required search or any other part of the Request can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss any questions and possible modifications with the Commission representatives identified in Instruction I 11 of this Request. All modifications to this Request must be agreed to in writing by a Commission representative. Submit the information requested in Specifications 1 and 10(a) of this Request promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search or interrogatory response obligations.

SPECIFICATIONS

1. Submit:

   (a) one copy of each organization chart and personnel directory in effect since January 1, **[Yr-2]** for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product [Service];

   (b) a list of all agents and representatives of the Company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other Persons retained by the Company in any capacity relating to the Proposed Transaction or any Relevant Product [Service] (excluding those retained solely in connection with environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues);

   (c) for each Person identified in response to Specification 1(b), the agent's or representative's title, business address, and telephone number, as well as a description of that Person's responsibilities in any capacity relating to the Proposed Transaction or any Relevant Product [Service] provided in any Relevant Area; and

   (d) an Information Systems Diagram for the Company.

2. List each Relevant Product manufactured or sold [Service provided] by the Company in the Relevant Area, and for each:

   (a) provide a detailed description of the product [service] [including its end uses]; and

(b) state [the brand name and] the division, subsidiary, or affiliate of the Company that manufactures or sells [provides] or has manufactured or sold [provided] the product [service].

3. For each Relevant Product [Service] listed in response to Specification 2 above, state or provide:

(a) the Company's Sales to all customers in each Relevant Area, stated separately in units and dollars;

(b) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured in the U.S.;]

(c) [that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products manufactured outside the U.S.;]

(d) that portion of the Company's Sales to customers in each Relevant Area, stated separately in units and dollars, that were of products purchased from sources outside the Company and resold by the Company rather than of products manufactured by the Company;

(e) the names and addresses of the [XX] Persons who purchased the greatest unit and dollar amounts of the Relevant Product [Service] from the Company in each Relevant Area;

(f) [a sample contract for each customer type]; and

(g) the name, address, estimated Sales, and estimated market share of the Company and each of the Company's competitors in each Relevant Area in the manufacture or sale of the Relevant Product [provision of the Relevant Service].

4. State the location of each facility that manufactures or sells [including distribution centers, etc.], or has manufactured or sold, any Relevant Product [provides or has provided any Relevant Service] in the Relevant Area for the Company, and for each such facility state: the current nameplate and practical capacity and the [annual, monthly] capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity; the number of shifts normally used at the facility; and the feasibility of increasing capacity [by X% or more], including the costs and time required.

5. For each Relevant Product manufactured or sold [Service provided] in the Relevant Area, submit (a) one copy of all current selling aids and promotional materials and (b) all documents relating to advertising [and marketing] Plans and strategies.

6. Submit all documents relating to the Company's or any other Person's Plans relating to any Relevant Product [Service] [in the Relevant Area], including, but not limited to, business plans; short-term and long-range strategies and objectives; expansion or retrenchment plans; research and development efforts; presentations to management committees, executive committees, and boards of directors; and budgets and financial projections. For regularly prepared budgets and financial projections, the Company need only submit one copy of final year-end documents for prior years, and cumulative year-to-date documents for the current year.

7. Submit all documents relating to competition in the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area, including, but not limited to, market studies, forecasts and surveys, and all other documents relating to:

   (a) the Sales, market share, or competitive position of the Company or any of its competitors;

   (b) the relative strength or weakness of Persons producing or selling each Relevant Product [providing each Relevant Service];

   (c) supply and demand conditions;

   (d) attempts to win customers from other Persons and losses of customers to other Persons, [including, but not limited to, all sales personnel call reports and win/loss reports];

   (e) allegations by any Person that any Person that manufactures or sells any Relevant Product [provides any Relevant Service] is not behaving in a competitive manner, including, but not limited to, customer and competitor complaints; and threatened, pending, or completed lawsuits; and

   (f) any actual or potential effect on the supply, demand, cost, or price of any Relevant Product [Service] as a result of competition from any other possible substitute product [service].

8. Submit:

   (a) all documents relating to the Company's or any other Person's price lists, pricing Plans, pricing policies, pricing forecasts, pricing strategies, price structures, pricing analyses, price zones, and pricing decisions relating to any Relevant Product [Service] in the Relevant Area; and

   (b) all studies, analyses, or assessments of the pricing or profitability of any Relevant Product [Service] sold or provided by the Company, [by third-party distributors/lessee dealers/etc.], or through other channels of trade in any Relevant Area.

9. Identify the Person(s) at the Company responsible for creating or monitoring price strategy, [price zones,] pricing practices, and pricing policies for the Relevant Product [Service] in the Relevant Area. Describe in detail the Company's pricing strategy, pricing practices, and pricing policies, including, but not limited to:

   (a) a description regarding how, and how often, the prices for each Relevant Product [Service] in each Relevant Area are determined;

   (b) whether, and how, pricing based on customer characteristics, presence of other competitors, or other factors are used by the Company in determining the prices for each Relevant Product [Service] in each Relevant Area; and

   (c) **[**whether, and how, price zones and/or pricing based on geographic areas, the presence of local competitors, or other factors are used by the Company for each Relevant Product [Service] in each Relevant Area.]

10. Identify each electronic database used or maintained by the Company in connection with any Relevant Product [Service] at any time after January 1, **[Yr-3]**, that contains information concerning the Company's (i) products [services] and product codes; (ii) facilities; (iii) production; (iv) shipments; (v) bids or sales proposals; (vi) sales; (vii) prices; (viii) margins; (ix) costs, including but not limited to production costs, distribution costs, standard costs, expected costs, and opportunity costs; (x) patents or other intellectual property; (xi) research or development projects; or (xii) customers. For each such database:

   (a) describe the (i) database type, *i.e.*, flat, relational, or enterprise; (ii) fields, query forms, and reports available or maintained; (iii) software product(s) or platform(s) required to access the database;

   (b) for each Relevant Product [Service] in each Relevant Area, compile and submit one or more Data Sets from the database comprising data used or maintained by the Company at any time after January 1, **[Yr-3]** that constitutes, records, or discusses:

      (i) discount requests or approvals (including rebates and other promotions);

      (ii) sales personnel call reports;

      (iii) meeting competition requests or approvals;

      (iv) win/loss reports;

      (v) prices, quotes, estimates, or bids submitted to any customer;

      (vi) the results of any bid or quote submitted to any customer or prospective customer;

(vii) customer relationships; and

(viii) transaction-level Sales data for all [top 20, 50, 100**]** customers by revenue and unit volume [and a X percent random sample of the remaining customers**]**, including, but not limited to, customer name, customer address, product code, product description, and transaction date; and

(c) for each Data Set provided in response to Specification 10(b), provide a data dictionary that includes:

(i) a list of field names and a definition for each field contained in the Data Set;

(ii) the meaning of each code that appears as a field value in the Data Set; and

(iii) the primary key in the Data Set or table that defines a unique observation.

The Company should consult Instruction I 3 regarding the inclusion of Sensitive Personally Identifiable Information or Sensitive Health Information in a Data Set(s) responsive to Specification 10.

11. Provide each financial statement, budget, profit and loss statement, cost center report, profitability report, and any other financial report regularly prepared by or for the Company on any periodic basis, since January 1, **[Yr-3]**, including, but not limited to, such statements and reports for the Company as a whole; for each of the Company's manufacturing facilities, sales offices, and distribution facilities relating to the research, development, manufacture, license, sale, or provision of any Relevant Product [Service] in each Relevant Area; and for any product line or customer for any Relevant Product [Service] in each Relevant Area. For each such statement, budget, or report, state how often it is prepared, and identify the Person responsible for its preparation; provide all such statements and reports on both a quarterly basis and a yearly basis. For each Relevant Product [Service], provide all regularly prepared customer profitability reports and product line profitability reports.

12. State the name and address of each Person that has entered or attempted to enter into, or exited from, the manufacture or sale of each Relevant Product [the provision of each Relevant Service] in any Relevant Area from **[Yr-10]** to the present. For each such Person, state:

(a) the product(s) or service(s) it sells or provides, sold or provided, or attempted to sell or provide in each Relevant Area;

(b) the date of its entry into, attempted entry into, or exit from the market; and

(c) whether such Person constructed a new facility, converted assets previously used for another purpose, or began using facilities that were already being used for the same purpose.

13. For each Relevant Product [Service], identify or describe (including the bases for your response) and submit all documents relating to:

(a) requirements for entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area including, but not limited to, research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement;

(b) the total costs required for entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area; the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the manufacture or sale of the Relevant Product [provision of the Relevant Service]; the methods and amount of time necessary to recover such costs; and the total Sunk Costs entailed in satisfying the requirements for entry;

(c) [barriers to entry into the production or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area, including but not limited to network and customer lock-in effects;]

(d) possible new entrants into the manufacture or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area; and

(e) the Minimum Viable Scale; the minimum and optimum plant size, production line size, capacity utilization rate, and production volume; requirements for multi-area, multi-plant, multi-product, or vertically integrated operations; and other factors required to attain any available cost savings, economies of scale or scope, or other efficiencies necessary to compete profitably in the manufacture or sale of the Relevant Product [provision of the Relevant Service] in each Relevant Area.

14. State whether the Company has entered into the manufacture or sale of any Relevant Product [provision of any Relevant Service] in any Relevant Area from **[Yr-5]** to the present and provide date(s) of entry. For each Relevant Product [Service] in each Relevant Area, describe in detail the steps taken by the Company to enter, including but not limited to steps related to research and development, planning and design, production, distribution, patents, licenses, sales and marketing activities, and any necessary governmental and customer approvals, and the time required to complete each step. For each entry event provide the costs associated with each step taken by the Company to enter.

15. Submit all documents relating to any Plans of the Company or any other Person for the construction of new facilities, the closing of any existing facilities, or the expansion, conversion, or modification (if such modification has a planned or actual cost of more than $[xxxxxxxx]) of current facilities for the manufacture or sale of any Relevant Product [provision of any Relevant Service] [in the Relevant Area].

16. [Submit all documents relating to actual and potential imports into, or exports from, each Relevant Area of any Relevant Product, including, but not limited to, documents showing: the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any Person; and any costs or barriers to imports or exports. Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each Relevant Area of any Relevant Product.]

17. [Identify, and state whether the Company is a member of or subscribes to, all trade associations, information services, and other organizations relating to the production or sale of any Relevant Product [provision of any Relevant Service]. Submit one copy of all documents submitted to or received from each identified organization (or its agents) by any Person that discuss or describe production, Sales, prices, competition, or entry conditions relating to the Relevant Product [Service].]

18. [Identify each non-U.S. competition or antitrust authority that the Company has notified (or intends to notify) of the Proposed Transaction, and for each authority:

(a) state the date (or expected date) the authority was (or is expected to be) notified;

(b) provide copies of all documents (including draft filings) submitted to the authority, including but not limited to, notifications and appendices, remedies submitted to a reviewing authority or authorities for market testing, white papers, responses to requests for information, and competitive impact submissions;

(c) state the date (or expected date) the authority completed (or will complete) its review; and

(d) submit a copy of any draft or final order, decision to enter a new stage of investigation (*e.g.*, a 6(1)(c) decision by the European Commission), Statement of Objections, or request for additional information, issued by the authority in connection with its review.]

19. Submit all documents relating to the Company's or any other Person's Plans for, interest in, or efforts undertaken to bring about any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the manufacture or sale of any Relevant Product [provision of any Relevant Service] other than the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to or in connection with any prior transaction involving the manufacture or sale of any Relevant Product [provision of any Relevant Service] in the Relevant Area other than the Proposed Transaction.

20. Submit all documents (except documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues) relating to the Proposed Transaction and provide:

    (a) a timetable for the Proposed Transaction, a description of all actions that must be taken prior to consummation of the Proposed Transaction, and any harm that will result if the Proposed Transaction is not consummated [or is delayed];

    (b) a detailed description of (including the rationale for) all Plans for changes in the Company's and **[A/B-Side's]** operations, structure, policies, strategies, corporate goals, financing, business, officers, employees, or any other area of corporate activity as a result of the Proposed Transaction. Identify all documents directly or indirectly used to prepare the Company's response to this subpart;

    (c) a detailed description of the reasons for the Proposed Transaction and the benefits, costs, and risks anticipated as a result of the Proposed Transaction; and

    (d) a detailed description of all statements or actions by any Person (identifying the Person by name, title, and business address) in support of, in opposition to, or otherwise expressing opinions about the Proposed Transaction or its effects.

21. Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including, but not limited to, all cost savings, economies, or other efficiencies of any kind anticipated as a result of the Proposed Transaction, including:

    (a) a description of the steps the Company will take to achieve each benefit, cost saving, economy, or other efficiency;

    (b) the estimated time and cost required to achieve each benefit, cost saving, economy, or other efficiency and an explanation for how the cost was derived;

    (c) the estimated dollar value of each benefit, cost saving, economy, or other efficiency, stating separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings in dollars per unit and dollars per year, and an explanation of how that value was derived;

    (d) an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction; and

    (e) the identity of each Person (including the Person's title and business address) employed or retained by the Company with any responsibility for achieving, analyzing, or quantifying each benefit, cost saving, economy, or other efficiency described.

22. Describe and submit all documents related to any Relevant Product [Service] that discuss the Company's Plans or attempts to:

  (a) reduce its costs;

  (b) improve its products or services;

  (c) expand its sales or distribution efforts;

  (d) introduce new products or services;

  (e) integrate the Relevant Products [Services] sold by the Company with any products [services] sold by **[A/B-Side]**;

  (f) improve its operating performance, financial condition, or competitive viability;

  (g) close, consolidate or rationalize any facility;

  (h) discontinue the research, development, manufacture, license, or sale of any Relevant Product or product line [Service]; and

  (i) achieve any benefits as a result of any multi-plant, multi-product, or vertically integrated operation of the Company.

23. Describe in detail (including the time and cost required to achieve), quantify (if possible), and submit all documents related to projected and actual cost savings, economies, or other efficiencies resulting or predicted to result from each previous merger, acquisition, or joint venture by the Company that is being relied upon by the Company to support any claim of predicted cost savings, economies, or other efficiencies expected to result from the Proposed Transaction. Provide a copy of all submissions provided to any regulatory agency relating to expected efficiencies with respect to any prior transaction.

24. [Identify, and provide all documents relating to, each occasion that the Company (i) submitted a bid or negotiated to provide or sell any Relevant Product [Service] in or from any Relevant Area; or (ii) declined to submit a bid or negotiate to provide or sell any Relevant Product [Service] in or from any Relevant Area. For each such occasion, state or provide:

  (a) the date the request for proposal, inquiry, or other solicitation for bids or offers was received;

  (b) the identity of the Person that requested or received the bid;

  (c) the identity of the incumbent provider(s), if any, of the Relevant Product [Service] to the Person that requested or received the bid at the time of the request for proposal, inquiry, or other solicitation for bids or offers;

(d) the request for proposal, inquiry, or other solicitation for the bid, including any proposed specifications, request for information, or request for quotation;

(e) if applicable, the terms of the Company's final bid, including, but not limited to, any aspects relating to price or quantity (*e.g.*, incentives not to switch; rebates, pre-bates, cash awards, etc.; the product/services covered; the geography covered); the terms of any other Company bid; and the date each Company bid was submitted;

(f) if applicable, the pricing methodology or calculations the Company used for its bid(s), and all factors considered in determining the bid price and other terms;

(g) an itemized breakdown of the Company's estimated total, fixed, and variable costs, and the Company's gross margin, relating to each bid;

(h) the reason the Company declined to bid, if applicable;

(i) the identity of each Person that submitted a competing bid and the terms of each competing bid, including any proposal by the prospective customer to provide any part of the Relevant Product [Service] in-house;

(j) the date that the contract was awarded or that the Company expects it to be awarded;

(k) if applicable, the identity of the Person(s) to whom the contract or order was awarded, the price and terms of the winning bid(s), and the products or services included in the winning bid(s);

(l) whether the Company won the contract or order, and if so, state the Company's actual Sales by Relevant Product [Service]; the total, fixed, and variable costs incurred by the Company; and the margin earned by the Company, pursuant to the contract;

(m) the costs associated with preparing the bid; and

(n) all documents relating to each bid or negotiation identified in this Specification.]

25. Submit, without regard to custodian:

(a) all documents provided to the Company's Board of Directors relating to any Relevant Product [Service] in any Relevant Area; and

(b) all minutes or other recordings of meetings of the Company's Board of Directors relating to any Relevant Product [Service] in any Relevant Area.

26. Identify each prior or ongoing investigation from **[Yr-5]** to the present by any state, federal, or international authority related to whether the Company has violated the antitrust or competition laws of any jurisdiction. The Company need not disclose (i) an investigation that has been reported to the federal agencies under the Hart-Scott-Rodino Act, (ii) that an investigation is currently being conducted by a grand jury, or (iii) that an investigation involves a pending leniency application made by the Company to the United States Department of Justice. For each applicable investigation, identify the authority that conducted or is conducting the investigation and describe the conduct being investigated and the status of the investigation (or outcome of the investigation if closed). For each identified investigation, submit:

   (a) all communications between the Company and the authority relating to the investigation (excluding those to/from a grand jury);

   (b) all trial transcripts, deposition transcripts, declarations, and other sworn testimony related to the investigation (excluding grand jury testimony); and

   (c) all documents and information related to the investigation produced by the Company, employees of the Company, and former employees of the Company to the authority.

27. Identify, and submit documents sufficient to show and, to the extent not reflected in such documents, describe in detail (including when the policy or procedure was last updated or changed, when any updates or changes were made during the period of this Request, and what prompted each update or change):

   (a) Company's policies and procedures relating to the retention and destruction of documents, including:

      (i) any specific policies on the retention and destruction of email, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack);

      (ii) storage, deletion, and archiving of electronically stored information; or

      (iii) specific policies for documents in or sent via any Collaborative Work Environments or Messaging Applications;

   (b) Company policies and procedures relating to the use of both Employee-Owned Devices and Company-owned devices to conduct Company business, including technological feasibility of accessing Company emails, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack), documents, and databases; and

   (c) Company policies and procedures relating to installation or use of Messaging Applications on Company and Employee-Owned Devices used to conduct

Company business, including message retention obligations, suspension of automatic time-based or capacity-based deletion protocols, and use of services to capture or archive messages (*e.g.*, use of Smarsh to archive SMS messages) that could be used to store or transmit documents (as defined in Definition D 6) responsive to this Request.

28. List (a) each federal judicial district (*e.g.*, District of Columbia, Southern District of New York) within the United States in which the Company has an agent to receive service of process, and provide each such agent's name, current business and home addresses, and telephone numbers; (b) each federal judicial district within the United States in which the Company is incorporated or licensed to do business or currently is doing business; and (c) each federal judicial district within the United States in which the Company has an office or a facility, and, for each such office or facility, list the address and the individual in charge (with his or her title).

    Alternatively, the Company may respond to this Specification by providing a written stipulation that it agrees to accept service of process, and to subject itself to personal jurisdiction, in all federal judicial districts within the United States.

29. Identify the Person(s) responsible for preparing the response to this Request and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, identify the Person who gave the instructions, describe the content of the instructions, and identify the Person(s) to whom the instructions were given. For each Specification, identify the individual(s) who assisted in the preparation of the response, with a listing of the Persons (identified by name and corporate title or job description) whose files were searched by each.

30. Identify the dates on which any document hold notices regarding the Transaction were provided to employees of the Company. Describe any steps taken or that will be taken to collect, preserve, retain, and/or produce documents in connection with any document hold notice regarding this Request.

31. Identify any electronic production tools or software packages utilized by the Company in responding to this Request for: keyword searching, Technology Assisted Review, email threading, de-duplication, and global de-duplication or near-de-duplication (please note that the use of all forms of de-duplication or other processes used to eliminate data in some form require advance approval from Commission staff per Instruction I 4(e), and:

    (a) if the Company utilized keyword search terms to identify documents and information responsive to this Request, provide a list of the search terms used for each custodian;

    (b) if the Company utilized Technology Assisted Review software:

        (i) describe the collection methodology, including: (a) how the software was utilized to identify responsive documents; (b) the process the Company utilized to identify and validate the seed set documents subject to manual review; (c) the total number of documents reviewed manually; (d) the total number of documents determined nonresponsive without manual review; (e) the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; (f) how the Company handled exceptions ("uncategorized documents"); and (g) if the Company's documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and

(ii) provide all statistical analyses utilized or generated by the Company or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this Request; and

(c) identify the Person(s) able to testify on behalf of the Company about information known or reasonably available to the organization, relating to its response to this Specification.

DEFINITIONS

For the purposes of this Request, the following Definitions apply:

D 1. The term “the Company” or “**[A-Side]**” means **[A-Side]** [Ltd., plc] and includes any related entities; its domestic and foreign parents, predecessors, successors, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25% or more) or total ownership or control between the Company and any other Person.

D 2. The term “**[B-Side]**” means **[B-Side]** [Corporation, Inc.] and includes any related entities; its domestic and foreign parents, predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is partial (25% or more) or total ownership or control between **[B-Side]** and any other Person.

D 3. The term “Proposed Transaction” means the proposed acquisition of **[B-Side]** by **[A-Side]** pursuant to the [Merger/Stock Purchase/Transaction/etc.] Agreement dated [date], or any other proposed, contemplated, discussed, or related transaction between **[A-Side]** and **[B-Side]**.

D 4. The term “Collaborative Work Environment” means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, document management systems (*e.g.*, iManage), intranets, web content management systems (“CMS”) (*e.g.*, Drupal), wikis (*e.g.,* Confluence), work tracking software (*e.g.,* Jira), and blogs.

D 5. The term “Data Set” means all or a subset of data held by, or accessible to, the Company in the normal course of business provided by the Company to respond to any Specification in this Request.

D 6. The term “documents” means all written, printed, recorded, or electronically stored information (“ESI”) of any kind in the possession, custody, or control of the Company, including information stored on and communications sent through social media accounts like Twitter, Facebook, or Snapchat; including chats, instant messages, text messages, direct messages, other Messaging Applications, audio/visual recordings, wherever stored, including documents contained in Collaborative Work Environments and other document databases as well as copies of documents that are not identical duplicates of the originals in a person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Company. Employee-Owned Devices used to store or transmit documents responsive to this Request are considered in the possession, custody, or control of the Company. "Documents" includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, "documents" excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

D 7. The term "Employee-Owned Device" means any computer, phone, tablet, or other electronic device owned by a Company employee that has been used to conduct business for Company.

D 8. The term "Information Systems Diagram" means an organized list, schematic, diagram, or other representation sufficient to show where and how the Company stores all physical and electronic information in its possession, custody, or control, including, but not limited to, information systems (*e.g.*, email messages, voice-mail messages, communications logs, enterprise content management, instant messaging, database applications), Collaborative Work Environments, locations where information is stored, including servers and backup systems (*e.g.*, physical Company facility, third-party vendor location, cloud). The Diagram shall include, for each <u>Custodian</u> of the Company, an "Application List" identifying any communication, collaboration, Messaging Application, or Collaborative Work Environment accessible, either currently or at any time during the period for which information is requested per Instruction I.1, on any Employee-Owned Device or electronic device in the possession, custody, or control of the Company if the application has ever been used on any occasion, in any manner whatsoever, to discuss the Company or its business, and the associated telephone number(s), account name(s), user name(s), affiliated with each Messaging Application.

D 9. The term "Messaging Application" refers to any electronic method that has ever been used by the Company and its employees to communicate with each other or entities outside the Company for any business purposes. "Messaging Application" includes platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (*e.g.*, Microsoft Teams, Slack). "Messaging Application" may overlap with "Collaborative Work Environment."

D 10. The term "Person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

D 11. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

D 12. The terms "and" and "or" have both conjunctive and disjunctive meanings.

D 13. The term "Plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

D 14. The term "Sales" means net sales (*i.e.*, total sales after deducting discounts, returns, allowances and excise taxes). "Sales" includes Sales of the Relevant Product [Service] whether manufactured [provided] by the Company itself or purchased from sources outside the Company and resold by the Company in the same manufactured form as purchased.

D 15. The term "Relevant Product [Service]" as used herein means, <u>and information shall be provided separately for</u>, each [name or list of product(s) or service(s) at issue].

D 16. The term "Relevant Area" means, <u>and information shall be provided separately for</u>, (a) the United States and (b) worldwide [or regional or local market(s)].

D 17. The term "Minimum Viable Scale" means the smallest amount of production [smallest service volume] at which average costs equal the price currently charged for the Relevant Product [Service]. It should be noted that Minimum Viable Scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.

D 18. The term "Sunk Costs" means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the Relevant Product [provide the Relevant Service] that cannot be recovered through the redeployment of these assets for other uses.

D 19. The term "Technology Assisted Review" means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.

INSTRUCTIONS

For the purposes of this Request, the following Instructions apply:

I 1. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for: (1) documents for each of the years from **[January 1, Yr-2]** to the present; and (2) information for each of the years from January 1, **[Yr-3]** to the present. Where information, rather than documents, is requested, provide it separately for each year; where yearly data is not yet available, provide data for the calendar year to date. If calendar year information is not available, supply the Company's fiscal year data indicating the 12-month period covered, and provide the Company's best estimate of calendar year data.

I 2. This Request shall be deemed continuing in nature so as to require production of all documents <u>responsive to any Specification included in this Request</u> produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this Request. [<u>except</u> for documents responsive to Specification 7, Specification 20, and Specification 26, for which the date is 21 calendar days prior to the date of the Company's full compliance with this Request.]

I 3. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document.

The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following:

- date of birth
- driver's license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

The term "Sensitive Health Information" includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. Sensitive Health Information relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

I 4. Form of Production: The Company shall submit documents as instructed below absent written consent.

(a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

(i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted, metadata and TIFF image placeholder.

(ii) Submit Emails in TIFF (Group IV) format with extracted text and the following metadata and information:

Metadata/Document Information	**Description**
Spec No.	Subpoena/request paragraph number to which the document is responsive
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the email.
Bates End	Bates number of the last page of the email.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the person from whom the email was obtained.
Email BCC	Names of person(s) blind copied on the email.
Email CC	Names of person(s) copied on the email.
Email Date Received	Date the email was received. [MM/DD/YYYY]
Email Date Sent	Date the email was sent. [MM/DD/YYYY]
Email From	Names of the person who authored the email.
Email Message ID	Microsoft Outlook Message ID or similar value in other message systems.

Metadata/Document Information	Description
Email Subject	Subject line of the Email or Calendar Invite
Email Time Received	Time email was received. [HH:MM:SS AM/PM]
Email To	Recipients(s) of the email.
Email Time Sent	Time email was sent. [HH:MM:SS AM/PM]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (*e.g.*, docx, xlsx).
Record Type	Indicates form of record: E-Doc, E-Doc Attachment, Email, Email Attachment, HardCopy, Calendar Appt, Text Message, Chat Message etc.
Folder	File path/folder location of email.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Redaction	Indicates Yes or No status regarding document redactions.
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt

(iii) Submit Email attachments other than those described in subpart (a)(i) in TIFF (Group IV) format. For all email attachments, provide extracted text and the following metadata and information as applicable:

Metadata/Document Information	Description
Spec No.	Subpoena/request paragraph number to which the document is responsive
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.

Metadata/Document Information	Description
Bates End	Last Bates number of the document.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of person from whom the file was obtained.
Date Created	Date the file was created. [MM/DD/YYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY]
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (*e.g.*, docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Record Type	Indicates form of record: E-Doc, E-Doc Attachment, Email, Email Attachment, HardCopy, Calendar Appt, Text Message, Chat Message etc.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Author	Author field value extracted from the metadata of a native file
Last Author	Last Saved By field value extracted from metadata of a native file
Redaction	Indicates Yes or No status regarding document redactions.
Native Link	Relative file path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Parent ID	Document ID or beginning Bates number of the parent email.

Metadata/Document Information	Description
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

(iv) Submit all other electronic documents, other than those described in subpart (a)(i), in TIFF (Group IV) format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Alternative Custodian	List of custodians where the document has been removed as a duplicate.
Bates Begin	Beginning Bates number of the document.
Bates End	Last Bates number of the document.
Beg Attach	First Bates number of attachment range.
End Attach	Ending Bates number of attachment range.
Custodian	Name of the original custodian of the file.
Date Created	Date the file was created. [MM/DD/YYY]
Date Modified	Date the file was last changed and saved. [MM/DD/YYYY HH:MM:SS AM/PM]
Record Type	Indicates form of record: E-Doc, E-Doc Attachment, Email, Email Attachment, HardCopy, Calendar Appt, Text Message, Chat Message etc.
Author	Author field value extracted from the metadata of a native file
Last Author	Last Saved By field value extracted from metadata of a native file
Redaction	Indicates Yes or No status regarding document redactions.

Metadata/Document Information	Description
Page count	Number of pages in record.
File size	Size of document in KB.
File Extension	File extension type (*e.g.*, docx, xlsx).
Filename with extension	Name of the original native file with file extension.
Hash	Identifying value used for deduplication – typically SHA1 or MD5.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative path to submitted native or near native files. Example: \NATIVES\001\FTC0003090.xls
Text Link	Relative path to submitted text file. Example: \TEXT\001\FTC-0003090.txt
Time Created	Time file was created. [HH:MM:SS AM/PM]
Time Modified	Time file was saved. [HH:MM:SS AM/PM]

(v) Submit documents stored in hard copy in TIFF (Group IV) format accomplished by OCR with the following information:

Metadata/Document Information	Description
Spec No.	Subpoena/request paragraph number to which the document is responsive
Bates Begin	Beginning Bates number of the document.
Bates End	Bates number of the last page of the document.
Record Type	Indicates form of record: E-Doc, E-Doc Attachment, Email, Email Attachment, HardCopy, Calendar Appt, Text Message, Chat Message etc.

Page count	Number of pages in record.
Redaction	Indicates Yes or No status regarding document redactions.
Custodian	Name of person from whom the file was obtained.

(vi) Submit redacted documents in TIFF (Group IV) format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction I 7.

(b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact. Submit data separately from document productions.

(c) Produce electronic file and ESI processed submissions as follows:

(i) For productions over 20 gigabytes, use an External Hard Disc Drive (stand-alone portable or hard drive enclosure) or USB Flash Drive in Microsoft Windows-compatible, uncompressed data format.

(ii) For productions under 20 gigabytes, submissions may be transmitted electronically via FTP. The FTC uses Kiteworks Secure File Transfer.

To request a Kiteworks upload invitation, contact the FTC representative identified in the request you received.

Use of other File Transfer methods is permitted. Please discuss this option with the FTC representative identified in the request to determine the viability.

(iii) CD-ROM (CD-R, CD-RW) optical disks and DVD-ROM (DVD+R, DVD+RW) optical disks for Windows-compatible computers, are acceptable storage formats.

(iv) <u>All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this Request</u>.

(v) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.

(d) Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.

(e) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this Request.

I 5. Before using software or technology (including search terms, email threading, Technology Assisted Review, deduplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Company must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and company terminology. For any process that relies on a form of Technology Assisted Review to identify or eliminate documents, the Company must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows Commission representatives to review statistically-significant samples of documents categorized as non-responsive documents by the algorithm.

I 6. All documents responsive to this Request:

(a) shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files;

(b) shall be marked on each page with corporate identification and consecutive document control numbers when produced in TIFF format (*e.g.*, ABC-00000001);

(c) if written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

(d) shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (*e.g.*, a chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format TIFF);

(e) shall be accompanied by an index that identifies: (i) the name of each Person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that Person's documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that, Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request; and

(f) shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents.

I 7. If any documents or parts of documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes, in separate fields, a privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; all custodians; date of the document; the title or subject line; an indication of whether it is redacted; the basis for the privilege claim (*e.g.*, attorney-client privilege), including the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the Person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document or part of a document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this Instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third party, such as internal law firm memoranda, may be omitted from the log. Provide the log in Microsoft Excel readable format.

I 8. If the Company is unable to answer any question fully, supply such information and data as are available. Explain why the answer is incomplete, the efforts made by the Company to obtain the information and data, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

I 9. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy as disclosed or described in response to Specification 27 of this Request, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify the Persons having knowledge of the content of such documents.

I 10. In order for the Company's response to this Request to be complete, the attached certification form must be executed by the Company official supervising compliance with this Request, notarized, and submitted along with the responsive materials.

I 11. Any questions you have relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to **[Staff Contact Name]** at **[Telephone Number]**. The response to the Request shall be delivered per the instruction of **[Staff Contact Name]** during the course of normal business (8:30 a.m. to 5:30 p.m., Monday through Friday). **[Staff Contact Name]** will provide specific mail delivery instructions should that method of transmittal be required.

CERTIFICATION

As required by §803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object based on the Commission not offering the original document.

____ (Signature)

____
(Type or Print Name and Title)

Subscribed and sworn to before me at the City of ___________________,

State of _________________, this _____day of ___________, 20___.

____
(Notary Public)

____
(Date Commission Expires)

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Competition Matters

New HSR thresholds and filing fees for 2024

February 5, 2024

Each year, the Commission adjusts the minimum dollar jurisdictional thresholds that determine reportability under the Hart-Scott-Rodino Act based on the change in gross national product in the prior year. The 2023 Consolidated Appropriations Act created new filing fee tiers with new filing fees and the thresholds for these filing fees, as well as the fee amounts, are also adjusted annually along with the jurisdictional thresholds.

The Commission recently announced the updated jurisdictional thresholds and the updated fee schedule, both of which will become effective on March 6, 2024. The following rules of thumb should help parties determine the relevant thresholds and any resulting reporting obligations that apply based on when the filing is made, when the transaction closes, and when the thresholds adjust. They should also help parties determine the correct filing fee.

Rule 1: The correct threshold for determining reportability is the one in effect at the time of closing.

The most significant threshold in determining reportability is the minimum size of transaction threshold. This is often referred to as the "$50 million (as adjusted)" threshold because it started at $50 million and is now adjusted annually. For 2024, that threshold will be **$119.5 million.** To determine reportability for a deal that will close around the time that the new threshold is effective, look to what the $50 million (as adjusted) threshold will be *at the time of closing.* For example, a deal valued at $115 million which will close on or after March 6, 2024, is not reportable because it is below the new minimum size of transaction threshold, even though it exceeds the current threshold of $111.4 million.

Here are the new jurisdictional thresholds, effective on March 6, 2024:

ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
$10 million	$23.9 million
$50 million	$119.5 million
$100 million	$239 million
$110 million	$262.9 million
$200 million	$478 million
$500 million	$1.195 billion
$1 billion	$2.390 billion

Rule 2: The filing fee is determined by the value of the transaction at the time of filing.

If you determine that a transaction is reportable, the filing fee should be based on the filing fee threshold that is in effect *at the time of filing*. Here are the new filing fee thresholds, as well as the adjusted fee amounts, revised in accordance with the 2023 Consolidated Appropriations Act and effective on March 6, 2024:

FILING FEE	SIZE OF TRANSACTION
$30,000	less than $173.3 million
$105,000	not less than $173.3 million but less than $536.5 million
$260,000	not less than $536.5 million but less than $1.073 billion
$415,000	not less than $1.073 billion but less than $2.146 billion
$830,000	not less than $2.146 billion but less than $5.365 billion
$2,335,000	$5.365 billion or more

Rule 3: Notification thresholds for subsequent purchases adjust yearly, too.

The HSR Rules contain additional notification thresholds that relieve parties of the burden of making another filing every time additional voting shares of the same person are acquired. So, when HSR notification is filed, the acquiring person has one year from the end of the waiting period to cross the threshold stated in its HSR filing. Under Section 802.21, you must cross the threshold stated in the filing within one year after the end or termination of the waiting period, or you will have to file a new HSR notification in order to cross that threshold. Section 802.21 also specifies that once the filed-for waiting period ends or terminates, you can acquire up to the next threshold over the next five years without filing again.

Here's how this works. If you file on February 10, 2024, for a $120 million voting securities acquisition that will close after March 6, 2024, you should file to cross the $119.5 million threshold because that is the $50 million (as adjusted) threshold in effect at the time of closing (See Rule 1) and pay a $30,000 fee, the filing fee in effect at the time you file. You then have one year from the end of the waiting period to cross the $119.5 million threshold, even though the $50 million (as adjusted) threshold may be higher next year when the thresholds adjust again.

The next relevant threshold is the "$100 million (as adjusted)" threshold (so called because it started as $100 million and is now adjusted annually). So, after the end of the waiting period for the filing to cross the $119.5 million threshold, you then have five years to acquire up to the next notification threshold -- in this case, the $100 million (as adjusted) threshold -- without an additional HSR filing. each subsequent year of the five-year period under Section 802.21, that threshold will adjust and yo always look to the revised threshold in effect at the time. The revised $100 million (as adjusted) threshold for 2024 will be $239 million, but in 2025, it will likely be higher and you would look to the higher 2025 figure for evaluating additional acquisitions at that time.

Give Feedback

As always, contact the PNO with specific questions regarding the HSR rules.

Tags: Competition | Bureau of Competition | Hart-Scott-Rodino Act (HSR)

More from the Competition Matters

Competition Matters

[Slack, Google Chats, and other Collaborative Messaging Platforms Have Always Been and Will Continue to be Subject to Document Requests]

January 26, 2024

Competition Matters

[Contract Terms That Impede Competition Investigations]

John Newman & Amy Ritchie, Bureau of Competition | June 16, 2023

Competition Matters

[Spring Meeting updates]

Holly Vedova, Bureau of Competition | March 31, 2023

Competition Matters

[BC's Criminal Liaison Unit is Off to the Races]

Holly Vedova, Director of the Bureau of Competition | March 24, 2023

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC Challenges Kroger's Acquisition of Albertsons

Largest supermarket merger in U.S. history will eliminate competition and raise grocery prices for millions of Americans, while harming tens of thousands of workers, FTC alleges

February 26, 2024

Tags: Competition | Bureau of Competition | Merger | Retail | Grocery/Supermarkets

The Federal Trade Commission today sued to block the largest proposed supermarket merger in U.S. history—Kroger Company's $24.6 billion acquisition of the Albertsons Companies, Inc.—alleging that the deal is anticompetitive.

The FTC charges that the proposed deal will eliminate fierce competition between Kroger and Albertsons, leading to higher prices for groceries and other essential household items for millions of Americans. The loss of competition will also lead to lower quality products and services, while also narrowing consumers' choices for where to shop for groceries. For thousands of grocery store workers, Kroger's proposed acquisition of Albertsons would immediately erase aggressive competition for workers, threatening the ability of employees to secure higher wages, better benefits, and improved working conditions.

"This supermarket mega merger comes as American consumers have seen the cost of groceries rise steadily over the past few years. Kroger's acquisition of Albertsons would lead to additional grocery price hikes for everyday goods, further exacerbating the financial strain consumers across the country face today," said Henry Liu, Director of the FTC's Bureau of Competition. "Essential grocery store workers would also suffer under this deal, facing the threat of their wages dwindling, benefits diminishing, and their working conditions deteriorating."

The FTC issued an administrative complaint and authorized a lawsuit in federal court to block the proposed acquisition pending the Commission's administrative proceedings. A bipartisan group of nine attorneys general is joining the FTC's federal court complaint.

Kroger operates thousands of stores across 36 states, which includes regional banners such as Fred Meyer, Fry's, Harris Teeter, King Soopers, Kroger, and Quality Food Centers (QFC). Albertsons also operates thousands of stores across 35 states under regional names including Albertsons, Haggen, Jewel-Osco, Pavilions, Safeway, and Vons. If the merger were completed, Kroger and Albertsons would operate more than 5,000 stores and approximately 4,000 retail pharmacies and would employ nearly 700,000 employees across 48 states.

Executives for both Kroger and Albertsons have acknowledged that the two supermarkets are direct competitors, forcing each other to aggressively compete for customers by lowering prices and for employees by providing better pay and benefits across the country. Similarly, executives for both supermarket chains have conceded that Kroger's acquisition of Albertsons is anticompetitive, with one executive reacting candidly to the proposed deal: "you are basically creating a monopoly in grocery with the merger."

Inadequate Divestiture Offering

To try to secure antitrust approval of their merger, Kroger and Albertsons have proposed to divest several hundred stores and select other assets to C&S Wholesale Grocers (C&S), which today operates just 23 supermarkets and a single retail pharmacy. The FTC's administrative complaint alleges that Kroger and Albertsons's inadequate divestiture proposal is a hodgepodge of unconnected stores, banners, brands, and other assets that Kroger's antitrust lawyers have cobbled together and falls far short of mitigating the lost competition between Kroger and Albertsons.

The FTC says the proposed divestitures are not a standalone business, and C&S would face significant obstacles stitching together the various parts and pieces from Kroger and Albertsons into a functioning business—let alone a successful competitor against a combined Kroger and Albertsons. The proposal completely ignores many affected regional and local markets where Kroger and Albertsons compete today. In areas where there are divestitures, the proposal fails to include all of the assets, resources, and capabilities that C&S would need to replicate the competitive intensity that exists today between Kroger and Albertsons. Even if C&S were to survive as an operator, Kroger and

Albertsons's proposed divestitures still do not solve the multitude of competitive issues created by the proposed acquisition, according to the complaint.

Harm to Consumers

In addition to raising grocery prices, the FTC alleges that Kroger's acquisition of Albertsons would also diminish their incentive to compete on quality. Today, Kroger and Albertsons compete to improve their stores in many ways, including offering fresher produce, higher quality products, improved private label offerings, a broader array of in-store services, flexible store and pharmacy hours, and curbside pickup services.

The FTC charges that the deal would eliminate head-to-head price and quality competition, which have driven both supermarkets to lower their prices and improve their product and service offerings. If the merger takes place, grocery prices will increase, and Kroger and Albertsons' incentive to improve product quality and customer service will decrease, further harming customers.

Harm to Workers

Kroger and Albertsons are the two largest employers of union grocery labor in the United States. They actively compete against one another for workers. The two companies also try to poach grocery workers from each other, especially in local markets where they overlap. Currently, most workers for both supermarket chains are members of the United Food and Commercial Workers (UFCW) union.

Today, UFCW and other unions leverage the fact that Kroger and Albertsons are separate and competing companies. Unions push for both supermarket chains to negotiate better employment terms for union grocery workers, especially when negotiating over collective bargaining agreements (CBAs).

A combined Kroger/Albertsons, however, would gain increased leverage over workers and their unions—to the detriment of workers, the FTC alleges. The combined Kroger and Albertsons would have more leverage to impose subpar terms on union grocery workers that slow improvements to wages, worsen benefits, and potentially degrade working conditions. In some regions, such as in Denver, the combined Kroger/Albertsons would be the only employer of union grocery labor. Union grocery workers ability to leverage the threat of a boycott or strike to negotiate better CBA terms would also be weakened.

The Offices of the Attorneys General of Arizona, California, the District of Columbia, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming are joining the Commission's federal lawsuit.

The Commission vote to issue the administrative complaint and authorize staff to seek a temporary restraining order and preliminary injunction in federal district court was 3-0. The federal court complaint and request for preliminary relief will be filed jointly with the state attorneys general in the U.S. District Court for the District of Oregon.

NOTE: The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an administrative law judge.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

Media Contact

Victoria Graham
Office of Public Affairs
415-848-5121

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care

Tuesday, March 5, 2024 | 12:30PM - 4:00PM

Tags: Competition | Office of Policy Planning | Bureau of Competition | Health Care

Event Description

The Federal Trade Commission will host a public workshop, *Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care*, aimed at examining the role of private equity investment in health care markets.

The FTC is dedicated to fostering competition in health care markets. In recent years, the Commission has become increasingly concerned about the effects of private equity investment in this sector. We are convening a workshop bringing together experts and affected individuals to discuss their insights. The workshop will consist of several panels and feature remarks from government officials, academics, economists, and practitioners, as well as members of the public who have experienced, first-hand, the effects of private equity investment in the health care system.

The workshop will take place virtually and will be livestreamed on the FTC's website.

Agenda

Event Speakers

Transcripts

Video

FTC Privacy Policy

Under the Freedom of Information Act ("FOIA") or other laws, we may be required to disclose to outside organizations the information you provide when you pre-register for events that require registration. The Commission will consider all timely and responsive public comments, whether filed in paper or electronic form, and as a matter of discretion, we make every effort to remove home contact information for individuals from the public comments before posting them on the FTC website.

The FTC Act and other laws we administer permit the collection of your pre-registration contact information and the comments you file to consider and use in this proceeding as appropriate. For additional information, including routine uses permitted by the Privacy Act, see the Commission's Privacy Act system for public records and comprehensive privacy policy.

This event will be open to the public and may be photographed, videotaped, webcast, or otherwise recorded. By participating in this event, you are agreeing that your image — and anything you say or submit — may be posted indefinitely at ftc.gov or on one of the Commission's publicly available social media sites.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Budget, Performance, and Financial Reporting

Every year we present financial and performance results and plans to the American people, the President, and to Congress. These reports share detailed information about how we use our financial resources and progress in reaching our strategic goals. Our financial reports demonstrate our commitment to our mission and accountability over the resources entrusted to us. Our performance reports and plans document our accomplishments and challenges in protecting consumers and promoting a competitive marketplace, as well as set targets for the future. Our archive provides documents from past years. View the Archive

Congressional Budget Justifications

- FY 2025 Congressional Budget Justification
- FY 2024 Congressional Budget Justification
- FY 2023 Congressional Budget Justification
- FY 2022 Congressional Budget Justification

Annual Performance Report and Plan

- FY 2023 Annual Performance Report and FY 2024-25 Plan

Agency Financial Report

- FY 2023 Agency Financial Report

Data Quality Appendix

- Data Quality Appendix, updated 4/4/2024

FTC Appropriation and FTE Utilization

- **FY 2024 Appropriation** = $425.7 million
- **FTC Appropriation and FTE History**

Federal Activities Inventory Reform (FAIR) Act Inventory

2023 FAIR Act Inventory

Join us at the FTC!

View our open positions

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Legal Library: Statutes

The Commission has enforcement or administrative responsibilities under more than 80 laws. The agency's primary statutes, the Federal Trade Commission Act and the Clayton Act, appear first followed by all of the other statutes in alphabetical order. The links for the statutes primarily are to uscode.house.gov, which updates the statutes on a regular basis. Please note, however, that the FTC cannot guarantee the accuracy of any particular statute or statute link at any particular time.

Search

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Statutes

Federal Trade Commission Act

Mission: Competition Consumer Protection

Law: 15 U.S.C. §§ 41-58, as amended

The Federal Trade Commission Act is the primary statute of the Commission. Under this Act, as amended, the Commission is empowered, among other things, to (a) prevent unfair methods of competition and...

Safe Web Act (194.69 KB)

http://uscode.house.gov/view.xhtml

Statutes

Clayton Act

Mission: Competition

Law: 15 U.S.C. §§ 12-27, as amended

The Commission is charged under Sections 3, 7 and 8 of this Act with preventing and eliminating unlawful tying contracts, corporate mergers and acquisitions, and interlocking directorates. This Act...

http://uscode.house.gov/view.xhtml

Statutes

INFORM Consumers Act

Mission: Consumer Protection

Law: 15 U.S.C. § 45f

The Act requires online marketplaces to collect and verify bank account information, contact information, and tax ID information from high-volume third party sellers that sell consumer products...

https://uscode.house.gov/view.xhtml

Statutes

Protecting Indian Tribes from Scams Act

Mission: Consumer Protection

Law: Pub. L. No. 117-103, 136 Stat. 49, Division Q, Title IV, §§ 401-402

Under Section 402, the FTC, in consultation with Indian Tribes, must make public and submit to congressional committees a report on scams targeting Indian Tribes. This report, due no later than March...

https://www.congress.gov/117/bills/hr2471/BILLS-117hr2471enr.pdf

Statutes

Fraud and Scam Reduction Act

Mission: Consumer Protection

Law: Pub. L. No. 117-103, 136 Stat. 49, Division Q, Title I, §§ 101-122

The Fraud and Scams Reduction Act seeks to raise awareness of, identify, and combat schemes to defraud consumers, especially schemes that target seniors. Section 112 establishes the Senior Scams...

https://www.congress.gov/117/bills/hr2471/BILLS-117hr2471enr.pdf

Statutes

COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act

Mission: Consumer Protection

Law: Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XIV, § 1401

For the duration of the COVID-19 public health emergency declared pursuant to section 319 of the Public Health Service Act (42 U.S.C. 247d), this Act makes it unlawful under Section 5 of the Federal...

https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

Statutes

Horseracing Integrity and Safety Act of the 2021 Consolidated Appropriations Act

Mission: Consumer Protection

Law: Pub. L. No. 116-260, 134 Stat. 1182, Division FF, Title XII, §§ 1203-1210

This Act creates a Horseracing Integrity and Safety Authority ("Authority") as a private self-regulatory organization. The Authority must develop rules related to horseracing, including anti-doping...

Commission Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority (908.79 KB)

https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

Statutes

No Surprises Act of the 2021 Consolidated Appropriations Act

Mission: Consumer Protection

Law: Pub. L. No. 116-260, 134 Stat. 1182, Division BB, § 109

The No Surprises Act seeks to protect consumers from surprise medical bills arising out of certain out-of-network emergency care. Under Section 109 of the Act, the Secretary of Health and Human...

https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

Statutes

Elder Abuse Prevention and Prosecution Act

Mission: Consumer Protection

Law: Pub. L. No. 115-70, 131 Stat. 1209, codified in relevant part at 34 U.S.C. §21711

Section 101 of this Act requires the FTC to designate an Elder Justice Coordinator within the agency's Bureau of Consumer Protection. This individual is responsible for coordinating and supporting the...

https://uscode.house.gov/view.xhtml

Statutes

Protecting Children in the 21st Century Act

Mission: Consumer Protection

Law: 15 U.S.C. § 6552-53

This Act requires the FTC to provide a nationwide program that promotes children's safe use of the internet. The Act specifies that the FTC's program must utilize existing resources of public and...

https://uscode.house.gov/view.xhtml;jsessionid=7F576D1F323BD62E579BAB23A5E5C31F

Statutes

Economic Growth, Regulatory Relief, and Consumer Protection Act

Mission: Consumer Protection

Law: Pub. L. No. 115-174, codified in relevant part primarily at 15 U.S.C. 1650, 1681c, 1681c-1, 1681i and 42 U.S.C. 405b

This act includes a number of changes to the Fair Credit Reporting Act and other lending-related laws, many of which affect consumers and the FTC. In particular: Title III amends the FCRA regarding...

http://uscode.house.gov/statviewer.htm

Statutes

Patient Right to Know Drug Prices Act

Mission: Competition

Law: Pub. L. No. 115-263, 132 Stat. 3673, codified in relevant part at 21 U.S.C. § 355 note

Section 3 of this Act requires certain agreements involving biosimilar biological drugs to be filed with the antitrust agencies in the same way certain agreements involving generic drugs must be filed...

https://uscode.house.gov/view.xhtml

Statutes

FAA Reauthorization Act of 2018

Mission: Consumer Protection

Law: Pub. L. No. 115-254,132 Stat.3314, codified in relevant part at 49 U.S.C. § 44801 note

Under Section 375 of the Act, it is an unfair and deceptive practice under FTC Act § 5(a) for a person that uses an unmanned aircraft system (i.e. a drone and its operational elements) for commercial...

https://uscode.house.gov/view.xhtml

Statutes

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act)

Mission: Consumer Protection

Law: 15 U.S.C §§ 7701-7713

This Act establishes requirements for those who send unsolicited commercial email. The Act bans false or misleading header information and prohibits deceptive subject lines. It also requires that...

http://uscode.house.gov/view.xhtml

Statutes

Consumer Review Fairness Act

Mission: Consumer Protection

Law: 15 U.S.C. § 45b

The Act generally makes provisions of form contracts between sellers and individual consumers void from inception if the provisions: (1) prohibit or restrict individuals from reviewing sellers' goods...

http://uscode.house.gov/view.xhtml

Statutes

Motor Vehicle Information and Cost Savings Act

Law: Pub. L. No. 92-513, 86 Stat. 947, now codified in relevant part at 49 U.S.C. §§ 32908, 32912-32913, and 32918, and 42 U.S.C. § 6363

Provisions added to this Act by Section 301 of the Energy Policy and Conservation Act (a) provide for Commission enforcement of fuel economy labeling requirements under the FTC Act, except for penalty...

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http://uscode.house.gov/view.xhtml
http://uscode.house.gov/view.xhtml

Statutes

Military Lending Act

Mission: Consumer Protection

Law: 10 U.S.C. § 987

The Military Lending Act, as amended, imposes a 36% rate cap, bans mandatory arbitration, and imposes other restrictions, and requires disclosures for “consumer credit” (as defined by rule issued by...

http://uscode.house.gov/view.xhtml

Statutes

Made in USA Provisions of the Violent Crime Control and Law Enforcement Act of 1994

Mission: Consumer Protection

Law: Pub. L. No. 103-322, 108 Stat. 1796, codified in relevant part at 15 U.S.C. § 45a

Under Section 320933 of the Act, labels representing that a product is "Made in America" or "Made in the U.S.A." must conform with the domestic content requirements for such claims established by the...

http://uscode.house.gov/view.xhtml

Statutes

Wool Products Labeling Act

Mission: Consumer Protection

Law: 15 U.S.C. §§ 68-68j

Under this Act, the manufacture, introduction, sale, transportation, distribution, or importation of misbranded wool constitutes a violation of the Federal Trade Commission Act.

http://uscode.house.gov/view.xhtml

Statutes

Telephone Disclosure and Dispute Resolution Act of 1992

Mission: Consumer Protection

Law: 15 U.S.C. §§ 5701-5724

The Act requires the Commission to promulgate certain regulations respecting advertising for, operation of, and billing and collection procedures for, pay-per-call or "900 number" telephone services...

http://uscode.house.gov/view.xhtml

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

International Waivers of Confidentiality in FTC Antitrust Investigations

The FTC encourages all parties to investigations that involve non-U.S. competition authorities to consider whether they will provide a letter to the FTC that waives the confidentiality provisions of the Hart Scott Rodino Act, FTC Act, and FTC Rules of Practice to the extent necessary to allow staff of the FTC to share confidential information with one or more non-U.S. competition authorities reviewing the matter.

Waivers enable more complete communication, cooperation, and coordination among competition agencies concurrently reviewing a matter. By permitting cooperating agencies to discuss or otherwise exchange the individual's or company's confidential information, a waiver enables agencies to make more informed, consistent decisions, and coordinate more effectively, often expediting the review.

MODEL WAIVER FTC staff and the Antitrust Division of the Department of Justice have created a model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities ("Model Waiver"), for use by parties and third parties. Using the Model Waiver will significantly reduce the time spent negotiating individual waivers. The Model Waiver was developed with the intention that it will be used in almost all civil matters. • Model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities - PDF | Word	WAIVERS FAQ FTC staff and the Antitrust Division of the DOJ have drafted a set of Frequently Asked Questions to accompany the Model Waiver. The FAQ provides an introduction to waivers of confidentiality and describes the confidentiality rules applicable to the information provided pursuant to the Model Waiver. It also describes the process for providing a waiver of confidentiality to either agency and explains specific provisions of the Model Waiver. • Frequently Asked Questions

ADDITIONAL RESOURCES

- News Release: Federal Trade Commission and Justice Department Issue Updated Model Waiver of Confidentiality for International Civil Matters and Accompanying FAQ
- International Competition Network report on Waivers of Confidentiality in Merger Investigations

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Protocol for Coordination in Merger Investigations

PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL

Some mergers and acquisitions may become subject to simultaneous federal and state investigations by either the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") or the Federal Trade Commission ("FTC"), and one or more State Attorneys General. To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger. This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties.

I. CONFIDENTIALITY

These joint investigations are generally nonpublic in nature and will routinely involve materials and information that are subject to statutes, rules, and policies governing when and how they may be disclosed. Participating agencies are required to protect confidential information and materials ("confidential information") from improper disclosure. Confidentiality obligations continue even if a receiving agency subsequently decides to pursue an enforcement avenue different from that chosen by one or more of the other agencies.

Agencies receiving confidential information from another agency ("the originating agency") will agree to take all appropriate steps to maintain its confidentiality, including:

1. timely notification to the originating agency of discovery requests or public access requests for that information;
2. a vigorous assertion of all privileges or exemptions from disclosure claimed by the originating agency;
3. intervention in legal proceedings, or provision of assistance to the originating agency in intervening in legal proceedings, if necessary, to assert such privileges or exemptions; and
4. complying with any conditions imposed by an agency that shares information it deems to be confidential.

Any agency that becomes aware that confidential information has been disclosed in contravention of this Protocol will promptly advise all other agencies conducting the joint investigation of the disclosure so that its significance and implications for further information-sharing can be assessed.

II. PROCEDURES INVOLVING THE MERGING PARTIES

The merging parties may be required to produce documents or other information to the Antitrust Division or FTC pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), Civil Investigative Demands, or other compulsory process, and to State Attorneys General pursuant to subpoena or other compulsory process. To minimize the burden on the merging parties and to expedite review of the transaction, the merging parties may wish to facilitate coordination between the enforcement agencies.

The Antitrust Division and the FTC will, with the consent of the merging parties, provide certain otherwise confidential information to State Attorneys General. The acquiring and acquired persons in the transaction must:

A. agree to provide the states, according to the National Association of Attorneys General Voluntary Premerger Disclosure Compact, or otherwise, all information submitted to the Antitrust Division or the FTC pursuant to the HSR Act, Civil Investigative Demands, or other compulsory process, or voluntarily; and

B. submit a letter to the Antitrust Division or the FTC that waives the confidentiality provisions under applicable statutes and regulations to allow communications between the Antitrust Division or FTC and State Attorneys General.(1)

Where these requirements have been satisfied, the Antitrust Division or FTC will provide to the state investigating the merger or, if there is a multistate working group, to the coordinating state:(2)

1. copies of requests for additional information issued pursuant to the HSR Act ("second requests");
2. copies of civil investigative demands issued pursuant to the Antitrust Civil Process Act and
3. copies of subpoenas and civil investigative demands issued by the FTC; and
4. the expiration dates of applicable waiting periods under the HSR Act.

III. CONDUCT OF JOINT INVESTIGATION

The following is intended to set forth suggested guidelines that may be followed to coordinate merger investigations by State Attorneys General and the FTC or Antitrust Division. All applicable investigatory, work product, or other privileges shall apply to any material exchanged.

A. STRATEGIC PLANNING

Coordination between federal and state enforcement agencies may be most effective at the earliest possible stage of a joint investigation. It should begin with an initial conference call among the FTC or Antitrust Division and State Attorneys General.

To the extent lawful, practicable, and desirable in the circumstances of a particular case, subjects of the conference calls should include:

1. Identification of lawyers and other legal and economic team members working on the case, and assignment of areas of responsibility.
2. Identification of potential legal and economic theories of the case to be developed and assignment of research projects. It may be appropriate for state and federal enforcers to share memoranda, papers and/or briefs prepared in similar prior matters with appropriate redactions for confidential information, as well as those prepared during the current investigation to the extent permitted by the participating agencies.

3. Identification of categories of data, documents, and witness testimony needed to be obtained, and strategies for obtaining and sharing such information, including to the extent lawful, practicable, and desirable, the initiation of requests seeking the consent of past and future submitters to disclosure of such information. State Attorneys General should particularly be encouraged to take responsibility for obtaining data located within their respective geographic areas or maintained by state or local governmental agencies.

4. Identification of potential consulting economists or other experts.

5. Where multiple states are involved, understandings should be reached on how information can be most conveniently exchanged. For example, the coordinating state might assume responsibility for transmitting documents received from the FTC or Antitrust Division to other State Attorneys General.

B. DOCUMENT PRODUCTION

Coordinating both the request for, and review of, documentary materials can reduce the parties' burden and facilitate the agencies' investigation. To the extent lawful, practicable, and desirable, three steps should be taken in connection with issuing a second request or subpoenas, CID's, or voluntary requests for information from the merging parties or third parties:

1. Consideration of ideas from other investigating agencies on the content and scope of the request.

2. Providing correspondence to other investigating agencies memorializing agreements with parties to narrow or eliminate request specifications.

3. Division of responsibility among investigating agencies for document review and exchange of summaries and indices.

C. WITNESS EVIDENCE/EXPERTS

To the extent lawful, practicable, and desirable in a particular case, the State Attorneys General and the FTC or Antitrust Division should coordinate the joint development of testimonial evidence. The investigating agencies should try to integrate their efforts to the maximum extent possible. Specifically:

1. Identification and development of lists of potential interviewees/deponents should be undertaken in a coordinated manner. States should be encouraged to use their

greater familiarity with local conditions/business to identify interviewees and schedule interviews.

2. Joint interviews and/or depositions of witnesses should be coordinated whenever lawful, practicable and desirable. An early understanding should be reached regarding the extent to which notes of interviews will be maintained and exchanged. Coordination of deposition summaries should also be discussed.

3. State Attorneys General and the FTC or the Antitrust Division should coordinate responsibility for the securing of declarations or affidavits.

4. State Attorneys General and the FTC or the Antitrust Division should discuss early during a joint investigation whether to employ experts jointly or separately. If the latter, a method should be provided for exchange of economic views/theories among the experts and with staff economists. The preparation of expert affidavits/testimony should be closely coordinated.

IV. SETTLEMENT DISCUSSIONS

To achieve the full benefits of cooperation it is imperative that federal and state antitrust enforcement agencies collaborate closely with respect to the settlement process. While each federal and state governmental entity is fully sovereign and independent, an optimal settlement is most likely to be achieved if negotiations with the merging parties are conducted, to the maximum extent possible, in a unified, coordinated manner.

It will normally be desirable for federal and state enforcement agencies to consult on settlement terms in advance of any meeting with the merging parties where settlement is likely to be discussed. Where possible, any such meeting should be attended by both federal and state representatives. Furthermore, each enforcement agency should keep the other enforcement agencies advised of communications regarding settlement with a merging party.

If any federal or state antitrust enforcement agency determines that circumstances require it to pursue a negotiation or settlement strategy different from that of the other investigating agencies, or decides to close its investigation, it should disclose that fact immediately.

V. STATEMENTS TO THE PRESS

It is important that understandings be reached between the enforcement agencies regarding the release of information to the news media. These agreements should cover the timing of and procedures for notifying the other enforcement agencies prior to the release of any information to the press.

EXHIBIT 1A

To: Assisant Director for Premerger Notification
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

With respect to [the proposed acquisition of X Corp. by Y Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq., and the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 et seq., insofar as these protections in any way limit confidential communications between the Federal Trade Commission and the Attorney(s) General of [insert pertinent State(s)].

Signed:

Position:

Telephone:

EXHIBIT 1B

To: Director of Operations
Antitrust Division
Department of Justice
Tenth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

With respect to [the proposed acquisition of X Corp. by Y Corp.] the undersigned attorney or corporate officer, acting on behalf of [indicate entity], hereby waives confidentiality protections under the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h), the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 et seq., and any other applicable confidentiality provisions, for the purpose of allowing the United States Department of Justice and the Attorney(s) General of [insert pertinent State(s)] to share documents, information and analyses.

Signed:

Position:

Telephone:

EXHIBIT 2: CORRESPONDENCE/MEMORANDUM DEPARTMENT OF JUSTICE

Date: September 6, 1996

To: Antitrust Contacts

From: Kevin J. O'Connor
Assistant Attorney General

Subject: Memorandum of Clarification of Liaison and Coordinating States Under the NAAG Voluntary Pre- Merger Disclosure Compact

As our experience with the NAAG Voluntary Pre-Merger Disclosure Compact ("Compact") grows, additional questions concerning its application inevitably arise. The purpose of this memo is to clarify the distinction between the "liaison state" under the Compact and any multistate working groups or litigating groups which may be formed to deal with a matter that is the subject of a filing under the Compact.

LIAISON STATE

The function of the liaison state under the Compact is to receive the filing and to notify forthwith all signatories to the Compact of the filing and the identity of the merging parties. Upon request, the liaison state must permit signatories of the Compact to inspect the documents or obtain a photocopy of the filing from the liaison state. In short, the liaison state serves a ministerial function of receiving and distributing, upon request, copies of the confidential filings of the prospectively merging parties. (3)

COORDINATING STATE

In certain cases, two or more states may investigate or litigate regarding a particular transaction. This may occur whether or not the Compact has been invoked. As is the case with any Multistate Antitrust Task Force Working Group, the process of joint investigation and litigation operates largely by consensus. Although each enforcement agency retains its sovereignty, the synergies achievable from a joint investigation can only be realized if the states share a common interest in goals and process and organize effectively. Typically, the states most directly, and adversely, impacted by a proposed transaction, will take the lead in such investigations provided they have the resources to do so.

Chair Selection: Where a group of investigating states decides to work together, it will often be desirable to have a coordinating or "chair" state. The coordinating or "chair" state should be determined by the states actively involved in the investigation and litigation after consultation with the Chair of the Multistate Antitrust Task Force. The criteria for choosing a "coordinating state" should include, for example, whether the prospective chair state is (a) likely to be adversely affected by a proposed transaction, (b) is in a position to commit resources to the investigation, and (c) can coordinate effectively with the other states and the federal agencies that may be involved in reviewing the same transaction. Under these criteria, the state assuming the role of coordinating state is not necessarily the same state identified by the Compact as the state undertaking the largely ministerial duties set forth in the Compact.

Chair Function: The function of the coordinating state shall be to coordinate the investigative and enforcement activities of the working group states, to coordinate with any federal agency collaborating with the states, and to facilitate settlement discussions. Again, because this is largely a consensual process, the coordinating state should do all of the above in consultation with the other investigating states and federal agencies.

Settlement Negotiations: Because merger investigations often occur in a very short time frame, and because the issue of settlement is often raised during that time frame, it is imperative that the coordinating states and the investigating federal agency consult and collaborate early and often regarding terms and process of settlement. The interested enforcement agencies are more likely to achieve an optimal resolution by presenting the merging parties, to the maximum extent feasible, with a united front. If an individual enforcement agency, state or federal, determines that its interests require pursuing a negotiation or settlement strategy separate from the cooperating states and federal agencies, it is incumbent upon that agency to disclose its posture at the earliest possible opportunity and to implement its strategy in a way which minimizes any adverse impact upon the other states and enforcement agencies.

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(1) Examples of such a letter are annexed hereto as Exhibit 1.

(2) Pursuant to the NAAG Voluntary Pre-Merger Disclosure Compact, the merging parties may reduce their burden of complying with multiple state subpoenas by providing a set of all required materials to the designated "liaison state." The role of the liaison state is ministerial in nature. It differs from that of the "coordinating state," which is responsible for coordinating the investigation and any resulting litigation. The differences between the roles of the liaison and coordinating states are described more fully in the memorandum annexed hereto as

Exhibit 2. Depending on the investigation, these roles may be performed by the same state or different states.

(3)***The Compact lists the order of preference for identifying the liaison state upon whom the merging parties may serve a copy of their filings. This order of preference includes: First, the principal place of business of the acquiring party to the merger; second, the attorney general of the state which is the principal place of business of the acquired party; third, the attorney general of the state of incorporation of the acquiring party; and, fourth, the attorney general of the state of incorporation of the acquired party. If no member of the Compact falls within the foregoing four preferences, the parties may make a filing upon the chair of the Multistate Antitrust Task Force or any other member of the Compact who is willing to act as liaison state for such transaction.

Chapter 3

MULTIJURISDICTIONAL MERGERS: RATIONALIZING THE MERGER REVIEW PROCESS THROUGH TARGETED REFORM

The spread of merger control law has the potential to create significant benefits. Merger review regimes with advance notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. At the same time, the marked increase in the number of jurisdictions possessing merger review regimes renders it increasingly likely that international mergers and acquisitions will be reviewed by multiple jurisdictions.

While recognizing the benefits of merger review systems, the Advisory Committee also sees that significant and sometimes unnecessary transaction costs may be imposed on proposed transactions through the notification and review procedures implemented by various jurisdictions. These costs are of particular concern given that the vast majority of transactions reviewed by competition authorities are permitted to proceed with no action, suggesting that the transactions are either competitively benign or beneficial to society.

In considering the consequences of multijurisdictional merger review, the Advisory Committee has sought to identify those problematic practices employed by various jurisdictions around the world, as well as the exemplary practices that others could usefully adopt. The Advisory Committee believes that the challenges identified in this chapter can most profitably be addressed by advocating targeted reform in individual merger control regimes through the promotion of best practices. Broadly speaking, the best practices that the Advisory Committee identifies in this chapter fall within two major categories: ensuring that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction; and ensuring that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process. The Advisory Committee believes that identifying the beneficial and troublesome practices of various jurisdictions provides useful comparisons and ultimately provides countries with the ability to select those practices that will enhance their merger review processes while comporting with national legal and cultural characteristics.

The United States by virtue of its experience and developed practices can and should play a leading role in the effort to implement reforms in the international arena. Perhaps one of the most effective ways in which the United States can stimulate global reform is through leading by example. It is therefore important that the United States continue to examine and perfect its own merger review processes. After addressing problems within its own borders, the United States is well positioned to advocate that other jurisdictions make modifications in their merger review systems.

In the previous chapter the Advisory Committee considered ways to bridge the differences between systems and to minimize the risk that differing substantive standards employed by reviewing jurisdictions will lead to diverging evaluation on the merits, incompatible or burdensome remedies, and international friction. This chapter examines those problematic features within merger review systems that heighten uncertainty about filing obligations and review schedules and generate unnecessary transaction costs. It also identifies concrete ways in which the United States and other jurisdictions constructively may begin to address these international challenges. The chapter first explores in greater detail both the benefits and the challenges presented by the proliferation of merger control regimes with antitrust notification obligations. It then identifies specific practices that require reform, together with ways in which the Advisory Committee believes that these reforms may be implemented most effectively. Finally, the Advisory Committee identifies the likely impact of its recommendations in the United States.

Benefits of Antitrust Merger Notification

While mergers frequently lead to significant cost savings and other benefits, they also may be anticompetitive. Merger review regimes give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. The U.S. Department of Justice (DOJ) has estimated that its merger review efforts during 1998 saved consumers $4 billion.[1] Although the Federal Trade Commission (FTC) does not track total estimated consumer savings flowing from its enforcement efforts, estimates in two specific actions are notable. The FTC estimates that it has saved consumers approximately $250 million annually since it obtained a preliminary injunction to prevent two office supply superstores from merging in 1997. The agency also estimates that it has saved consumers another $300 million annually by blocking two nearly simultaneously proposed mergers in the drug wholesaling industry in 1998.[2] Recognizing the benefits created by merger review systems, scores of jurisdictions around the world have enacted merger control laws within the last decade.

The more established national competition laws, as well as many of those more recently implemented, include substantive prohibitions on anticompetitive mergers, acquisitions, and joint ventures. Many of the laws require advance notice of proposed transactions. In fact, commentators have noted that "[i]t is not hyperbole that perhaps the greatest U.S. export in the last decade has been the adoption of pre-

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1 Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 64.

2 FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998)(enjoining the merger of Cardinal Health Inc. with Brunswig Corp. and McKesson Corp. with Amerisource Health Corp.).

merger review processes, particularly in developing countries."[3] Of the more than 80 jurisdictions currently possessing competition laws, it is estimated that at least 60 require (or provide for) antitrust merger notification.[4] This number undoubtedly will increase as other countries implement competition laws.

Advance notice is viewed as useful to competition authorities because it permits them to evaluate and either prohibit or restructure potentially anticompetitive transactions before the transaction is implemented. In this way, competition authorities avoid the widely acknowledged difficulties that accompany attempts to restore competition by "unscrambling the eggs" after allegedly anticompetitive transactions have been completed. The experience of the U.S. antitrust enforcement agencies before 1976 illustrates that imposing structural relief after a transaction has been consummated is often difficult, if not impossible. Attempting to prevent anticompetitive harm by relying on antitrust conduct cases after an anticompetitive merger has been implemented, according to the U.S. antitrust enforcement agencies, is a poor substitute for preserving competitive structure in the market in the first place. Even if postconsummation remedies were effective, consumers would suffer the harmful effects of the loss of competition during the interim period before remedies were imposed. Indeed, the stated purpose of the U.S. Congress in enacting the premerger notification regime embodied in the Hart-Scott-Rodino Act of 1976 (HSR Act or HSR) was to give the agencies "an effective mechanism to enjoin illegal mergers *before* they occur."[5]

Reliance on premerger notification systems to provide advance notice of proposed transactions is based in large part on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they have the ability to detect those "midnight mergers" that are consummated without public notice. Moreover, it is not practical to place the burden of notification on concerned competitors and consumers. Reliance on these entities to provide advance notice may prove imperfect either because these entities may not know about transactions before their consummation or because the transaction costs incurred by these entities in notifying the competition authorities may outweigh any benefits obtained by having the proposed transactions reviewed.

For these reasons, many jurisdictions view premerger notification regimes as the most efficient way of systematically obtaining advance notice of potentially anticompetitive transactions. Most competition law systems thus require merging parties to notify competition authorities of proposed transactions that meet certain criteria and to await the competition authorities' review before consummating those transactions.

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3 Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, "Rationalizing International Pre-Merger Review," ICPAC Hearings (Nov. 4, 1998), at 3 [hereinafter Byowitz and Gotts Submission].

4 Most (approximately 50) merger control regimes provide for mandatory notification before closing, although some countries allow for postclosing or voluntary notification combined with the authority of the competition agency to intervene after consummation of the transaction. Annex 2-C identifies several antitrust merger notification systems.

5 S. REP. NO. 94-803, at 72 (1976).

Parties to a proposed transaction that meets the threshold filing requirements of the HSR Act, for example, must file a premerger notification form with the DOJ and FTC and observe a 30-day initial waiting period before consummating the proposed transaction. If either of the agencies requests additional information before the expiration of the initial waiting period, the parties must wait an additional 20 days after substantially complying with the request for additional information before going forward with the proposed transaction.[6]

So that competition authorities need not review each proposed transaction, premerger notification regimes require notification only for proposed transactions that meet certain criteria.[7] Because substantive merger control laws are concerned with structural restraints of competition, merger notification regimes in the first instance generally limit notification requirements to those transactions that result in the change of control by one or more entities over one or more other independent entities.[8] Most regimes also generally limit their scope by requiring notification only for those transactions deemed large enough to justify the expenditure of agency resources. In the United States, for example, parties to a merger need not notify the DOJ or FTC unless the statutory "size of party" and "size of transaction" tests are met.[9]

Challenges Presented by the Proliferation of Merger Regimes

While the spread of merger control law has the potential to create significant benefits, the growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that firms

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[6] 15 U.S.C. §18a(b)(1)(B) and (e); 16 C.F.R. §803.10(b)(1)-(2). In cash tender offers the initial waiting period is 15 days. In several other countries, such as Belgium, closings are not barred unless expressly ordered, but the parties may be limited from taking "irreversible" measures affecting operations in the jurisdiction.

[7] One commentator characterizes this feature of premerger notification regimes as the "filter" function. *See* Andre Fiebig, Esq., Gardner, Carton & Douglas, "The Limitations Imposed by International Law on the Extraterritorial Reach of Premerger Control Regimes," (May 26, 1999), at 5, submitted by Mr. Fiebig for inclusion in the Advisory Committee record [hereinafter Fiebig Submission].

[8] Each jurisdiction has its own definition of when a transaction triggers the application of merger control law. Virtually all jurisdictions focus on a change in "control." However, the boundaries of control often are blurred and vary greatly among jurisdictions. Merger control laws are presumptively triggered in a number of jurisdictions by monetary, stockholding or market share thresholds. For example, in Poland and Austria, acquisitions of 25 percent or more are considered mergers regardless of whether the minority shareholder may exercise control. Many antitrust regimes also incorporate a spectrum of control thresholds, where the lower control thresholds may be satisfied by relatively modest rights or abilities to influence (but not decisively influence) the management of a legal entity. For example, under EC jurisprudence, this spectrum ranges from "decisive influence" to "influence" to "no influence/passive investment." *See* Barry E. Hawk and Henry L. Huser, *"Controlling" the Shifting Sands: Minority Shareholdings Under EEC Competition Law,* 17 FORDHAM INT'L L.J. 294 (B. Hawk ed., 1994).

[9] 15 U.S.C. §18a.

undertaking mergers must now consider may be a mixed blessing. As a result of this explosion in merger regulation, merging parties face an array of up to 60 merger regimes that require, among other things:[10]

- Knowledge of and compliance with complex filing rules.
- Completion of an array of forms in accordance with various national requirements.
- Payment of substantial fees to the reviewing authorities (often designed to subsidize the operation of government agencies).
- Knowledge of and compliance with review schedules and waiting periods.

Although no comprehensive data are available that quantify the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements, the responses of firms and their advisors to ICPAC outreach efforts suggest that these costs are sizeable.[11] According to those responses, one significant category of costs imposed on international mergers results from having to ascertain potential notification obligations in literally dozens of separate jurisdictions. Determining whether merger control regulations exist in all potentially affected jurisdictions is in itself a daunting task, as is determining whether the disparate jurisdictional thresholds for merger notification in these various countries are met. Many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which currently are employed by many jurisdictions (though not the United States). Mistakes may be costly: several jurisdictions, including the United States and the European Commission (EC), impose fines for failure to notify a reportable transaction.[12]

A second significant category of costs results from having to file multiple merger notifications. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which the merging parties operates. This information is required even for transactions those pose few or no competition issues. In some cases, filings must be made in countries having no reasonable basis for exerting jurisdiction

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[10] *See* Byowitz and Gotts Submission, at 3-5.

[11] *See* J. William Rowley, QC and A. Neil Campbell, *Multi-jurisdictional Merger Review -- Is It Time for A Common Form Filing Treaty?* in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW: A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, at 9 (1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter Rowley and Campbell Submission].

[12] Many other jurisdictions also impose fines for failure to comply with notification requirements; some of these are: Argentina (1 million pesos per day); Brazil (R$55,000 to R$5.5 million); Japan (up to Yen 2 million); Poland (1 percent of an undertaking's average monthly revenue); Taiwan (NT$100,000 to NT$1 million). Additional penalties may be imposed for closing without clearance. *See Getting the Deal Through: The International Regulation of Mergers and Joint Ventures*, GLOBAL COMPETITION REVIEW (2000).

over a transaction. Numerous premerger notification regimes set reporting thresholds at exceedingly low levels or require notification of transactions that lack any appreciable nexus to the economy of the reviewing jurisdictions. Precise statistics regarding the percentage of proposed transactions that ultimately are reviewed by multiple jurisdictions are not available. Anecdotal evidence collected by the Advisory Committee indicates, however, that it is not unheard of for merging parties to file notifications with a dozen or more jurisdictions.[13]

Direct costs of compliance include attorneys' fees, filing fees, and document production costs. Companies frequently must retain local counsel in a multiplicity of jurisdictions to obtain guidance on whether the proposed transaction is subject to notification requirements and on how to comply with premerger filing requirements, a task complicated by the fact that, in many jurisdictions, few attorneys may be experienced in competition law. As one submission to ICPAC observed, "local counsel must be retained to guide the parties through the complexities of the individual antitrust regimes and obtain the approval of the local antitrust authorities. Often the laws in a particular jurisdiction, including their standards for filing, are ambiguous, or the forms that must be submitted to the reviewing authorities are complex and call for detailed local information, requiring the active intervention of local counsel."[14]

Annex 3-A identifies the filing fees imposed by several jurisdictions and shows how quickly they mount when multiple jurisdictions are involved. The United States, for example, requires each acquiring party to pay a US$45,000 filing fee; filing fees in the United States totaled $195 million in fiscal year 1999.[15] Similarly, Canada in November 1997 introduced a filing fee of Cdn$25,000 for each prenotifiable transaction and request for an Advance Ruling Certificate.[16] Although filing fees may account for only a tiny fraction of the total cost of a large transaction, multiple filing fees may impose relatively significant costs on smaller transactions.

Multijurisdictional merger review also imposes indirect and difficult-to-quantify costs that may exceed the direct costs identified above. These indirect costs include, for example, the drain on executives' time and productivity. One observer notes that:

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13 *See, e.g.,* Submission by the U.S. Council for International Business, ICPAC Hearings (Apr. 22, 1999), at 4 [hereinafter USCIB Submission] ("Presently, it is not unheard of that a multinational corporation with a proposed merger would be required to file in 20 or 30 jurisdictions.").

14 James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews* in THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY, VOL. III INTERNATIONAL TRADE, at 717, 720 (Gulser Meric and Susan E.W. Nichols eds. 1998) submitted by Mr. Kobak for inclusion in the Advisory Committee record [hereinafter Kobak Submission].

15 U.S. DOJ Premerger Office.

16 Competition Bureau Fee Charging Policy, CANADA GAZETTE, PART I, VOL. 131, NO. 44, at 3,446 (Nov. 1, 1997).

> Executives' time and productivity lost due to a protracted investigation (or series of investigations) takes a heavy toll on the parties to the transaction. In each jurisdiction where some form of compliance is required, senior officers of the companies involved will have to spend many hours conducting, coordinating, and supervising the search for financial and market information that will have to be produced to each of the regulating authorities involved. The senior officers will also likely have to make themselves available to counsel and to the authorities for interviews and other information gathering activities, which distract the senior officers from the business of the firm.[17]

The same observer notes that the "loss to the company of the executives' time and productivity will compound with each follow up request propounded by the regulating authorities."[18]

Other intangible costs arise from the delays that may be engendered by the review process in a number of jurisdictions. Delays imposed on proposed transactions result from the lack of strict deadlines and lengthy review periods. At the extreme, the merging parties may abandon the transaction. Mergers are almost always time sensitive; delays may prove fatal to a transaction, particularly if it relates to a high-technology industry, such as electronics, computers, or software, with a very short life cycle. In addition, delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff.[19]

Delays also create lost opportunity costs. For example, "[d]uring the time that deals are delayed, the parties to a transaction lose the savings, efficiencies and synergies (assuming there are any) that induced their respective business decisions to do the deal in the first place, and the economy is denied whatever competitive benefits would result."[20] One ICPAC hearing participant testified that he is aware of a merger where the annual efficiencies exceed a billion dollars. "This particular merger will take at least a year to

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[17] Kobak Submission, at 721-22. The parties to the Halliburton/Dresser transaction estimate that they spent approximately $3.5 million to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States). In addition, company officials spent a great amount of time compiling requested data and preparing for and undergoing formal depositions. The United States deposed 12 executives, and informal interviews were conducted with a few key executives by the authorities in Mexico and the EU. The EU also conducted a site visit. Submission by Lester L. Coleman, Executive Vice President and General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire regarding the Halliburton/Dresser transaction (March 9, 1999) [hereinafter Coleman Submission].

[18] Kobak Submission, at 722.

[19] Submission of Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998), at 12-13 [hereinafter Hawk Submission].

[20] Joe Sims and Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 885-86 (1997).

clear, and that's one merger out of a world of mergers."[21] Other opportunity costs may include the inability of the individual parties to accept business that the merged entity would have been well positioned to accept because of the anticipated synergies realized from combining their operations.

Despite these escalating costs, the Advisory Committee was presented with no evidence suggesting that transaction costs associated with multijurisdictional merger review have slowed the pace of the global economy.[22] However, some ICPAC hearing participants cautioned that as more and more countries adopt competition laws, transaction costs incurred by global firms tend to increase, creating the danger that those costs could "cancel out the efficiency gains that one would expect from the globalization process."[23]

Rationalizing the Merger Review Process in Light of Globalization

After looking at the transaction costs that result from multijurisdictional merger review, the Advisory Committee considered whether they are merely costs of doing business in multiple jurisdictions or whether they are excessive and could be minimized while still ensuring that enforcers have the tools necessary to identify and remedy anticompetitive transactions. *In the Advisory Committee's view, many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing*

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[21] Testimony of J. William Rowley, McMillan Binch, ICPAC Hearings (Nov. 3, 1998), at 145. A company representative estimated that clearing antitrust regulatory hurdles in eight jurisdictions cost British Telecommunications PLC an estimated $100 million in lost efficiencies during each month that the British Telecommunications/MCI Telecommunications Corp. transaction could not be closed. Statement of Tim Cowen, BT Group Legal Services, at the Fordham Corporate Law Institute (Oct. 22 & 23, 1998).

[22] Hawk Submission, at 14. *But see* Presentation by Members of the International Antitrust Law Committee of the Section of International Law and Practice, ICPAC Hearings (April 22, 1999), at 4 [hereinafter Members of ABA Int'l Antitrust L. Comm. Submission](contending that the U.S. merger review system imposes substantial costs both in money and management time, and therefore can and does chill some foreign transactions and cause the structuring of others to exclude U.S. operations). Of course, some deals may exclude U.S. operations because of potential antitrust concerns and vigorous U.S. enforcement.

[23] Statement of Frédéric Jenny, Vice President, Conseil de la Concurrence, ICPAC Hearings (Nov. 2, 1998), at 58; *see also* Testimony of Luis de Guindos Jurado, Director General de Politica Economica y Defensa de la Competencia, ICPAC Hearings (Nov. 2, 1998), at 100 ("mega-mergers must be regarded as a logical consequence of a whole range of factors, and, importantly, as a symptom of market dynamism in pursuit of ever greater efficiency. Of course, the competition authorities must be alert to the possible creation or enforcement of dominant positions as a result of such operations, and cooperation between competition authorities must be welcomed as a useful and necessary means to this end. Nevertheless, we must also take care to avoid any kind of intervention that could deter market dynamism or prevent firms from improving their economic efficiency. Otherwise, there is a very real risk that we as competition authorities could actually impair economic growth and damage consumer welfare."); *see also* Byowitz and Gotts Submission, at 3 ("continued globalization through mergers and acquisitions should not be discouraged or inappropriately taxed by national competition review processes. Instead, the merger wave should be encouraged, and the international merger review process simplified and rationalized").

business. At the same time, the Advisory Committee is of the view that while antitrust merger control regimes have the potential to create benefits for society, those same notification and review processes also impose significant transaction costs on international transactions. It is therefore important to focus on those *unnecessary* and *burdensome* costs that have little or no relationship to antitrust enforcement goals.

These costs are of particular concern when it is recognized that the majority of the transactions that are reviewed by competition authorities are permitted to proceed with no enforcement action, suggesting that those transactions are efficiency enhancing or competitively benign. Indeed, statistics for several jurisdictions, including the United States, indicate that only a small percentage (generally ranging from 1 to 5 percent) of all notified mergers ultimately are either prohibited or restructured by competition authorities (Box 3-A). This evidence leads the Advisory Committee to conclude that the growing incidence of multijurisdictional merger reviews is imposing unnecessary transaction costs in a large number of transactions that present little, if any, actual competitive concern.

Box 3-A: Merger Challenge Rate

Australia: In 1997-98 the Australian Competition and Consumer Commission considered 176 mergers and joint ventures of which it objected only to 8 (5 percent). Australian Competition & Consumer Commission Annual Report 1997-98.

Brazil: From June of 1998 to September of 1998, only 2 of the 48 notified transactions (4 percent) were not approved outright. From May of 1996 to May of 1998, all but 17 of the 104 notified transactions were approved without any condition. Cade.

Canada: During the fiscal year ending March 31, 1999, the Canadian Competition Bureau received notification of 192 transactions (an additional 222 requests were made for advance ruling certificates). Of the examinations concluded during the year, all but 5 were approved outright. Annual Report of the Commissioner of Competition (1999).

European Commission: According to the EC, only 14 transactions out of 292 notifications (less than 5 percent) in 1999 were challenged or subjected to a second-phase investigation. In response to concerns expressed by the European Commission, an additional 19 transactions (approximately 6.5 percent) were cleared subject to undertakings accepted during the first phase of investigation.

Japan: In 1998, no formal measures were taken against the 3,813 notified mergers and acquisitions, although at least two transactions (less than 1 percent) were revised in response to concerns raised during prenotification consultation (others may have been abandoned or revised during prenotification consultation). Annual Report on Competition Policy in Japan. Notably, the thresholds were revised effective January 1, 1999, and are expected to capture approximately 200 transactions annually.

Taiwan: Of the 1,045 notified cases that were concluded in 1999, all but 13 (less than 2 percent) were approved. Taiwan Fair Trade Statistics.

United Kingdom: The Office of Fair Trading in the United Kingdom examined 425 transactions in 1998, of which only 8 (less than 2 percent) were referred to the Monopolies and Mergers Commission (MMC) for further investigation. Undertakings were accepted in an additional three (less than 1 percent) in lieu of a reference to the MMC (others may have been abandoned in response to confidential guidance). Director General's Annual Report to the DTI.

United States: Of the 4,679 transactions notified during the fiscal year ending September 30, 1999, requests for additional information were issued in 113 (2.4 percent), and only 76 transactions (1.6 percent) resulted in enforcement actions. U.S. DOJ Premerger Office.

To preserve the benefits of merger review while easing unnecessary burdens on international transactions, the Advisory Committee concludes that in the first instance each jurisdiction should take steps to ensure that it casts its merger review "net" only as broadly as necessary to identify potentially problematic transactions. Once a transaction has come under the merger review net of a particular jurisdiction, moreover, the Advisory Committee concludes that jurisdictions should ensure that unnecessary burdens are not imposed on that transaction.

To achieve these goals, the Advisory Committee recommends several "best practices" designed to rationalize the application of merger review procedures.[24] Having considered problematic practices in various jurisdictions around the world, the Advisory Committee recommends the following approaches to remedy those ills, which are discussed later in this chapter:

- In designing their merger review systems, jurisdictions should seek to review only those transactions that have a nexus to and that pose the threat of appreciable anticompetitive effects within the reviewing jurisdiction. To this end, threshold filing requirements should be designed to screen out mergers that lack a nexus to the reviewing jurisdiction. In addition, notification thresholds should be set at levels designed to screen out transactions unlikely to generate appreciable anticompetitive effects within the jurisdiction. Additional steps that can be taken to eliminate unnecessary burdens on merging parties during this stage include establishing objectively based notification thresholds and ensuring their transparency.

- Once a proposed transaction falls within the merger review system of a given jurisdiction, that jurisdiction should avoid imposing unnecessary costs on the transaction. To this end, premerger notification and review should occur within a two-stage process designed to enable enforcement

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[24] Advisory Committee Member Eleanor M. Fox suggests another approach to facilitate efficient coordination of filings and reduce the burden on parties of multiple notifications. She proposes a common clearinghouse for premerger notification by firms that elect to opt into such a system. One way to achieve this would be to permit the merging parties to file with a disinterested clearinghouse center on the day of the first filing. Alternatively, if the first filing is in a mature antitrust jurisdiction and covers international markets where all or most of the impacts would occur, all interested nations would be bound to accept the first filing as their first and basic information about the merger. The notified center or jurisdiction would announce the filing to member nations (or to interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

Although other members found merit in the proposal, it was noted that a number of issues needed to be resolved. For example, sufficient information would have to be produced in the initial filing to enable all potentially affected jurisdictions to determine whether a notification obligation is triggered and whether a jurisdiction has an enforcement interest in the transaction. It was noted that this business information is confidential and is not in the public domain. A clearinghouse system would require the broad dissemination of this confidential information to jurisdictions with varying degrees and capabilities of assuring adequate protection.

agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

- This goal can be accomplished by adopting reasonable deadlines and time frames for review. Jurisdictions should strive to clear nonproblematic transactions within a 30-day or one-month time frame following notification. In addition, jurisdictions should seek to rationalize review periods by harmonizing rules pertaining to when premerger filings can (or must) be made. Finally, merger review periods should not be open ended and more deadlines should be employed during second-stage review processes so as to provide greater certainty to the merging parties.

- To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the initial notification should require the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Mechanisms also should be established to narrow the legal and factual issues presented by each proposed transaction early in the merger review process.

The Advisory Committee believes that these recommendations represent realistic goals that can reduce costs on international transactions without reducing the efficacy of the enforcement agencies. The Advisory Committee believes it is in the interest of the United States and other jurisdictions to examine their own merger review processes and undertake reform efforts, where necessary, targeted at minimizing the burdens associated with merger review. In particular, one additional area warranting consideration is overlapping decisionmaking power for competition policy within jurisdictions. This feature of merger review systems may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

TARGETED REFORM: CASTING THE MERGER REVIEW NET APPROPRIATELY

Various jurisdictions that rely on exceedingly low notification thresholds or that require a filing in the absence of any appreciable domestic effects impose significant costs on transactions that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdictions.[25] Thus, international

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[25] In addition to imposing unnecessary transaction costs on proposed transactions premerger notification regimes that rely on thresholds of this nature may violate customary principles of international law. The Advisory Committee requested input from the private bar on whether the extraterritorial extension of jurisdiction in these cases potentially infringes international law. This input suggests that international law requires a nexus between the state and the act, person, or property being regulated. In the context of economic regulation, a significant detrimental effect (on competition, for example) within a state generally will justify the extraterritorial extension of jurisdiction by that state. Because the exercise of jurisdiction in these instances may interfere with the sovereignty of other states, however, the international law principle of proportionality requires that the regulation be necessary to achieve the legitimate goal of

transactions are burdened, but concomitant benefits are not necessarily created. To complicate matters, many jurisdictions' filing requirements are vague, subjective, or difficult to interpret.

Using Notification Thresholds to Screen Out Mergers That Are Unlikely to Have Appreciable Anticompetitive Effects Within the Reviewing Jurisdiction

Several best practices can be employed to rationalize threshold tests for notification to reduce unnecessary transaction costs without significantly reducing the public benefit created by advance notification. First, in establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction. This goal can be accomplished by implementing threshold tests that include an appreciable nexus to the economy of the jurisdiction, such as transaction-related sales or assets in the jurisdiction, and that are set at only as broad as necessary to require the reporting of transactions that may have the potential to cause appreciable anticompetitive effects within the jurisdiction. These thresholds also should be objectively based and transparent.

Because notification thresholds are established by statute in many jurisdictions, revisions would require legislative action. Thus, it is recognized that the proposed reforms pertaining to notification thresholds likely cannot be accomplished in the short run. In the meantime, jurisdictions should ensure that transparency exists, with respect to their merger regimes generally, but should focus particularly on clarifying the manner in which those thresholds should be applied and providing information on how to comply with premerger filing requirements.

Nexus to the Jurisdiction

The Advisory Committee recognizes that transactions between firms with international operations can create anticompetitive effects in multiple countries. Thus, the Advisory Committee acknowledges that the reporting of foreign and domestic transactions is necessary and appropriate so long as those transactions possess an appreciable nexus to the reviewing jurisdictions. However, numerous jurisdictions require notification of transactions in the absence of any appreciable domestic effect. In delineating their sphere of application, few (if any) premerger notification regimes rely expressly on the potential for proposed transactions to create anticompetitive effects. Rather, most jurisdictions rely on surrogate criteria such as sales volume, asset values, or market shares to determine the reach of their premerger notification regimes. Reliance on surrogate criteria is understandable, given the subjectivity that

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the law and further be restricted to means which are least likely to interfere with the sovereignty of other states. *See* Fiebig Submission. As described later, using notification thresholds that require an appreciable (and objectively based) nexus to the economy of the reviewing jurisdiction would encroach less on the sovereignty of the states where the parties are located and reduce uncertainty surrounding the level of local contacts necessary to trigger a notification obligation. This suggests that reliance on worldwide figures or potential effects in themselves is not a sufficient basis of jurisdiction under principles of international law for a state to compel compliance with the premerger control regime.

necessarily is involved in determining whether a proposed transaction poses harm to competition and therefore whether a premerger notification filing is required. The use of these proxies may be problematic, however, when they are not tailored to identify transactions that may cause appreciable anticompetitive effects within a given jurisdiction.

Specifically, several jurisdictions premise their notification threshold tests on worldwide figures, including worldwide sales volumes or worldwide asset values. Reliance by a premerger notification regime on thresholds of this nature creates the possibility that a transaction with no reasonable likelihood of generating any effect within a jurisdiction still may be required to make a premerger filing in that jurisdiction. This possibility exists even if the premerger notification regime requires that a certain volume of sales be made in the territory of that country.

One example of this problematic practice can be found in the "effects test" employed by some jurisdictions, under which any transaction with the potential to generate effects within a jurisdiction may be subject to premerger notification requirements in that jurisdiction. For example, before the implementation of amendments that became effective on January 1, 1999, Germany required premerger notification if a transaction involved one party with annual worldwide sales of more than DM2 billion (approximately $1.06 billion), or two or more parties with annual worldwide sales of more than DM1 billion (approximately $530 million), whenever the transaction had any potential effect in Germany.[26]

Under the new German law, notification is not required unless the proposed transaction satisfies requirements with respect to both worldwide and German sales figures. The addition of the German turnover threshold makes it more likely that transactions captured within the merger review regime will have at least some nexus to Germany; the problem is not entirely eliminated, however, because transactions may still be notifiable notwithstanding the fact that one party has no (or *de minimis*) sales in Germany.[27] A number of other jurisdictions still employ variants of the effects test to assert jurisdiction and impose

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[26] Similar rules applied under the Austrian merger statute until the Austrian Supreme Court ruled that Austrian turnover is to be considered. Submission by the American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999), at 7-9 [hereinafter ABA Antitrust Section Multijurisdictional Merger Review Submission].

[27] Specifically, a premerger notification filing is required if the merging parties' aggregate worldwide turnover exceeds DM1 billion (approximately $530 million) and at least one of the parties has sales in Germany of more than DM50 million (approximately $26.5 million)(conversion rates as of June 1999). The German FCO issued a notice interpreting the term "domestic effects," which provides guidance to merging parties. However, uncertainty remains, and a filing still may be triggered in cases where the target has no sales in Germany. For example, the notice provides that domestic effects are assumed to be present if it is *likely* that goods will be supplied to Germany as a result of the merger, the merger will enhance the know-how of a participant undertaking that operates in Germany, industrial property rights will accrue or the financial strength of the participating undertaking that operates in Germany will be strengthened. *See* notice at <http://www.bundeskartellamt.de/merkblatt_inlandsauswirkung__.html>.

premerger notification requirements.[28] Box 3-A identifies several jurisdictions that rely on worldwide figures to assert jurisdiction over proposed transactions.[29]

In addition to capturing transactions with no reasonable likelihood of anticompetitive effects, thresholds based on worldwide figures generate significant uncertainty about when contacts in a foreign jurisdiction (particularly in Eastern European jurisdictions) rise to the level of "domestic effects" triggering application of a jurisdiction's merger control law.[30] Even local counsel remain uncertain as to how to interpret domestic effects in some jurisdictions.[31] Input received from the legal community is that antitrust notifications may be made merely out of an abundance of caution in jurisdictions where arguably there are no (or *de minimis*) local effects.

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[28] *See* ABA Antitrust Section Multijurisdictional Merger Review Submission, at 8-9; Testimony of Stephen D. Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company, on behalf of the National Association of Manufacturers, ICPAC Hearings (Apr. 22, 1999), at 2-3 [hereinafter NAM Submission]. In addition, the European Commission asserts jurisdiction under the EC Merger Regulation (ECMR) whether or not a transaction will have an effect on trade in the EU. *See* Jonathan Faull, Director, Directorate General for Competition (DG IV), European Commission, International Antitrust Takes Flight: a Review of the Jurisdictional and Substantive Law Conflicts in the Boeing/McDonnell Douglas Merger, Outline of remarks before the American Bar Ass'n Int'l Antitrust Committee Spring 1998 Meeting (Apr. 2, 1998), at 8. In his remarks, Director Faull questions whether insistence on notification under the ECMR of a transaction that meets the thresholds but lacks sufficient connection with the EU is contrary to international law.

[29] This list does not purport to be comprehensive nor does it identify those jurisdictions, such as Germany and the EU, where unrelated local sales (of the acquiring parties, for example) are sufficient to trigger a notification obligation. The information contained on this list and other lists or descriptions throughout the chapter regarding the rules and regulations in the various jurisdictions with merger control are based on available information; to determine notification obligations and filing rules and procedures, local counsel should be consulted rather than relying on the summary descriptions contained herein.

[30] *See e.g.,* Submission by Lawrence W. Keeshan, PricewaterhouseCoopers LLP, General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Pricewaterhouse/Coopers transaction, at 6-7 (Aug. 20, 1999) [hereinafter Keeshan Submission re the Pricewaterhouse/Coopers transaction] (determining whether notification would be required in any Eastern European country was generally very difficult based in part on the lack of any applicable precedents to determine the scope of the government's premerger authority under comparatively new regulatory regimes); USCIB Submission, at 5 ("businesses that need to file in multiple jurisdictions find it difficult and frustrating to locate reliable information regarding how and when to file in each jurisdiction").

[31] Advice of local counsel -- both on the interpretation of newly promulgated laws and regulations and on the proper application of existing laws and regulations -- may be inconsistent from transaction to transaction. Attempting to seek guidance from local competition authorities poses risk, as well. Officials may take months to respond to inquiries, for example. In addition, competition authorities seeking to increase their authority may be reluctant to advise that no filing is required. In some jurisdictions, the staff may not be well trained or well paid, or may receive additional compensation based on the number of filings made. For example, in Romania a government decision established a fund into which a portion of the taxes collected from notifications and other activities under the competition law are contributed and from which employees from the antitrust authority are awarded bonuses. This system creates incentives for officials to take the position that a merger should be notified to and approved by the antitrust authority for reasons unrelated to proper application of the competition law.

To eliminate unnecessary filings, notification should not be required in any jurisdiction based solely on potential domestic effects or local business activity unless such effects or activity exceeds some appreciable standard as measured, for example, by reference to the target's local activities, such as local sales or assets.[32] The Advisory Committee therefore recommends that the international community advocate that each jurisdiction review its notification thresholds to ensure that they incorporate an appreciable and objectively based nexus to the economy of the jurisdiction. This would screen out many transactions where there are no appreciable competitive effects in the jurisdiction and minimize uncertainty regarding the level of local contacts necessary to trigger a notification obligation, especially as to "foreign-to-foreign" transactions.

In revising notification thresholds, jurisdictions can look to those premerger notification regimes that are designed to identify only transactions with an appreciable nexus to the jurisdiction. Positive examples in this regard include:

- Canada (to trigger a notification obligation the target company must carry on an operating business in Canada coupled with Canadian assets/sales tests);
- Sweden (statute as interpreted by the Swedish authority requires an "acquisition of a Swedish business" with *non de minimis* sales and a Swedish subsidiary, affiliate, employees or sales organization); and
- the United States (foreign transaction exemptions based on U.S. assets and/or sales of target).[33]

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[32] Perhaps the most obvious effective alternative (or supplement) to sales volumes as a criterion for delineating the scope of a premerger notification regime is reliance on market shares. However, as described later, market share tests are even more troublesome because of their inherent subjectivity and the uncertainty they generate.

[33] ABA Antitrust Section Multijurisdictional Merger Review Submission, at 9.

Box 3-B: Notification Obligations Triggered by Worldwide Sales and/or Asset Values

Albania	Notification obligation triggered if the assets of one of the parties exceed Leks 50 million (approximately $363,958) or the combined firms' assets exceed Leks 200 million (approximately $1.5 million).
Argentina	Notification obligation triggered if the parties' combined worldwide turnover exceeds Arg. Pesos 2.5 billion (approximately $2.5 billion).
Brazil	Notification obligation triggered if any of the parties has total worldwide sales exceeding R$400 million (approximately $222.4 million).
Croatia	Notification obligation triggered by combined worldwide turnover of 700 million Kuna (approximately $98.3 million) or two or more parties have worldwide turnover of 90 million Kuna (approximately $12.6 million).
Estonia	Notification obligation triggered by combined worldwide turnover of 100 million Kroons (approximately $6.81million).
Ireland	Notification required in any transaction involving two or more parties with worldwide assets of at least IR• 10 million (approximately $13.5 million) or worldwide turnover of at least IR• 20 million (approximately $27.06 million) whenever either party carries on business in Ireland.
Lithuania	Notification obligation triggered by combined turnover in excess of LTL 30 million (approximately $7.5 million) and two or more parties with turnover in excess of LTL 5 million (approximately $1.25 million).
Poland	Notification obligation triggered by combined worldwide turnover of ECU 25 million (approximately $26.64 million) or worldwide value of the assets acquired of ECU 5 million (approximately $5.33 million).
Romania	Notification obligation triggered by combined worldwide turnover of ROL 25 billion (approximately $1.6 million).
Slovakia	Notification obligation triggered by combined worldwide turnover of at least 300 million Slovak crowns (approximately $7.25 million) and at least 2 of the parties each have worldwide turnover of 100 million Slovak crowns (approximately $2.4 million).
S. Korea	Notification obligation triggered if parties' combined worldwide turnover or asset value exceeds Korean won 100 billion (approximately $84.1 million).

Conversion rates are year end average 1999. This list does not include alternative threshold tests. For example, in Brazil if none of the parties have worldwide sales exceeding R$400 million, a notification obligation still may be triggered if the parties meet the alternative market share test.

Appreciable Anticompetitive Effects within the Reviewing Jurisdiction

Numerous premerger notification regimes also cast their merger review nets overbroadly by relying on exceedingly low notification thresholds. As data shown in Box 3-A suggests, the vast majority of mergers reviewed under merger notification regimes are found not to offend the law. The few mergers that are either prohibited or restructured indicate that the establishment of low notification thresholds results in capturing in the merger review net many more transactions than necessary to achieve merger review objectives.

A number of jurisdictions recently have enacted laws with thresholds so low that acquisitions unlikely to have any appreciable effect on competition still must be notified. In other countries with longstanding laws, this problem may be the result of a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. In fact, jurisdictions generally do not index their premerger notification thresholds to inflation rates or stock market indices. Italy is one of the few jurisdictions that does increase its thresholds annually to account for inflation. In countries that do not employ indexing measures, an ever-increasing proportion of mergers becomes reportable.[34]

In the United States, for example, premerger notification thresholds have not been adjusted since enactment of the HSR Act in 1976. Data provided by business groups and the private bar indicate that since 1976, stock market valuations of companies and their assets have increased dramatically; because the reporting thresholds have remained unchanged, an increasing proportion of transactions come under the merger review net. For 1997, the filing thresholds captured transactions that would be valued, in constant 1976 dollars, at approximately $5 million between parties with total sales and assets of approximately $35 million and $3.5 million, respectively. If the filing thresholds had simply kept pace with inflation, the number of filings in 1998 would have equaled their 1990 level, eliminating the nearly 134 percent increase in filings since 1990.[35]

Nor has Canada adjusted its notification thresholds for inflation since the country adopted its modern merger review system in 1986. Using the Consumer Price Index as of May 1998 to adjust the

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[34] *See* Rowley and Campbell Submission, at 15-16. A survey conducted by Rowley and Campbell reports that the most antitrust merger notifications in 1998 were made to the United States (4,728). Switzerland had the fewest reportable transactions (27). Most agencies were clustered in the 125-320 range. Rowley and Campbell attribute the disparity in the number of notifications in the United States and Switzerland to country size. Two other exceptions -- Poland (1,750) and Germany (1,333) -- appear to result from using broad thresholds that capture more transactions than other jurisdictions.

[35] Submission by U.S. Chamber of Commerce, ICPAC Hearings (Apr. 22, 1999), at 3 [hereinafter U.S. Chamber of Commerce Submission], *citing* FTC & DOJ Annual Report To Congress Fiscal Year 1998. This conclusion is derived by the U.S. Chamber of Commerce by adjusting the jurisdictional thresholds in the HSR Act in light of the inflation statistics set forth at U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 489 (1998).

thresholds would increase the Cdn$400 million party-size and Cdn$35 million target-size thresholds to almost Cdn$560 million and Cdn$50 million, respectively. Canadian counsel point out that other legislation in Canada accounts for the effects of inflation: the threshold for a reviewable transaction under Section 14.1 of the Investment Canada Act is adjusted annually to account for inflationary effects.[36]

As these numbers suggest, indexing notification thresholds for inflation would exclude a significant number of transactions from notification and review. Given the significant cost of compliance, it seems reasonable not to subject so many competitively benign transactions to the notification and review process. At the same time, however, the Advisory Committee notes that an automatic indexing method may produce arbitrary results and cautions against raising thresholds to such a level that competition authorities' enforcement missions may be compromised. The trade-off for raising filing thresholds is less comprehensive antitrust enforcement. The ability of competition authorities to detect nonreportable mergers (and the risk that these transactions would go unreviewed), as well as the jurisdictional ability of competition authorities to investigate and challenge nonreportable transactions, must be factored into any decision to adjust notification thresholds.

The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are appropriate or too low. Jurisdictions, of course, should continue to set the precise level, balancing the cost of compliance with notification rules and regulations against the likelihood that notifiable transactions will generate appreciable anticompetitive effects within the jurisdiction. If an automatic indexing mechanism is not employed, the Advisory Committee recommends that the jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.

To better ensure that potentially anticompetitive transactions do not escape scrutiny, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds.[37] Although the federal antitrust enforcement agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.

Any efforts to revise notification thresholds also must account for the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including federal antitrust agencies in the United States. Ideally, no competition authority should be dependent on filing fees for its budgets, staff salaries, or bonuses. A linkage of this nature may skew incentives to revise notification thresholds because consideration of limitations that may be warranted on the basis of competition-oriented objectives must be weighed against the collateral fiscal effects. Another risk that must

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[36] Rowley and Campbell Submission, at 16 and n.26.

[37] Of course, this may not apply in all jurisdictions, particularly the EU where transactions that fall below the EC Merger Regulation thresholds are potentially notifiable under member state merger regimes.

be considered is that the ability of competition authorities to fund their law enforcement activities may be compromised when the current merger wave subsides.[38]

To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds. Although linking filing fees to agency budgets clearly is undesirable as a matter of sound public policy, delinking fees or raising thresholds is simply not tenable without offsetting measures.

A variety of measures may be employed to offset any loss of filing fees flowing from the adjustment of notification thresholds. For example, the revision of thresholds could be accompanied by measures to increase filing fees for reportable transactions, or to levy filing fees scaled to the size of the transaction. Similarly, filing fees also could be assessed based on the amount of work performed by the reviewing authorities. In Germany, for example, the size of the filing fee for a transaction depends upon the economic importance and complexity of the case. Filing fees generally range from DM10,000 to DM100,000 (for straightforward cases, it is typically less than DM20,000). In exceptional cases, the fee may amount to as much as DM200,000.[39] Similarly, in Switzerland, no fee is required if a transaction is cleared within the initial review period. A filing fee is imposed if a second-stage investigation is opened and is based on the amount of work performed by the agency. The Advisory Committee notes, however, that when a transaction must be reviewed in several jurisdictions, filing fees will quickly mount.

Reducing Uncertainty and Unnecessary Burden Imposed by Notification Thresholds

Notification thresholds that do not clearly and objectively delineate the circumstances requiring parties to a proposed transaction to notify the competition authorities also impose uncertainty and unnecessary burden on merging parties.

Objectively Based Notification Thresholds

Imprecise and subjective notification thresholds impose significant transaction costs on parties to international mergers. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which many jurisdictions, although not the United States, currently use.[40] One

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[38] U.S. Chamber of Commerce Submission, at 4-5.

[39] Act Against Restraints of Competition §80(2).

[40] Jurisdictions employing market share tests to determine whether a proposed transaction is subject to notification obligations include, among others, Brazil (20 percent); Bulgaria (20 percent); Czech Republic (30 percent); Estonia (40 percent); Greece (25 percent); Israel (50 percent); Portugal (30 percent); Slovenia (50 percent); Slovakia (20 percent); Spain (25 percent); Taiwan (25 percent); Tunisia (30 percent); and Turkey (25 percent). *See* ABA Antitrust Section Multijurisdictional Merger Review Submission, at 6-7.

drawback of market share tests arises from the inherent subjectivity of market share calculations: reasonable minds may differ concerning the definition of the relevant markets. Another disadvantage of market share tests concerns their inherent impreciseness: calculation of market shares requires an estimation of the size of the relevant market. In addition, the calculation of market shares may entail a full and substantive analysis of the proposed transaction, which parties should not be required to undertake simply to determine whether premerger notification requirements are met in any given jurisdiction.[41]

The difficulties associated with market share tests are exacerbated by interpretive ambiguities and inconsistencies. Under Greek rules, for example, a filing is required if either party meets the 25 percent market share threshold, regardless of whether there is any horizontal overlap or vertical relationship between the two parties. Until 1999 notification was required in Belgium if the parties (individually or together) had a market share of more than 25 percent in Belgium not only for overlapping products, but also in any "upstream," "downstream," or "neighboring" markets. Presumably in recognition of the inherent difficulties associated with market share tests, the Belgian authority abandoned that test and instead adopted a Belgian turnover test.

To spare merging parties significant and unnecessary transaction costs, the Advisory Committee recommends that the international community should promote the elimination of market-share tests in favor of objectively quantifiable and readily accessible information, such as sales or assets. In addition to the Belgian thresholds, positive examples in this regard include Canada (Canadian assets/sales tests); the Netherlands (Dutch turnover); and Switzerland (Swiss turnover).[42]

Transparency

A lack of transparency in many jurisdictions makes it difficult to track and interpret myriad complex notification requirements (particularly in jurisdictions without a long history of merger control).[43] Jurisdictions should ensure that their merger review regimes are transparent generally, but should focus particularly on identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.

Transparency may be facilitated in many ways. In Chapter 2 the Advisory Committee recommended that jurisdictions produce policy statements and annual reports on competition policy, and publish speeches and press releases. These sources also should be used to publicize changes in administrative practices or in the application of merger notification rules and regulations. In addition, competition authorities should issue interpretations of notification threshold tests so that legal counsel can

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41 *Id.*

42 *Id.*

43 Keeshan Submission re the Pricewaterhouse/Coopers transaction, at 6-7; Byowitz and Gotts Submission, at 7.

correctly advise clients on whether premerger notification of a proposed transaction is required. These interpretations of threshold tests should make clear whether they apply to domestic or global assets, revenues, and market shares. This need is particularly acute in developing economies in which the local bar is not experienced in handling complex transactions or competition matters.

The U.S. antitrust agencies have made a substantial effort to increase the transparency of the HSR rules and regulations, and their efforts to facilitate transparency provide a useful model for other jurisdictions. Informal interpretations of whether a transaction is notifiable can be obtained by calling or writing the Premerger Notification Office at the FTC. Informal interpretations from the FTC staff are collected and discussed in the ABA Antitrust Section, Premerger Notification Practice Manual, which is periodically updated. In addition, the U.S. agencies release significant volumes of materials to assist practitioners and businesses in complying with the HSR Act, including a source book that compiles HSR rules and regulations, Federal Register publications, form filing information, formal interpretations, press releases, speeches, an annual report, and merger guidelines.

TARGETED REFORM: REDUCING BURDENS ON TRANSACTIONS IN THE MERGER REVIEW NET

The Advisory Committee recognizes the inherent difficulty in designing objectively based notification thresholds consistent with enforcement objectives that will identify *only* potentially problematic transactions. Although the recommendations set forth in the preceding section are designed to screen out mergers unlikely to generate appreciable anticompetitive effects within a jurisdiction, to some extent notification of a broad range of transactions is necessary. Therefore, the goal should be to impose the minimum burden necessary on those transactions that fall within the merger review system of a given jurisdiction.

Detailed filing requirements and prolonged delays in merger reviews may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those that pose no harm to competition. To ensure that each jurisdiction refrains from unduly burdening transactions that trigger a notification obligation, the Advisory Committee recommends that merger review should be conducted in a two-stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously. At each stage of the process, jurisdictions should set reasonable deadlines and time frames for review and craft focused information requests.

Setting Reasonable Deadlines and Time Frames for Review

ICPAC outreach efforts reveal that heightened uncertainty and prolonged delays in merger reviews result in large part from a lack of strict deadlines and lengthy review periods.[44] To facilitate the expeditious and efficient review of transactions, particularly those that do not raise competitive concerns, the Advisory Committee recommends that the international community should promote the adoption of 30-day or one-month initial review periods and harmonization of rules about when parties are permitted to file premerger notification.[45] For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. One approach to provide greater certainty required for effective transaction planning is the adoption of nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

Triggering Events

Rules pertaining to when merging parties are permitted or required to file premerger notification vary across jurisdictions. Some jurisdictions make premerger clearance mandatory, others make postclosing notification mandatory, and some jurisdictions make notification voluntary.

Jurisdictions also differ with respect to which types of events will trigger filing requirements. In a number of jurisdictions with preclosing notification requirements, such as the United States and Canada, a filing may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has been signed. In a few jurisdictions, such as Germany, a filing may be made whenever the intention of the parties has become sufficiently concrete to establish the structure of the transaction and the schedule for its implementation, or at least when a clear and serious intent to finalize the merger within a

[44] Hawk Submission, at 13. For example, had the parties in the Seagram/Polygram transaction been prepared to close the acquisition in three months (when EC and U.S. clearance had been granted) rather than six months (when all of the other corporate steps had been taken), serious problems could have arisen because of the amount of time some other national merger review authorities took to reach a decision. The agencies had the information they needed; some of them just took a long time to reach a decision. In addition to the EC and the United States, Australia, Brazil, Canada, Colombia, Mexico, Poland, and Taiwan were formally notified of this proposed merger. Submission by Kenneth R. Logan, Esq., Simpson Thacher & Bartlett, on behalf of himself and Edgar Bronfman, Jr., President and CEO, The Seagram Co., in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Seagram/PolyGram transaction, at 6 (March 26, 1999) [hereinafter Logan Submission re the Seagram/PolyGram transaction].

[45] One of the earliest driving forces behind procedural convergence was the concern that companies could engage in forum shopping and other strategically motivated behavior by using the procedural and substantive differences in various jurisdictions, and particularly differing time frames of review, to their advantage. For example, Seagram, in its acquisition of PolyGram filed first in the United States because Seagram expected the United States to "be on the critical path." After the FTC cleared the transaction, Seagram filed in Europe where the company thought that the Merger Task Force would give some deference to the U.S. clearance. Logan Submission re the Seagram/PolyGram transaction, at 4-5. With markedly increased cross-border cooperation among antitrust authorities, the advantages that can be obtained from this type of strategic behavior are minimized. Nonetheless, provided mandatory deadlines are eliminated, harmonization of time frames would not prevent parties from staggering notification.

short time has emerged.[46] These systems give the parties with the flexibility of filing early in the transaction planning process (that is, during negotiations), at an intermediate stage (after signing the definitive agreement) or nearer to the end of the transaction process (generally no later than 30 days before the expected closing or completion, or 15 days in the case of cash tender offers).[47]

In several other jurisdictions, however, premerger notification is not permitted until the parties have executed a definitive agreement. For example, antitrust filings to the European Commission can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid.

Although most jurisdictions that require notification before closing do not impose a notification deadline provided the parties observe any statutory waiting periods before consummating the transaction, other jurisdictions require notification within a specified number of days after the triggering event. The EC technically requires notification one week after the triggering event has occurred, for example, although extensions may be granted. Similar requirements are imposed in Belgium (1 month), Finland (1 week), Greece (10 days), Hungary (8 days), Poland (14 days), and Slovakia (15 days). To the extent that parties must observe mandatory waiting periods following notification, these arbitrary filing deadlines are superfluous.[48]

Preparation of a notification form in regimes that have both definitive agreement requirements *and* filing deadlines may entail a substantial amount of work, making compliance with these notification deadlines generally difficult. (As discussed below, many of these jurisdictions require the submission of detailed information in the initial filing.) Failure to comply with the applicable premerger notification rules can result in significant fines whether or not the transaction has an anticompetitive effect in the jurisdiction.[49] In practice, the enforcement authorities in some of these jurisdictions have shown flexibility in granting extensions of time. However, the EC recently fined a company that did not observe the filing deadline (Samsung was fined ECU33,000 (approximately $37,000)); it was the first time the EC had imposed such

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46 In some jurisdictions there is no triggering event. Rather, informal contacts are made with the competition authority to discuss the overall contours of the transaction and address any antitrust concerns.

47 *See* Submission by Michael Reynolds, Allen & Overy, "Information Sharing and Procedural Harmonization; EU and US Merger Control Procedures and Cooperation," ICPAC Hearings (Nov. 3, 1998), at 4 [hereinafter Reynolds Submission].

48 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 11.

49 For example, antitrust counsel informs the Advisory Committee of recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for "late" notification.

a fine.[50] Moreover, having to seek waivers from each jurisdiction where a filing is required would be burdensome and increase transaction costs with no corresponding enforcement benefit.[51]

To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation among reviewing authorities, the Advisory Committee recommends that the international community promote harmonization of rules concerning when parties are permitted to file premerger notification. This can be accomplished by targeting reform efforts in those jurisdictions with definitive agreement requirement and postexecution filing deadlines to permit filings to be made at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

ICPAC hearing participants suggested that this type of reform might encounter some resistance, particularly in the EU, because reviewing a transaction that has not become the subject of a binding agreement would require the use of scarce Merger Task Force (MTF) resources. It was suggested that this concern could be addressed with a "good faith intention to consummate" representation similar to the HSR Act affidavit requirement (although, in jurisdictions with hefty filing fees, the fee alone may be sufficient to infer a good faith intention to consummate the transaction.)[52] Moreover, as discussed in Chapter 2, to the extent that requirements calling for a written opinion for each reviewed transaction are eliminated, additional resources may become available.[53]

Initial Review Periods

In most jurisdictions, the initial review period runs for either 30 days or one month following notification. This is the approach employed in the United States, for example, where the DOJ and FTC smoothly process thousands of transactions each year under the premerger notification system created by the HSR Act. Notably, the U.S. agencies resolve approximately 97 percent of all notified transactions in 30 days or less.[54]

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50 *See* Reynolds Submission, at 4. It is important to note, however, that the EC encourages parties to seek informal confidential guidance on procedural and substantive issues prior to notification. *See* Merger: Best Practices Guidelines at <http://europa.eu.int/comm/dg04/merger/en/best-practice-gl.htm>.

51 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10-11.

52 For example, Belgium permits filing on the basis of a draft agreement provided the parties state in the notification their intent to conclude an agreement that does not significantly depart from the draft agreement with respect to all elements relevant to the competition analysis.

53 Reynolds Submission, at 9. Mr. Reynolds also suggests that reducing the extent of the information required for the MTF to review also may free up some resources.

54 *See* FTC and DOJ Annual Report to Congress Fiscal Year 1998.

The initial review period in several other jurisdictions, however, substantially exceeds this time frame. These jurisdictions include France (initial review period of 2 months), Greece (3 months), Hungary (90 days), Poland (43 working days), and Taiwan (2 months). Others do not have fixed review periods (or do not strictly abide by them). These jurisdictions include Kenya (no prescribed review period) and the Czech Republic (indefinite review period).[55]

ICPAC hearing testimony suggests that marginal differences in the initial review periods are manageable from a transaction planning standpoint and are therefore inconsequential.[56] The Advisory Committee recommends that jurisdictions with initial review periods that substantially exceed 30 days or one month or are undefined be encouraged to amend their regulations to provide for a maximum initial review period of one month. Jurisdictions that are unable to terminate investigations before the expiration of the initial (or second-stage) review period(s) also should be given authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).

Second-Stage Review Periods

Transactions that are identified at the initial filing stage as potentially raising serious substantive issues are subjected to more extensive review in all jurisdictions with merger control laws. Most jurisdictions also prohibit parties from going forward with the transaction for an extended period of time while the review is being conducted.[57] In some jurisdictions the extended waiting period is fixed and does not depend on the length of time required to comply with the reviewing authority's request for additional information, as long as that is done in a reasonable period of time. The European Commission has an initial review period of one month and an extended review period of four months, as do Austria and Switzerland. Similarly, Finland and Germany have an initial review period of one month and an extended review period of three months. In others, review periods may be tolled with each information request.

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55 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10. In some jurisdictions authorities may clear or grant approval of a proposed transaction before the initial (or second-phase) review period expires. For example, in the United States, early termination may be granted for transactions that do not raise competitive concerns. Other jurisdictions (particularly in Europe and Japan) do not permit the reviewing agency to shorten waiting periods. Byowitz and Gotts Submission, at 8.

56 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10.

57 A number of jurisdictions, most notably the United States and the EU, impose an extraterritorial bar on closing pending review of a notified transactions. Other jurisdictions may require the parties to hold separate local subsidiaries or assets or not take irreversible measures until clearance has been obtained. As a result, closings have been delayed pending antitrust approvals from all relevant jurisdictions, and local assets or subsidiaries have been carved out or held separate pending approval. Many in the private bar have suggested that bars on closing should not be imposed extraterritorially but should be limited to local assets and subsidiaries. However this would limit the viability of extraterritorial remedies. In many cases divestiture of foreign-located assets or worldwide assets (such as intellectual property rights or rights to brand names) may be necessary to remedy anticompetitive effects in the reviewing jurisdiction.

The Advisory Committee recognizes the costs associated with lengthy delays in the completion of a transaction and the need for a more expedited time frame for review in many parts of the world. The Advisory Committee concludes that merger review periods should not be open ended and that companies derive value from certainty with respect to transaction planning. more deadlines should be employed to provide greater certainty. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy or open-ended review periods should adopt more expedited time frames for review. The Advisory Committee makes a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

Refining Information Requests

To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that information requests be structured in a two-stage process with focused information requests at each stage. The filing at the initial stage should require the minimum information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option. Alternatively, reviewing authorities may encourage merging parties voluntarily to provide sufficient information either to allow them to resolve any potential antitrust issues during the initial stage or to engage in a focused second-stage inquiry that narrowly targets the antitrust issues.[58]

The Advisory Committee recognizes that initial filing requirements in many jurisdictions may be statutorily imposed and that revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) alleging brief facts explaining why the transaction does not raise competitive concerns.[59]

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58 The less information the reviewing authority is initially given, the longer it may take the agency to clear the transaction because the agency will be forced to request further information. It was suggested to the Advisory Committee that the types of information that could usefully be submitted voluntarily by the parties include details on the overlapping markets, information sufficient to identify vertical relationships and general background information on the markets at issue, and market share information. The point was raised that counsel may initially resist providing market share information for a variety of reasons, including concerns about prematurely proposing a market definition or providing information that could spark closer investigation in cases that raise non-*de minimis* antitrust issues. Market share information, however, appears essential to conducting an initial review. Hawk Submission, at 8-10. See also information generally provided voluntarily by merging parties in the United States, discussed below.

59 Jurisdictions also should consider permitting a letter in lieu of notification in cases where the interests of the jurisdiction would be adequately protected by a review conducted by another jurisdiction.

Initial Filing Requirements

The Advisory Committee acknowledges that agencies have a legitimate interest in requiring enough information to enable them to identify competitively sensitive transactions. Some jurisdictions, however, impose substantial and unnecessary burdens through the use of overly detailed initial filing forms. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which they operate. In some jurisdictions, extensive information is required even for markets in which there is no horizontal overlap or vertical relationship between the parties. Providing this information may require the creation or purchase of information, such as third-party market share reports, and may impose substantial burdens on merging parties that are unwarranted in transactions that do not raise competitive issues.[60]

One commentator observed that "[i]n some overly zealous jurisdictions, particularly in Eastern Europe, the initial form will require a top-to-bottom examination of the two companies involved in a merger, including obtaining and reporting information totally irrelevant to the merger's competitive effects in that jurisdiction -- such as information regarding market share and sales revenues for each non-overlapping product and services offered by the acquiring company in that jurisdiction, or in some cases, worldwide."[61]

Some jurisdictions also require translation or certification of documents filed with the initial notification. It is entirely understandable that countries require premerger filings to be submitted in the local language. Some countries go far beyond this, however, and require the translation of all supporting documents, including merger agreements and annual reports.[62] Some require that the entire merger agreement not only be translated, but that the translation be a certified and notarized (or apostille) translation. In addition, several jurisdictions require exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not those entities have any relevance to the competition analysis. Box 3-C identifies several jurisdictions that have overly burdensome initial filing requirements.

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60 *See* Ilene Knable Gotts and Sarah E. Strasser, *Notification Rules Are Complex,* NATIONAL L.J., at C11 (May 4, 1998).

61 Byowitz and Gotts Submission, at 10.

62 *Id.*

Box 3-C: Examples of Burdensome Initial Filing Requirements

Belgium requires essentially the same detailed level of information as is required by the European Commission's Form CO. Depending upon the transaction, parties may have to provide a detailed analysis of the relevant horizontal (if the parties are in the same market), vertical (upstream and downstream), and conglomerate markets (any market in which either party has a market share of 25 percent or more), as well as comprehensive information about the parties, their customers, and their competitors, for each of the Member States involved.

Brazil requires detailed information about the parties' worldwide activities and imposes onerous translation and procedural requirements (for example, not only must the entire merger agreement be translated into Portuguese, but it also must be a certified and notarized/apostilled translation).

Hungary requires, *inter alia*, a detailed breakdown of controlled entities (including creation of a chart showing "control relationships"); identification of other entities on the boards of which directors of the parties sit; sales for direct *and* indirect participants; a description of acquisitions in the last two years that were not reported; market definitions; parties' sales and shares in such markets; expectations of growth in market share; identification of competitors, customers, and suppliers; description of entry conditions; significance of research and development efforts; supply and demand factors; and horizontal and vertical relationships.

Mexico requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to analyze whether the proposed transaction is likely to generate harm to competition.

Slovakia requires detailed asset information for the parties and affiliates involved; market definitions; market share calculations; balance sheets and financial statements for the parties, "including undertakings in which the parties have an ownership interest or stock or in which they are directors, officers or otherwise similarly interconnected"; a description of reasons for and effects of the concentration and its competitive impact; and a list of principal suppliers, customers, and competitors of the parties.

Turkey requires definitions of relevant markets (product and geographic); contact information regarding competitors and customers; estimated market shares of competitors; a description of entry conditions; submission of "account information" (in addition to that contained in annual reports); and production of business plans, market research, and related studies by the parties or by "third persons." Even if the merger thresholds are not met, the parties may be required to submit detailed information concerning "other agreements, decisions or practices" affecting Turkey, such as distribution agreements by foreign parties with local sales agents.

Source: Submission by the American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999).

Submissions from ICPAC hearing participants illustrate how some jurisdictions that have more experience with merger control employ varying methods to identify and focus on transactions that raise competitive issues while minimizing filing burdens on nonproblematic transactions.[63] One way is to use a detailed form at the initial filing stage that is administered in a flexible manner. This type of practice has been employed, for example, in the European Union. The EU's Form CO is quite burdensome on its face asking for extensive information about the markets in which either of the merging firms operates, and for each such market, extensive information concerning competitors, market shares, and entry conditions. This information must in theory be provided even for markets in which there is no competitive overlap between the merging parties.[64]

Before filing the form, however, merging parties are encouraged to contact the MTF to describe and provide basic information with respect to the proposed transaction, the merging parties and any competitive overlaps. During or shortly after that discussion, the MTF identifies for the parties the markets for which information will be required and the level of detail in which the information should be presented. In many transactions, the MTF grants derogations that free the parties from the need to provide much of the information that is technically required by the filing form.[65] In practice, these discussions also have

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63 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 13-20.

64 *Id.*, at 14, 18. Under the German system, there is no specific filing form. The Act Against Restraints on Competition of 1958, as amended, sets out the minimum information to be filed. In practice, the amount of information required varies from very little in most transactions to far more extensive data in deals that appear to raise competitive issues. The onus is on the merging parties to provide sufficient information to allow for a preliminary assessment by the FCO. This is frequently worked out in informal consultations with the FCO. The German authorities have routinely cleared transactions in a very short time after an initial filing (ten days to two weeks, or even less) when the transaction is uninteresting from a competitive standpoint.

65 The European Commission is launching "Merger Review 2000," a review of the EC Merger Regulation that includes an assessment of the possibility of revising filing requirements. Options under consideration include reducing the information requirements for classes of typically unproblematic mergers (which would be an extension of the current short form available for certain qualifying joint ventures) and a proposal for a form of block exemption for unproblematic cases. *See* Götz Drauz and Thalia Lingos, *The Treatment of Trans-border Mergers in the 1990s: A European Perspective,* at 55, 61, *in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW; A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY (1999).

enabled the parties to identify issues early on and potentially resolve them within the initial review period.[66]

ICPAC hearing participants note that the EU system has worked fairly well in avoiding the imposition of undue burdens on transactions that do not raise competitive issues but would not recommend the EU model as a suitable international template. It would obviously be burdensome to deal with a dozen or more jurisdictions that use an analogue to the EU initial filing process because that would require separate discussions with each jurisdiction.

In contrast, the systems employed by the United States and Canada can serve as useful templates for the initial filing stage. The United States, for example, requires only limited information in the initial notification form. The limited nature of the form flows from the recognition that the HSR Act thresholds capture a broad universe of transactions, and that the vast majority raise no competitive concerns.[67] This is not to say that no burden is imposed: a company with multiple product lines, subsidiaries or affiliates must expend a fair amount of effort when it first completes the HSR form. The process of collecting the documents submitted with the form can be time consuming as well. The burden is sufficiently manageable, however, and those companies that frequently make acquisitions may choose to keep the nontransaction-specific portions of their HSR form current so that they are able to complete a filing for a new transaction without too much additional effort.

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[66] In contrast, some practitioners have indicated that the clearance process in the United States hinders the ability of the agencies to provide prenotification guidance. In 1995, the federal antitrust enforcement agencies in the United States implemented a number of measures designed to expedite the premerger review process, including the clearance process. One step permits the agencies to provide joint meetings with parties who request the opportunity to provide additional information or analysis before a clearance decision is made. *See* 1995 Joint DOJ/FTC Premerger Program Improvements (Mar. 23, 1995), *reprinted at* 6 Trade Reg. Rep. (CCH) ¶42,751. In addition, when the agencies learn about a possible merger, frequently one agency will request clearance to begin investigating it rather than wait for the parties to submit their notification. If there is no difference of opinion between the agencies, clearance can be granted and a preliminary investigation will be opened. *See* John J. Parisi, U.S. Federal Trade Commission, Enforcement Cooperation Among Antitrust Authorities, before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (May 19, 1999)(Updated Nov. 1999) [hereinafter Parisi, IBC Address]. However, a number of outreach respondents suggested that the clearance process could benefit from further reform to assure the availability of coordinated joint meetings.

[67] The HSR Form requires fairly basic information, including a description of the transaction, the parties' most recent filings with the Securities and Exchange Commission, lists of certain subsidiaries and affiliates, and SIC Code data (data reported to the census bureau every five years). For example, U.S. sales by 4, 5, and 7-digit Standard Industrial Classification codes and geographic market data for transactions where 4-digit overlaps exist must be provided. Additionally, general information regarding the corporate structure, subsidiaries, minority stock interests, previous acquisitions (if overlap), and any vertical buyer-seller relationship between the parties must be provided. Also filed with the form are copies of all studies, surveys, analyses or reports prepared by or for any officer or director for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product and geographic markets (these latter documents are commonly referred to as 4(c) documents). Item 4(c) documents are frequently the most informative part of an HSR filing.

Several practical techniques also have developed in the United States to focus the legal and factual issues during the initial review stage.[68] Parties voluntarily may choose to supplement the initial notification with a "White Paper" containing a competition analysis of the transaction. The U.S. agencies also may ask the parties to provide additional information voluntarily within the initial 30-day review period. The agencies have been able to use this information to identify and often resolve the antitrust issues within the initial review period.[69] As described more fully below, if, after an initial review, the transaction appears to raise potentially serious competitive concerns, a formal request for additional documents and information may be issued before the end of the initial waiting period.

Canada uses a system that employs two different initial forms, known as the short form and the long form. Both forms require basic information such as a description of the proposed transaction, copies of current drafts of relevant legal documents, descriptions of the principal businesses of the notifying party and its affiliates, certain financial information, certain documents filed with stock exchanges and securities commissions, and any pro forma financials on the combined firm.[70] The short form is designed for transactions that do not raise competitive problems. The long form, used for transactions that may raise competition issues, requires significantly more information concerning affiliates of the notifying party and the products produced, supplied, or distributed by the parties and their affiliates, as well as the filing of all financial or statistical data prepared to assist the board of directors or senior management of the parties in analyzing the proposed transaction. Canada places the onus on the merging parties to select in the first instance which form to file. As a result, parties tend to choose the form most appropriate for their transaction.

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[68] *See* Ky P. Ewing, Jr., Some Thoughts and Lessons From Our Twenty Years of Experience with the United States' Merger Notification Regime, Before the International Bar Ass'n Antitrust Seminar on The Future of Merger Control in Europe, at 7-8 (Sept. 26, 1997).

[69] This information generally includes a list of products sold by each party, limited by geographic areas and to competitive overlaps; product brochures and promotional materials; recent sales or marketing reports; a general description of overlap or vertical markets, including internal or third-party market studies; a list of each company's ten largest customers for each designated product, along with a contact person, address, phone number and the dollar value of purchases during the last year; a list of each company's ten largest competitors for each designated product, along with a contact person, address, phone number and estimates of each party's and each competitor's share of the market; weekly price and quantity information such as information purchased from Nielsen, IRI or other market research companies; and copies of antitrust notifications made to other jurisdictions. Staff also may interview customers and competitors and obtain the opinion of economists involved in the investigation.

[70] Under recently enacted amendments to the Canadian Competition Act, the Act's premerger notification provisions have been revised in a number of ways. The information required by the short form increased slightly, while the information called for by the long form increased substantially. The changes became effective on the issuance of implementing regulations effective on December 27, 1999, by the Canadian Competition Bureau. The short form had a seven-day waiting period extended to 14 days. The long form had a 21-day waiting period extended to 42 days. If the short form is chosen, and the Canadian Competition Bureau determines that it needs more information, then it may require the merging parties to submit the long form, which triggers the running of the longer waiting period, without any credit for the shorter waiting period. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 16-18.

Canada also permits merging parties to apply for an Advance Ruling Certificate (ARC), which is issued at the discretion of the director of the Bureau of Competition Policy. If one is granted, then no premerger notification is required. If one is denied, the parties must file an initial notification form if their transaction is notifiable. Generally, an ARC can be obtained with the submission of less information than is required under either the long or short form. Usually the parties provide a description of their businesses and show that they do not overlap or, if they do, that the market shares are too low to warrant concern under the standards applied in Canada. The Competition Bureau can act on ARC requests in as little as two weeks.

Some efforts have been made at the international level to reduce notification burdens. For example, France, Germany, and the United Kingdom introduced a common merger notification form in September 1997. This form is accepted by all three antitrust authorities for mergers that are notifiable in more than one of these countries. It is a voluntary regime that results from cooperation between the authorities to simplify the procedure for multiple notifications.[71] On another front, the Competition Law and Policy Committee of the OECD undertook a review of OECD members' merger notification practices and released a framework for a merger notification form.[72] The framework seeks to synthesize the common elements of the merger notification forms currently employed by OECD members.

Harmonizing the procedural requirements of different jurisdictions is itself not an easy task; some observers also question whether these efforts will significantly reduce transaction costs. In some cases it might well increase them by imposing more burdensome notification requirements than some jurisdictions currently require. These observers also note that while a standardized form would eliminate or reduce the costs associated with duplicating certain information, the main transaction costs associated with merger control do not result from having to submit similar information to several different agencies. Indeed, the actual incidence of truly duplicative information is somewhat limited, because much of the information is necessarily specific to individual jurisdictions and markets.[73] For these reasons, the recommendations made

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[71] Although laudable, the Common Form may be of relatively limited practical value because the consequences of using it vary from country to country. In the UK, the Common Form does not trigger the statutory timetable provided for in section 75A of the Fair Trading Act 1973 (FTA): a Merger Notice would have to be filed if the parties wished to take advantage of the statutory timetable. Nevertheless, the UK Office of Fair Trading states that it hopes to indicate within one month of receipt of a complete Common Form whether the transaction qualifies for investigation by the Mergers and Monopoly Commission. In France, use of the Common Form will result in the French authorities' endeavoring to indicate within one month of the receipt of a complete Common Form whether a formal notification is advisable. In Germany, the notifying parties using the Common Form will be told within one month if further examination is required. *See* Submission by Mark W. Friend and Antonio F. Bavasso, Allen & Overy, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Federal-Mogul/T&N transaction, at 3 (April 14, 1999)*; see also* Comments of the Section of Antitrust Law of the American Bar Association on the Common Form for Mergers in the United Kingdom, in France and in Germany at <http://www.abanet.org/antitrust/common.html>.

[72] OECD Competition Law and Policy Committee, *Report on Notification of Transnational Mergers,* DAFFE/CLP (99)2/Final (Feb. 1999).

[73] Hawk Submission, at 5-7; ABA Antitrust Section Multijurisdictional Merger Review Submission, at 18-20.

by the Advisory Committee focus more heavily on limiting the information required in connection with transactions that lack antitrust significance.

Still, there is much that can be gained from multilateral efforts of the type undertaken by the OECD. The United States should continue to support further OECD efforts to develop a framework for notification, including the development of common definitions. The Advisory Committee recommends that the OECD continue to focus its efforts on identifying the minimum information required to make a preliminary determination of whether a transaction raises sufficient competition issues to warrant further review and to specify the categories of data that may be useful to narrow the factual issues to resolve any potential antitrust issues or engage in a focused second-phase inquiry.[74] Areas in which countries usefully could collaborate also could be identified and explored. For example, common approaches to issues such as defining relevant markets, barriers to entry, market power, and efficiencies may be usefully developed.[75]

As part of an OECD effort, the Advisory Committee recommends that consideration also be given to ways to reduce other unnecessary burdens. Included on the agenda should be efforts to reduce translation costs and certification and other procedural requirements. The Advisory Committee finds merit in the suggestion that parties should be able to provide brief summaries of certain foreign language documents or partial translations (limited to translation of closing conditions and other important relevant provisions in the merger agreement) on the condition that full translations, if requested, would be provided within a time certain. The U.S. system, which reduces the translation burden in the initial notification form for foreign language documents, provides a useful model. Merging parties are not required to translate many of the documents requested (such as annual reports, audit statements, balance sheets and studies, surveys, analyses, and reports), but must instead submit English language outlines, summaries or translations that already exist.

Second-Stage Investigations

For proposed transactions that are identified in the initial review stage as potentially raising serious substantive issues, most jurisdictions require the submission of more detailed information. the amount of information and documents that the parties are required to submit in these more thorough investigations

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74 Multiple and differing data requests can complicate reviewing authorities' attempts to conduct coordinated merger reviews. Even where the analytical approach is similar, if the input data are different, the outcomes will not necessarily coincide. Outreach respondents emphasize that even in parallel proceedings, reviewing authorities may fail to cooperate in requesting and analyzing a single set of data. *See* Comments of American Airlines, Inc. by Greg A. Sivinski, Senior Attorney, American Airlines (March 15, 1999), submitted for inclusion in the Advisory Committee record.

75 *See* Coleman Submission re the Halliburton/Dresser transaction, at 3 ("While it was clear that the [United States and the EC] did talk and share certain data, it was also clear that, ostensibly because of different standards to be applied under the different substantive laws, the two investigating staffs sought data at different levels of abstraction in their efforts to define antitrust markets and appeared to place no particular credence on the definitional work of the other jurisdiction's staff.").

varies from jurisdiction to jurisdiction. With the exception of the United States, this second-stage review process typically is not document intensive. Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide.

The differences in the information requirements of various systems generally are attributable to different legal cultures. In the United States, for example, the agencies do not have the power to block a problematic transaction themselves, but instead must ask a federal court to enjoin the transaction.[76] As a result, the agencies may feel that they need far more extensive information and documents than do their counterparts in jurisdictions like the EU, where the agency itself can block a merger, subject to *ex post* judicial review. As a practical matter, however, few companies can keep their deals together for the many months or years that it takes to seek judicial review in the EU.[77]

Further, when drafting a second request, DOJ and FTC staff are sometimes at a disadvantage because they lack access to information about the industry, the proposed transaction, and other key facts. From the U.S. government officials' perspective, moreover, anything outside the scope of the second request, from a practical standpoint will not be available to the reviewing agencies. Second requests, therefore, are broadly drafted to ensure access to a wide array of potentially relevant information. Notably, data provided by the agencies indicate that most parties comply only partially with second requests and that the transactions are resolved with relatively modest document productions and limited translation requirements.[78] These data largely are explained by the institution of a "quick look" policy in 1995, which

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[76] Some practitioners question the legitimacy of this concern:

> The HSR process was designed to give the Agencies sufficient information to determine whether or not to challenge a merger. Preliminary injunction merger cases frequently involve extensive, expedited discovery in which the Agency (as well as the merging parties) can seek to enhance its litigation position. But the United States' Agencies frequently appear to seek far more information and documents than they reasonably require to litigate. There are systems where the Agency has to go to court to stop a transaction, as in the United States, but where the process does not involve the massive document productions that are common in the U.S. process. Canada is an example. The need to be prepared for litigation does not justify the sweeping breadth of Second Requests in the United States.

ABA Antitrust Section Multijurisdictional Merger Review Submission, at 21-23. It is interesting to note that in fiscal year 1998, the DOJ filed only 15 complaints; 10 were settled, four of the transactions were abandoned, and another was abandoned pursuant to a consent decree. Similarly, FTC staff were authorized to seek injunctions in only three transactions; two were abandoned following court decisions, and one resulted in an administrative complaint. FTC and DOJ Annual Report to Congress Fiscal Year 1998. Efforts to address the second-request process are discussed later in this chapter.

[77] ABA Antitrust Section Multijurisdictional Merger Review Submission, 21-22.

[78] Letter from Constance K. Robinson, Director of Operations & Merger Enforcement, U.S. Dep't of Justice, Antitrust Division, to James F. Rill and Dr. Paula Stern (July 14, 1999) [hereinafter Robinson Letter]; Letter from William J. Baer,

encourages document production in stages. Using this approach, the agencies focus initially on issues that may be determinative in concluding that the transaction likely does not raise competitive concerns. If the agencies can reach that conclusion based on a quick look, full document production is not required. Nonetheless, as described below, there are notable instances where merging parties have been required to submit hundreds, if not thousands, of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception that second requests are unduly burdensome and "require the production of an enormous volume of materials, many of which are unnecessary for even the most comprehensive merger review."[79]

While recognizing the many strengths of the U.S. system, the Advisory Committee recommends a number of practices designed to instill more discipline in the U.S. system and to address some of the problems perceived by the business community and private bar. Some of these recommendations are practices designed to narrow the legal and factual issues and resolve antitrust issues expeditiously. Set out below are those that may serve as useful recommendations in other jurisdictions.

Of paramount importance is that there be an open exchange of information between competition authorities and the parties to a proposed transaction. This may require modifications in conduct both by the parties and reviewing authorities. The merging parties should recognize that the process works best when both sides engage in a cooperative dialogue early in the process.

To facilitate this process, the reviewing authority should tell the merging parties (either orally or in writing) at the beginning of a second-stage inquiry why it did not clear the transaction within the initial review period.[80] If the reviewing authority chooses to issue a written statement, the document need not be made public nor researched and written with the rigor of a judicial opinion. Rather, it should be a short and plain statement of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority's discretion to pursue any new theories of competitive harm if new information comes to light.

This type of reasoned explanation would provide several benefits. First, it would facilitate transparency of agency action, which is still a problem in many parts of the world. While cognizant of the need to refrain from overburdening agencies, the Advisory Committee also believes that it is important to ensure that the reviewing authority possesses a substantively sound and clearly articulated basis for moving forward. Second, an explanation of this type would reduce transaction costs by allowing the parties to

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Director, Bureau of Competition, U.S. Federal Trade Commission, to James F. Rill, Esq. and Dr. Paula Stern (June 15, 1999) [hereinafter Baer June 15, 1999 Letter].

79 Letter to Casey R. Triggs, Esq., Deputy Assistant Director, U.S. Federal Trade Commission from The Association of the Bar of the City of New York Committee on Antitrust & Trade Regulation, at 2 (June 29, 1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter New York City Bar Ass'n Committee Submission].

80 This is the practice in the EU.

focus their efforts on the issues identified as problematic, thereby permitting a resolution to be reached as quickly as possible. Third, delays would be reduced by preventing, or at least discouraging reviewing authorities from opening a second-stage inquiry simply to gain more time to review a proposed transaction.[81]

Agencies around the world also could assess their own performance with respect to those transactions they challenge. One way to do this is an after-the-fact audit of select merger challenges. Audits of this type have been used in transition economies as a condition for receiving assistance from groups such as the OECD. During these audits, the host country's competition authorities permit a group of outside observers to examine in great detail their decisions to prosecute, or to refrain from prosecuting, specific matters. These observers also examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases.[82] Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

ADVISORY COMMITTEE RECOMMENDATIONS FOR TARGETED REFORM IN THE UNITED STATES

In the preceding sections the Advisory Committee recommends a number of initiatives designed to rationalize the application of merger review procedures. The Advisory Committee believes that the United States should play a leading role in the effort to implement the reforms proposed herein in the international arena. One of the most effective ways in which the United States can stimulate global reform is through leading by example. It is therefore important that the United States examine its own merger review system in an attempt to identify and correct those aspects of the system that give rise to uncertainty and unnecessary transaction costs.[83] As one ICPAC hearing participant stated:

> In light of the proliferation and disparity of filing requirements around the globe, the increasingly complicated regulatory framework, and the associated escalation of transaction costs to meet the demands of the myriad jurisdictions, the United States can serve an important role by establishing a benchmark for the rest of the world. Before the United States can legitimately lay claim to a position of global leadership in the field of merger review,

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[81] *See* Hawk Submission, at 10-12.

[82] Remarks by William Kovacic, Professor of Law, George Washington University Law School, at ICPAC Committee Meeting (July 14, 1999), Meeting Minutes, at 74-78.

[83] The Advisory Committee focused on best practices that should guide merger review globally and in the United States. The Advisory Committee did not seek to address each aspect of the U.S. merger review system. Indeed, if the Advisory Committee were designing a merger review system, it would not adopt all features of the U.S. system. For example, some members of the Advisory Committee would not recommend the design of a system with dual enforcement of antitrust laws, such as the dual enforcement of the federal antitrust laws by the DOJ and the FTC. Rather, the focus of the Advisory Committee lay in identifying those features of the U.S. system that are either exemplary or problematic and that directly affect international transactions.

however, the U.S. first needs to conduct a balanced, candid assessment of its domestic requirements.[84]

Recommendations on Threshold Requirements

The regime currently in place in the United States requires no change with respect to two of the Advisory Committee's recommendations on premerger notification thresholds. The notification thresholds are objectively based, and the U.S. antitrust agencies ensure the transparency of these thresholds and their application by offering guidance to practitioners and businesses through published rules, regulations, guides, speeches, and press releases, and through the advisory services of the FTC Premerger Office.[85]

The area in which the U.S. notification thresholds fall short is in screening out transactions that are unlikely to generate appreciable anticompetitive effects within the United States. As discussed more fully below, this goal may be accomplished by raising the notification thresholds.

Nexus to the Jurisdiction

The United States has a well-established history of asserting jurisdiction over international mergers.[86] By providing exemptions from reporting requirements for certain transactions involving foreign persons, however, the HSR Act ensures that only parties to transactions with a nexus to the jurisdiction must notify the U.S. antitrust authorities.[87] Notification obligations for foreign transactions (where the acquiring and acquired persons are both foreign) are triggered only if the acquired party possesses more than a *de*

[84] U.S. Chamber of Commerce Submission, at 2.

[85] The Advisory Committee commends the transparency of the U.S. system and encourages the agencies to continue updating these valuable resources on a regular basis or as new developments occur.

[86] In 1995, the DOJ and the FTC released Antitrust Enforcement Guidelines for International Operations, U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §3.14 (1995) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107 (1995). These Guidelines set forth the antitrust agencies' policy on international antitrust issues and outline the agencies' position on jurisdiction over different types of international conduct. The guidelines provide several examples regarding both mergers and joint ventures and reaffirm the agencies' intention to assert subject matter jurisdiction over any transaction that would affect either U.S. import trade or U.S. export commerce. The guidelines state that "Section 7 of the Clayton Act applies to mergers and acquisitions between firms that are engaged in commerce or in any activity affecting commerce. The Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Act Section 7 cases as they would apply in Sherman Act cases." The guidelines also make note of the 1986 OECD Recommendation, which requests that OECD countries notify each other during the merger review process when their actions might affect the interests of other countries (subsequently replaced by the 1995 Revised Recommendation).

[87] *See* 16 C.F.R. §802.50-52. It is important to note that even if a proposed transaction involving foreign parties or foreign assets is exempt from premerger notification obligations in the United States, the U.S. agencies have the authority to challenge that transaction if it is likely to substantially lessen competition in the United States.

minimis U.S. presence.[88] Further, where both parties are foreign, the rules also provide an exemption if their aggregate annual sales in or into the United States are less than $110 million and their aggregate total assets in the United States are less than $110 million. In addition, all acquisitions of foreign assets by a foreign person are exempt from HSR notification requirements regardless of the amount of sales into the United States attributable to those assets.[89]

The HSR Act also exempts from notification obligations certain acquisitions by U.S. persons of foreign assets and shares. An acquisition of foreign assets is exempt from notification requirements if the acquiring person will not hold assets of the acquired person that accounted for $25 million or more in sales in or into the United States during the preceding year. An acquisition of shares of a foreign issuer is exempt from notification requirements unless the foreign issuer holds $15 million or more of U.S. assets or generated sales in or into the United States of $25 million or more during the preceding year.[90]

Despite the exemptions for certain classes of foreign transactions, in fiscal year 1999, the HSR Act captured 849 transactions involving a foreign acquiring person or foreign acquired entity, an increase from 736 the previous year. Of the 849 transactions, preliminary investigations were opened in 111, and second requests were then issued in 21. Enforcement actions were undertaken in only 5 of the 849 transactions.[91] These statistics suggest not only that very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transactions than may be necessary come within the U.S. merger review net. As a result several respondents to ICPAC outreach efforts have called for reform of the foreign person exemptions.[92]

Because of difficulties in obtaining data regarding the nature and extent of filings for transactions with an international aspect, the Advisory Committee believes that it is not in a position to make specific recommendations on exemption amounts for foreign transactions. Given that these levels have not been

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88 The acquisition by a foreign person of shares in a foreign issuer is exempt if the acquisition does not confer control of either an issuer that holds $15 million of U.S. assets or a U.S. issuer with annual sales or total assets of $25 million or more, whether domestic or foreign. By virtue of the definition of control under the HSR Act, all acquisitions by foreign persons of voting securities in foreign issuers are exempt if those shares do not exceed 50 percent of the outstanding voting securities of the foreign issuer. *Id*.

89 *Id*.

90 *Id*.

91 U.S. DOJ Premerger Office; *see also* Annex 2-B. For fiscal year 1999, statistics for transactions involving foreign persons -- second requests in 21 of 849 foreign transactions (2.5 percent) and challenges to 5 of 849 foreign transactions (0.6 percent) -- are almost identical to rates for all HSR transactions (2.4 percent and 1.6 percent).

92 *See, e.g.,* Submission by Michael Sennett, Bell, Boyd & Lloyd, in response to the Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Baxter International Inc./Immuno International AG transaction, at 4 (April 9, 1999) [hereinafter Sennett Submission re the Baxter International Inc./Immuno International AG transaction].

adjusted for many years, however, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons and that the U.S. antitrust agencies give serious consideration to the threshold exemptions to ensure that transactions that are not likely to violate the antitrust laws are exempt from premerger reporting classes of transactions.[93]

Appreciable Anticompetitive Effects

More generally, the Advisory Committee recommends that the current notification thresholds be carefully reviewed to ensure that they are only as broad as necessary to identify transactions that may cause an appreciable anticompetitive effect. *While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed by the premerger notification regime are too low and capture too many lawful transactions.* The Advisory Committee believes that the United States will not be well positioned to advocate that other jurisdictions review and revise their own premerger notification thresholds until it has addressed these same issues in its own system.

Enacted in 1914, the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition or tend to create a monopoly." The Clayton Act incorporates what has been characterized as an "incipiency standard," thereby empowering the U.S. antitrust agencies to prevent potentially anticompetitive mergers before they result in harm to competition. The premerger notification regime contained in the HSR Act is intended to give the U.S. antitrust enforcement agencies "an effective mechanism to enjoin illegal mergers *before* they occur."[94] With limited exceptions, the HSR Act requires premerger notification for each acquisition of assets or voting securities that exceeds $15 million (or that results in control of an acquired party with at least $25 million in sales or assets) in which one party to the transaction has at least $100 million in sales or assets and the other has at least $10 million in sales or assets.[95]

The DOJ and FTC Horizontal Merger Guidelines explain that while challenging potentially anticompetitive mergers, the U.S. antitrust agencies seek to avoid unnecessary interference with the larger universe of mergers that is either competitively beneficial or neutral.[96] As discussed above, however, only a small percentage of transactions captured by the notification thresholds currently in place leads to enforcement action. Indeed, no enforcement action is taken against more than 98 percent of all notified transactions. In addition, the annual level of filings made with the U.S. antitrust agencies has increased

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93 *See* 15 U.S.C. §18a(d)(2)(B).

94 S. Rep. No. 94-803, at 72 (1976).

95 15 U.S.C. § 18a.

96 U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines at 0.1 (Apr. 1992), as amended (Apr. 8, 1997), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104.

significantly since the HSR Act was enacted. The Advisory Committee believes that this increased level of filings is attributable not only to increased merger activity, but also to the failure to adjust the notification thresholds. They have not been changed since the HSR Act was enacted in 1976.

The most straightforward way to decrease the number of required filings while not materially compromising the agencies' enforcement mission is to increase the size-of-transaction threshold for acquisitions of voting securities and assets. Business groups and others have recommended to the Advisory Committee that the notification thresholds be adjusted to account for inflation and indexed to account for future inflation.[97] Adjusting for inflation using the Consumer Price Index, for example, the $15 million size-of-transaction threshold in 1976, if measured in 1998 dollars, would now be set at approximately $43 million. Increasing the threshold commensurate with the gross domestic product deflator, an indicator of inflation in the entire country, translates into an HSR threshold of $37.8 million when measured in 1998 dollars.[98]

The Advisory Committee acknowledges the benefits of this recommendation but notes that an indexing mechanism may produce arbitrary results. At the same time, the Advisory Committee recognizes that absent an automatic (that is, mandatory) indexing mechanism, there may be no incentive to raise the thresholds. If an indexing method is not used, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.

Enforcement statistics for 1998 suggest that adjusting the notification thresholds to keep up with inflation measured in 1998 dollars should not materially compromise the enforcement mission of the U.S. antitrust agencies. Depending on the base year and deflator used, that calculation would mean increasing the size-of-transaction threshold in the $33 million to $43 million range.[99] Although data are not publicly

[97] U.S. Chamber of Commerce Submission, at 3; NAM Submission, at 4-5 ("The NAM recommends that HSR thresholds be increased automatically on an annual basis commensurate with the gross domestic product deflator."); *see also* USCIB Submission, at 4. It is noteworthy that the fines for violating HSR are indexed to account for inflation, but the dollar values for determining whether a filing is required are not. Specifically, the maximum civil penalty of $11,000 for each day during which a person fails to comply with the HSR Act is adjusted periodically for inflation. The Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, §31001, 110 Stat. 1321, which amended the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, requires that civil penalties be adjusted for inflation at least once every four years.

[98] Using 1978 (the year in which the HSR thresholds came into effect) results in a similar jump. Adjusting for inflation using the Consumer Price Index, the $15 million size-of-transaction threshold would now be about $37.5 million if measured in 1998 dollars. Increasing the threshold commensurate with the gross domestic product deflator translates into an HSR threshold of $33 million when measured in 1998 dollars. Data sources: U.S. Dep't of Commerce Bureau of Economic Analysis and U.S. Dep't of Labor Bureau of Labor Statistics.

[99] The GDP deflator offers the most representative inflation series because it covers all economic activity. The CPI deflator pertains to a basket of consumer products and thus is less directly applicable to this analysis. Additionally, the CPI may overstate the annual rate of inflation.

available for that range, HSR statistics show that raising the threshold to $25 million or $50 million would have eliminated approximately 25 to 50 percent of transactions notified in fiscal year 1998.[100]

In 1998 transactions valued below $25 million raised few competitive concerns. In that year, the agencies received filings on 1,235 transactions valued at $25 million or less. The agencies issued second requests in only 11 (less than 1 percent) of these transactions. Indeed, in 95 percent of the 1,235 transactions, neither agency sought clearance to even contact the parties.[101] The filing fees alone in the 1,224 transactions in which no second request was issued, however, cost the acquiring parties $55.1 million.[102]

Likewise, only 27, or just over 1 percent, of the 2,398 transactions valued at $50 million or less received second requests. Although second-request investigations represented only a small percentage of notified transactions valued below $50 million, almost 9 percent of all investigated transactions involve transactions valued at less than $25 million and approximately 20 percent of all investigations involve transactions valued at less than $50 million, indicating that some small transactions raise sufficient antitrust concerns to warrant a more complete investigation.[103]

If a transaction is not captured by the thresholds, however, the agencies have the authority to investigate and take enforcement action, if needed.[104] For example, in each of the last two years the DOJ

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[100] FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

[101] *Id.* Of the 1,235 notified transactions valued at $25 million or less, 196 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 2 of the 196 transactions; no enforcement action was taken. Of the 2,398 notified transactions valued at $50 million or less, 344 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 5 of the 344 transactions; no enforcement action was taken. *See* Annex 2-B.

[102] NAM Submission, at 5-6 (additional costs included attorneys' fees, opportunity costs, and savings lost due to the delay in implementing any efficiencies resulting from the transactions).

[103] FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

[104] The agencies may issue "civil investigative demands" to obtain documents and information necessary to conduct a review of transactions not reportable under the HSR Act, although no bar on closing pending review is imposed. At least one antitrust official in the United States, however, has noted the relative ease with which competition authorities may now monitor pending transactions:

> Rarely do the authorities first learn of a merger through the submission of premerger notification. The merger wave of the nineties has been matched by the proliferation of media outlets -- both print and electronic -- that report hints of merger talks. Yet, old reliables, like the Financial Times and the Wall Street Journal, remain good sources of news about potential mergers. The agencies pay attention to these reports and may seek to substantiate them by calls to the companies or to their counselors. The agencies' staffs will also talk to one another on the basis of press reports to make sure that potential reviewing agencies are aware of such reports and can begin to determine whether they will have

opened more than 50 investigations of transactions that were not reportable under the HSR Act.[105] Although the agencies contend they have very little ability to detect nonreportable transactions, the Advisory Committee balances that concern with the recognition that only a small fraction of transactions that fall below notification thresholds will pose the threat of competitive harm. Thus, the Advisory Committee concludes that increasing the filing threshold in the $33 million to $43 million range should not materially affect the quality of Clayton Act enforcement efforts. Three Advisory Committee members advocate raising the size of the transaction threshold higher, to $50 million.

Any efforts to revise notification thresholds must account for the fact that filing fees currently constitute a significant source of revenue for the U.S. antitrust agencies. To ensure that the DOJ and FTC will be able to pursue their enforcement missions vigorously, it is imperative to provide alternative sources of funding to offset the loss of any funds that may result from revision of HSR thresholds. This goal may be accomplished by delinking the fees from the budget and by direct funding from general revenue. If funds are not directly appropriated, alternative funds may be realized in a variety of ways, including raising the filing fee, adjusting the fee based on the size of the transaction, or assessing the fee based on the complexity of the transaction and the amount of work performed by the reviewing agency, although these alternatives would not accomplish delinking the fees from the budget.

The existing linkage between filing fees and funding for the DOJ and FTC creates a conflict of interest for the agencies and also exposes them to substantial funding cuts if filings were to decrease, as occurred between 1989 and 1991 when filings dropped more than 40 percent.[106] The Advisory Committee is of the view that filing fees should be delinked from funding for the agencies, but that any efforts to do so must occur in an environment where sufficient funds are assured from other sources. This step would be beneficial both for the United States and for those countries around the world that have followed the U.S. lead in implementing filing fees and have linked them to agency budgets.

Recommendations on Deadlines and Time Frames for Review

The Advisory Committee commends the flexibility of the U.S. premerger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. In addition, the Advisory Committee commends the U.S. agencies for concluding their initial review

jurisdiction to review the transaction.

Parisi, IBC Address.

105 U.S. DOJ Premerger Office. Comparable FTC statistics are not available.

106 *See* NAM Submission, at 5; U.S. Chamber of Commerce Submission, at 4-5.

in a maximum of 30 days following notification. Thus, no reform of the U.S. triggering event or initial review period is needed.

More certainty with respect to time frames for the second-stage review process is needed, however. In the United States, the second-stage review process is triggered when a second request is issued prior to the expiration of the initial review period. The merging parties may not consummate the proposed transaction until 20 days (or, in the case of a cash tender offer, 10 days) after they have substantially complied with their respective second requests, which could take several months.[107] The length of the review process thus varies from case to case.

Because the U.S. agencies issue relatively few second requests -- 113 (less than 3 percent of all notified transactions) in fiscal year 1999 -- this discussion pertains to only a minority of all notified transactions. In addition, data submitted to the Advisory Committee by the U.S. agencies indicate that, on average, second-request investigations are resolved in about four months (Box 3-D). For transactions in which second requests were issued but in which the DOJ did not file cases, moreover, the average time to resolution after the issuance of the second request was only two to three months.[108] It is important to note, however, that some second-stage reviews may take up to a year or longer.[109]

Although year-long second-stage review periods constitute a distinct minority of all reviewed transactions, second-stage merger review in the United States is a controversial topic and therefore deserves the attention of both the Advisory Committee and the U.S. antitrust agencies. Among the concerns raised about the second-stage review periods, some parties have suggested the process is open ended and raise concerns about a lack of certainty about when a transaction may be closed. Of course, after a party is in substantial compliance, in all mergers involving unregulated industries (the bulk of all transactions investigated), the agencies are required by statute to complete that investigation in 20 days. That period can only be extended if the parties choose to do so.[110]

Box 3-D: Average Days to Resolution after Issuance of Second Request[1]

Fiscal Year	Department of Justice	Federal Trade Commission

[107] The filing parties may agree voluntarily not to close the transaction for some period of time after the expiration of the waiting period in order to give the parties more time to discuss the competitive significance of the transaction with the agencies or to negotiate a settlement.

[108] Robinson Letter.

[109] In some instances this length results from the parties choosing to delay compliance; in non-HSR transactions it may occur where the additional time does not delay the closing of the transaction.

[110] *See e.g.,* Members of ABA Int'l Antitrust L. Comm. Submission, at 2 (noting that under the U.S. system, "the potential for delay of consummation of a merger is great, and the length of delay is uncertain").

1995	135.88	92.3
1996	125.42	113.3
1997	153.84	152.2[2]
1998	112.07	122.3
1999 (to June)	57.68	86.0

Source: Robinson Letter; Baer June 15, 1999 Letter.

[1] From the date the second request is issued until closing of investigation or issuance of the proposed consent.
[2] Includes two transactions in which the parties chose not to comply for over two years.

The Advisory Committee is in accord on the need for certainty in merger review periods. Specifically, Advisory Committee members conclude that merger review be conducted within a reasonable time frame and that the review process should not be open ended. Advisory Committee members were not of a shared view on the appropriate mechanisms for addressing these concerns, however.

One avenue for addressing these concerns lies in the use of fixed maximum review periods. In fact, the data provided by the agencies indicate that the majority of transactions are cleared within reasonable time frames, which suggests that the agencies could (or should be able) to conduct their reviews within fixed maximum review periods (for example, five months following notification, along the lines of the EC). There was a divergence of views among Advisory Committee members, however, regarding whether imposing a fixed maximum review period is advisable.

Proponents of fixed maximum review periods contend that such limits are necessary to provide the certainty and discipline in the merger review process. These members believe that strict deadlines are particularly necessary in a two-stage review process to prevent the second stage from becoming a drawn out affair (discussed in detail below). Many practitioners, including some members of the Advisory Committee, believe that the strict time frames used by the European Commission show that fixed time limits for merger reviews are both feasible and beneficial.[111]

The majority of members believe that strict fixed time frames would be fraught with risk and extremely difficult to achieve under the U.S. system.[112] For example, unlike the EU system, in which the

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111 Rowley and Campbell Submission, at 20.

112 Advisory Committee Member David B. Yoffie acknowledged the difficulty of fixed time frames in the U.S. systems, but nonetheless advocates that fixed time periods are necessary to prevent the long delays and potential destruction of value that characterize the existing antitrust review process. On this point Professor Yoffie offers the following perspective:

European Commission decides whether a merger should be permitted, the U.S. agencies do not have the power to block a transaction themselves but must ask a federal court to seek a preliminary injunction. It was observed that, in a system with fixed maximum review periods, merging parties could thwart the U.S. agencies' efforts to review a transaction and to prepare for litigation by refusing to comply with a second request. Although the agencies could impose fines for failure to comply, some Advisory Committee members raised concerns that the agencies' enforcement mission nonetheless could be seriously compromised. Thus, it was recognized that if fixed maximum review periods were imposed, a fixed time frame for responding to the agencies' request for additional information also would be needed. This, however, would eliminate much of the flexibility that parties now enjoy in structuring and implementing their transactions.[113] It also would reduce the time available to negotiate reductions in the scope of second requests and hamper the ability of the agencies to conduct "quick look" investigations. Thus, fixed time frames could increase the burden on parties of complying with second requests.

Even disregarding the specific characteristics of the U.S. system, Advisory Committee members expressed concerns generally about fixed maximum review periods. Fixed time limits could result in enforcement errors. An agency may be forced to act because it ran out of time. This may result in too much enforcement, insufficient enforcement, inappropriate enforcement, or ineffective enforcement, and may impose unnecessary burdens on the parties to a transaction, harm consumers, or both.[114] There also was concern that maximum time periods would effectively turn into minimum or standard review periods.

Based on these concerns, the majority of Advisory Committee members eschew strict time frames but recommend instead that alternative steps be taken to provide the greater certainty required for effective

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> There is a pattern emerging in large, complicated transactions where antitrust authorities ask for too many documents, and companies procrastinate on delivery or deliver all of the documents (which the antitrust authorities then do not have adequate staff to review). Without a change in process, specifically without a mandate for agencies and merging parties to work on fixed time schedules, it will be difficult to break the current pattern. Particularly in high technology industries, which represent a growing fraction of anti-trust reviews, the current system of open-ended time frames and significant delays are especially problematic. While value can also be destroyed by delays in traditional industries, the long-run implications are potentially even more severe in high technology. Entire product cycle generations in some industries are six-to-nine months. As merger reviews stretch to the length of an entire product generation, and decisions within the merging companies are put on hold pending the merger review, the potential gains from a merger can turn into significant losses, both for consumers and producers.

[113] The FTC informs the Advisory Committee that FTC staff's experience is that parties postpone complying with a second request when it is in their interest to do so, whether to permit resolution of specific antitrust issues or to concentrate on business matters entirely unrelated to antitrust review. The FTC cautions that putting a time limit on investigation would severely restrict the flexibility of the agencies to resolve issues without substantial compliance or to negotiate appropriate relief.

[114] Remarks by Debra Valentine, General Counsel, U.S. Federal Trade Commission, at ICPAC Committee Meeting (Sept. 11, 1998), at 126 and discussions that followed.

transaction planning. One approach to provide the greater certainty required for effective transaction planning is for the agencies to adopt nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. The agencies should strive to meet these administrative deadlines and should publish the results on a regular basis. The Advisory Committee also notes that review periods might well be shortened if its recommendations for limiting the scope of second requests are adopted (see discussion on information requests below).

The Canadian system has adopted a similar approach. The Canadian Competition Bureau uses "service standards" guidelines. These guidelines identify the maximum turnaround times parties can expect for merger review in Canada. Under the guidelines, the Canadian authority will endeavor to clear a notified transaction in 14 days for noncomplex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The five-month review period coincides with the aggregated five-month review period used by the EC for mergers that are subjected to second-phase investigations. The service standards are not binding, and other than the three-year limitation period for challenging a transaction under the Competition Act, there is no legal limit on the length of a Bureau investigation.[115] The Canadian Competition Bureau reports that during the first year in which these service standards were established it met or surpassed the standards in the majority of cases.[116]

Of course, the ability of the agencies to meet such notional timetables will be affected by the conduct of the parties and the time they take to respond to information requests. It is evident that the process may produce opportunities for strategic behavior or gaming on the part of the parties to the transaction that can cause delay. At the same time, the agencies must do what they can to instill discipline and efficiency in the review procedures. As described below, reviewing agencies and merging parties can cooperate in several ways to expedite the process. To this end, it was suggested to the Advisory Committee that agency staff and the merging parties should routinely engage in candid and good-faith exchanges regarding the scope of the second request, compliance with the second request, and projected review periods.[117]

Recommendations on Focused Information Requirements

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[115] However, the review periods start to run only after the Bureau has received the information deemed necessary to complete an investigation, and this may involve substantially more information than prescribed for a filing under the Competition Act. Complex mergers are defined to include transactions between direct or potential competitors as well as mergers between customers and suppliers where there are indications that the transaction may create or enhance market power. Very complex mergers are those which are likely to create or enhance market power and in which Competition Tribunal proceedings are a strong possibility. Rowley and Campbell Submission, at 20; Competition Bureau Fee Charging Policy, CANADA GAZETTE, PART I, VOL. 131, NO. 44, at 3,446 (Nov. 1, 1997).

[116] Annual Report of the Commissioner of Competition for the year ending March 31, 1999, at 19-20, available at <http://competition.ic.ca>.

[117] New York City Bar Association Committee Submission, at 5.

The Advisory Committee commends the U.S. agencies for generally striking the right balance between avoiding unduly burdensome initial filing requirements and maintaining their ability to identify competitively sensitive transactions. The Advisory Committee observes, however, that the second-request process could benefit from adjustment.

Initial Filing and "One and a Half" Requests

The Advisory Committee believes that with modest exceptions, the HSR filing form requests only the information the agencies need to identify competitively sensitive transactions. Revisions to the HSR form, however, may enhance the agencies' ability to identify potentially problematic transactions. The FTC has acknowledged, for example, that it sometimes has difficulty identifying from the form the specific products produced by the filing parties.[118] Transactions also may be missed where the parties have not created 4(c) documents or where the documents that exist do not reveal the competitive overlaps, and where the transaction does not have a high enough profile to attract attention from the press or from competitors or customers who might wish to complain.

The FTC has been contemplating changes to the HSR notification form to eliminate requests for information that are not essential to the substantive antitrust review of a reportable transaction and to focus the form more directly on product overlaps.[119] The Advisory Committee encourages the FTC to implement changes to achieve these objectives. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way is to create a model voluntary submission list that identifies the categories of useful data that merging parties could submit in facially problematic cases.

Data provided by the agencies indicate that the voluntary submission of additional information during the initial waiting period does cut back the number of second requests. In fiscal year 1999, the DOJ issued nearly 15 percent fewer second requests than it had the preceding year. In fiscal year 1998, moreover,

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118 *See* Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994). This can occur because SIC codes are often overly broad or ambiguous so that overlaps are not apparent on the face of the form or because the companies may report in the ordinary course of business under different codes.

119 According to the FTC's Premerger Notification Office, the FTC is likely to propose implementing many of the changes first proposed in 1994. *See* Joseph G. Krauss, Assistant Director, Premerger Notification Office, Bureau of Competition, FTC, New Developments in the Premerger Notification Program, Before the DC Bar Ass'n Antitrust, Trade Regulation and Consumer Affairs Section Antitrust Committee (Oct. 7, 1998); William Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 854 (Spring 1997). Another 1994 proposal of particular interest amends the HSR notification and report form to require a listing of the name(s) of any foreign antitrust or competition authority that has been or will be notified of the proposed acquisition. *See* Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994).

the FTC issued the same number of second requests (46) as it had in fiscal year 1994, when half as many filings were received.

The U.S. agencies also could formalize the practice of permitting the merging parties to withdraw and refile the acquiring party's HSR form within 48 hours (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has usefully been employed when the reviewing agency has been unable to clear a transaction within the initial 30-day review period, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. In cases in which this mechanism is employed, the agency should endeavor to clear the transaction during the second 30-day period or, if a second request is issued, the second request should be narrowly tailored to those issues identified by the agency as problematic. In addition, publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option and alleviate concerns that it would only add an additional 30 days to the process.

In several recent multijurisdictional merger investigations, voluntary information provided at the initial filing stage allowed the FTC to focus its investigations more quickly on the potentially problematic portions of the transactions. In The Seagram Company's acquisition of PolyGram, voluntary early cooperation allowed the FTC to clear the transaction within the 30-day initial review period (Box 3-E). Two other notable examples involve transactions that required second requests, but the companies cooperated so fully that the FTC was able to negotiate and propose consent orders very quickly. The first involved two foreign industrial firms in a $1 billion transaction. FTC staff quickly identified concerns in two relevant markets, involving fairly sophisticated products and technology. A consent order was negotiated and the FTC approved the proposed consent less than 60 days after the second request was issued. A modest amount of documents was submitted by the parties. A second involved a multibillion dollar merger involving two multinational pharmaceutical firms. The staff reviewed several potential overlap markets and identified one with substantial competitive concerns. The parties negotiated a consent, identified an up-front buyer and the FTC voted out the proposed consent less than 45 days after the second request was issued. Again, only a small number of documents were submitted.[120]

[120] Baer June 15, 1999 Letter.

Box 3-E: The Seagram Acquisition of PolyGram

The Seagram acquisition of PolyGram in 1998 was a $10.4 billion transaction that merged the sixth (Universal) and the fourth (Polygram) largest music companies in the world to create the world's largest music company. According to Seagram, the purpose of the merger was to match Universal's relatively strong U.S. business and less-developed international business with PolyGram's strong international presence and weaker U.S. presence. The merger afforded better opportunities for U.S. artists to export their music internationally and for international artists to reach U.S. consumers. Substantial cost savings were also anticipated (and reportedly achieved). The relevant market for antitrust purposes was prerecorded music, whether sold in the form of compact discs, cassettes, or vinyl records. The geographic market was no smaller than a national market. The transaction resulted in a combined market share of approximately 25 percent (in the United States, Europe, and most other major markets), with the four other "major" record companies (Sony, Warner, EMI, and BMG) each having shares between 10 percent and 23 percent, and independent labels as a group accounting for approximately 15-20 percent of sales.

The seriousness of the antitrust issues raised by the transaction was difficult for Seagram to gauge. The combined market share was moderately high but not clearly a problem. In 1983, however, when Warner had attempted to acquire PolyGram, the FTC had investigated and ultimately blocked the transaction when the Ninth Circuit preliminarily enjoined the merger. The combined shares (and the shares of the remaining competitors) in 1983 were virtually the same as the combined shares in 1998. Moreover, at the time Universal launched its bid for PolyGram, several investigations of horizontal agreements among the major record companies were underway in the United States, Europe, and elsewhere. All of these presented concerns for the merging parties.

As it turned out, clearance proceeded smoothly with very few significant problems. Seagram initially had anticipated a five-to-six month period between the announcement of the transaction and closing, driven in part by the time anticipated to obtain antitrust clearance and in part by the time needed to plan the integration of the two companies. Seagram expected a significant investigation in the United States and not much antitrust resistance in the EU or elsewhere. Because of prior FTC enforcement history, Seagram anticipated a second request. Seagram's strategy was to make its HSR filing first in the United States and then to open discussions with the FTC staff immediately in an effort to narrow the issues and possibly avoid a second request altogether. Seagram, crediting experienced FTC lawyers, found the FTC very responsive. The staff was able to eliminate many issues immediately (or with only minimal additional information) and then devote its resources to the tougher issues. In addition to a fairly large group of 4(c) documents, Seagram voluntarily provided strategic plans and other documents to help the FTC get its bearings at the outset. Seagram then met with the FTC staff, including economists, several times and again voluntarily provided information (approximately three boxes in total). Ultimately, the FTC decided not to issue a second request and cleared the transaction within 30 days.

Source: Logan Submission.

The Second-Request Process

Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide. The Advisory Committee recognizes, however, the flexibility of the U.S. system that enables the agencies and merging parties to resolve issues in many matters with only limited production of documents and information. Data provided by the U.S. agencies indicate that more than half of all firms complied only partially with the second request and that many transactions were resolved with the submission of 50 or fewer boxes of documents.[121]

Many business groups and practitioners that appeared before the Advisory Committee, however, perceive the second-request process to be "unduly burdensome."[122] The Advisory Committee too is concerned that the data may not indicate the full extent of the burden. For example, even if parties ultimately did not substantially comply with the second request, they may still have undertaken a full document search to be prepared to comply fully with the second request in the event that settlement negotiations break down.[123] In addition, in a handful of notable instances, merging parties have been required to submit hundreds of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception of the unduly burdensome nature of the second-request process.

- In the Halliburton/Dresser transaction, the parties submitted 670 boxes of documents to the Justice Department, whereas they submitted only 4 boxes to the Mexican authorities, 2 to the European

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[121] Data provided by the DOJ indicate that in 1998, merging parties entered into substantial compliance in only 40 percent of the transactions in which second requests were issued. Sixteen percent of second-request transactions were resolved without the production of any second-request documents and 43 percent were resolved with only partial compliance. Robinson Letter. Similarly, during the 15-month period from March 1998 to June 1999, parties to transactions receiving a second request from the FTC entered into substantial compliance in fewer than one in six investigations. Approximately 60 percent of the FTC's investigations involved document productions of fewer than 20 boxes, and 70 percent involved document productions of fewer than 50 boxes. Baer June 15, 1999 Letter.

[122] ABA Int'l Antitrust Law Committee Members Submission, at 5-6 ("The burdensome nature of the Second Request process is particularly egregious with respect to foreign companies."); ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22 ("Practitioners and the business community widely perceive Second Requests to be unduly burdensome."); U.S. Chamber of Commerce Submission, at 5 ("The experience of members of the Chamber has been that the Second Request process as practiced in the United States is extremely burdensome....").

[123] In other instances, companies have entered into consent decrees because of their desire to avoid the expense and delay generated by the second-request process. *See* Sennett Submission re the Baxter International Inc./Immuno International AG transaction, at 3. Others allege that "[m]any experienced practitioners believe that the agencies use extensive Second Requests and the delay that they cause to increase their time to build a case and in some cases to create additional leverage to force more divestitures. This is particularly resented by foreigners. The fact is that many experienced practitioners will counsel their clients that if they wish to keep down the amount of assets to be divested, it is important to seize control of the HSR 'clock' by substantially complying with Second Requests." ABA Int'l Antitrust Law Committee Members Submission, at 2.

Commission, 1 box in Canada (where an ARC was granted) and ½ box each in Australia and Brazil.[124] The DOJ's investigation, however, was conducted simultaneously and cooperatively with an investigation by the EC into the merger. The U.S. enforcement action ultimately obviated the need for the EC to challenge the transaction. Rather, the EC relied on Halliburton's commitment to the DOJ to resolve competitive issues that might have arisen for the EC in the drilling fluids business.

- Materials submitted to the EC during the first phase of its review of the Baxter International Inc./Immuno International AG transaction, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled 1 box and required approximately 4 weeks to prepare. Materials submitted to the FTC through the "quick look" procedure, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled approximately 30 boxes and required 9 weeks to prepare. Baxter worked with the FTC staff on a modified "quick look" program because Baxter believed the transaction might not survive lengthy procedural delay in the United States. That is, Baxter "could not risk the time and burdens required to respond to a full 'second request.'" Baxter estimates that if it had completed the entire second-request process, it would have produced in excess of 800 boxes of documents at a cost of $2 to $3 million and that the review process would have lasted seven to nine months.[125] According to Baxter, as a result of the staff's cooperation and excellent work, it was able to complete the transaction in a timely manner, but only with a consent order, parts or all of which might have been unnecessary.

- Boeing and McDonnell Douglas together produced approximately 5,000 boxes of documents containing 5 million pages. The FTC also conducted extensive depositions in the fact- gathering stage of its investigation. In contrast, relatively few documents (numbering only in the thousands) were gathered by the EC, which conducted no depositions or interviews of Boeing or McDonnell Douglas witnesses. Although the parties regarded this as "good news" in a sense, they were concerned that the EC authorities must necessarily have relied more on general industry assumptions than on specific evidence in reaching their conclusion.[126]

The Advisory Committee recognizes that these anecdotes do not necessarily reflect the relationship between information requests and other elements of merger review, including the nature and extent of the potential impact of the transaction in each jurisdictions. Likewise, the volume of documents produced cannot be divorced from the procedures for evaluation, administrative prohibition or litigation, and the

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[124] Coleman Submission re the Halliburton/Dresser transaction.

[125] Sennett Submission re the Baxter International Inc./Immuno International AG transaction.

[126] Submission by Benjamin S. Sharp, Perkins Coie LLP, antitrust counsel for Boeing in the Boeing/McDonnell Douglas transaction, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire (March 30, 1999).

appeal in the various jurisdictions.[127] The Advisory Committee believes, however, that it is important for the U.S. agencies to implement measures to address some of the perceived problems. Whether or not the agencies deem the concerns of the business community to be meritorious, the United States will be ill positioned to advocate reform in other jurisdictions until it attempts to address these issues at home.[128] In some cases, the recommendations that follow require little more than improving the transparency of the merger review process. In other cases, they deal with attempts to institutionalize best practices. More generally, the Advisory Committee supports the project of the American Bar Association Section of Antitrust Law to study second-request issues.[129]

The U.S. agencies can take several measures to address perceptions regarding the second-request process. First, the Advisory Committee recommends that when the agencies issue a second request, they give the merging parties their reasons (either orally or in writing) for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the second request will facilitate transparency in the merger review process and will help the parties to understand that the second request is based on genuine substantive concerns rather than on strategic motivations.[130]

In designing second requests, moreover, the Advisory Committee recommends that the agencies narrowly tailor their requests for additional information to the issues prompting the need for further review. In 1995 the agencies announced that they had addressed concerns about the second-request process by

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127 Indeed, business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is "fundamentally sound." While recognizing some areas may need adjustment, these representatives nonetheless applauded the "efficient and productive work of the Federal Trade Commission and the Antitrust Division of the Department of Justice in the face of a merger wave of unprecedented dimension and duration." *See, e.g.,* New York City Bar Association Committee Submission, at 1.

128 *See* U.S. Chamber of Commerce Submission, at 5 ("Until the United States has attained a heightened level of investigative efficiency, it is ill-positioned to guide the world community as to appropriate practices."); Members of the Antitrust Law Committee of the ABA Section of International Law and Practice testified at ICPAC Hearings that a refusal of U.S. authorities to change the U.S. system may have a chilling effect on efforts to achieve procedural harmonization: "Other countries are unlikely to coalesce behind the U.S. system due to the burdensome nature of the U.S. process in second stage investigations....The U.S. system also has a chilling effect of efficiency enhancing deals. Because Second Requests impose substantial costs in terms of money and management time, they can and do chill some foreign transactions and cause the structuring of others to exclude U.S. operations. It would be desirable from a policy standpoint to avoid creating undue burdens in mergers that ultimately would be found not to raise a substantive problem." ABA Int'l Antitrust Law Committee Members Submission, at 1, 4.

129 The project is composed of practitioners from the private bar and the business community, with the active input and participation of staff members of the agencies.

130 At the DOJ, recommendations by staff to issue second requests are screened through section management, the Director of Merger Enforcement, and, in some cases, the appropriate Deputy Assistant Attorney General. A similar procedure is followed at the FTC. In many instances, this review results either in a narrowing of the second request or in a decision not to issue it. In FY1999, of the 113 second request investigations, enforcement actions were taken in 76 (roughly 70 percent).

adopting a model second request. The predominant view of ICPAC hearing participants, among others, however, is that this reform helped reduce burdens only marginally.[131] An internal after-the-fact audit of several merger challenges could be useful in identifying the appropriate components of an effective model second request. Such an audit could include at least two different levels of analysis. First, it could consider whether the agencies are requesting the right types of information. In other words, do the agencies use the information they request? Second, the audit could consider the types of information subsequently used at trial. Perhaps the answers to these questions will enable the agencies to refine the model second request.

Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary greatly among staff members and merging parties, however, and modification requests sometimes may not be resolved in a timely fashion. To institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating timely modifications to the scope of requests. Success in this endeavor also requires a willingness on the part of merging parties and their advisors.[132]

When modification negotiations break down, parties should be encouraged to use the appeals process.[133] Since its inception in 1995, however, that process has never been used at the FTC and has been used only three times at the DOJ. Practitioners told the Advisory Committee that merging parties were concerned about potential stigma from using the appeals process, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency (even though in the three DOJ appeals, most issues were decided in favor of the merging parties). Because the agencies want the appeals process to be used, the Advisory Committee recommends that the agencies make the procedure more attractive to merging parties. Commentators have suggested this can be achieved by making the appeals process more expeditious and its outcome more transparent.[134] Further, the agencies

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[131] ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22-23.

[132] William J. Kolasky, Jr., and James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 891, 907 (1997), submitted by Mr. Kolasky for inclusion in the Advisory Committee record; *see also* Casey R. Triggs, Deputy Assistant Director, U.S. Federal Trade Commission, *Effectively Negotiating the Scope of Second Requests*, ANTITRUST 36 (Summer 1999).

[133] This is an internal appeal process that parties may use if they believe that they are in compliance with a second request or that compliance would be unduly burdensome, and they have been unable to reach agreement with agency staff on proposed modifications. The procedure allows for a written appeal to the Bureau of Competition director at the FTC and to the deputy assistant attorney general for antitrust at the Department of Justice.

[134] New York City Bar Ass'n Committee Submission, at 5-6.

should actively encourage merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.[135]

The Advisory Committee recommends that the agencies attempt to institutionalize these and other best practices to ensure the integrity and effectiveness of the second-request process. The institutionalization of these best practices is particularly important because at least some of the perceived problems identified by the private bar appear to stem from differences in practices by individual staff attorneys. Thus, the agencies at the highest levels should articulate principles or best practices to guide staff during the second-request process and should ensure that procedures are practiced consistently throughout the agencies.

Another issue that requires attention is the reduction of foreign productions and translation requirements. In companies with foreign operations, second requests call for English translations for all responsive documents. At an average cost of $40 a page word for word (one box is roughly 2,000 pages, thus $80,000 a box) or $10 a page for a summary ($20,000 a box), translation requirements can impose a significant cost on parties with multinational operations.

Over the past three years, however, the FTC has required translation of documents in only five matters. The burden in these cases was reportedly minimal. The FTC typically requests the parties to provide summaries of the documents and then requests full translations of only those documents particularly relevant to the inquiry. In only one investigation in the last three years did the FTC require translation of more than a handful of documents. Likewise, at the DOJ, parties have provided translated documents in only 13 transactions in the last three years. Usually, when parties have asked to provide summaries of documents rather than full translation of all foreign language documents, staff has allowed the parties to do so.[136]

However, the ICPAC hearings testimony stressed that many staff members are unwilling to modify second requests to cut back on translation requirements unless the parties are willing to concede that the relevant geographic market is limited to the United States or North America. Testimony suggests that many staff members operate from the perspective that if they have to look at producers abroad, then every aspect

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135 Recently introduced legislation, S. 1854, 106th Cong. (1999), provides for a ruling by a federal magistrate on whether a second request is unreasonably cumulative or duplicative; whether it imposes a burden or expense that substantially outweighs any likely benefit in conducting a preliminary review; or whether the appealing party is in substantial compliance with the second request. It is questionable whether this is a workable solution. Some suggest that a standard of review would be difficult to apply, that the mechanism could be gamed by the parties, and that it has resource implications for the agencies, which would be required to litigate these issues in court. *See* ICPAC Full Committee Meeting (Nov. 19, 1999), Meeting Minutes. *But see* Testimony of Donald I. Baker, Baker & Miller PLLC, ICPAC Hearings (April 22, 1999), Hearing Transcripts, at 192 ("I think that the real weakness in the U.S. system is the absolute lack of any independent force in the process in terms of determining substantial compliance or any other question. Give me a federal magistrate or somebody who you can go into and say, look, this is ridiculous.")

136 Baer June 15, 1999 Letter; Robinson Letter.

of the competitive situation outside the United States is relevant to their investigation. These hearing participants acknowledged that perspective may be appropriate in some cases, but nonetheless contend that foreign operations often are relevant only because the parties are arguing that a price increase in the United States will be defeated by a supply response from foreign producers.[137]

The ICPAC hearings and meetings with antitrust lawyers produced several suggestions to reduce burdensome translation costs where some or all of the company's records are located outside the United States. One approach would permit the parties to produce responsive documents in the original language. The agency would be responsible for employing staff proficient in the relevant language or retaining outside consultants (such as foreign antitrust lawyers) to review the documents and translate only those significant to the issues in the case. Another approach would still leave the translation task to the agencies but impose a higher fixed filing fee where such government translation is required or set a maximum number of pages that a merging party is required to translate, with the government agency having to do the translation beyond that limit.[138] Such a system in which costs of translation are shifted to the agencies or shared with the merging parties is thought to heighten sensitivities to the burdens of translations and encourage a more balanced assessment of when costs should reasonably be incurred.

Given budgetary constraints and the number of foreign languages that are potentially implicated, it is not realistic for the agencies to hire language-proficient staff. Rather, the agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations only of documents relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

Multiple Review of Mergers by Antitrust and Sectoral Regulators

Overlapping responsibilities for merger review in the United States also warrant consideration, in the Advisory Committee's view. A decision by the DOJ or the FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. Federal and state legislatures and judicial decisions have empowered a wide array of public and private parties to challenge mergers, acquisitions and joint ventures on competition policy grounds. Because shared power may generate inconsistent policy approaches within a single jurisdiction, it can make efforts at global harmonization and cooperation more difficult. In addition, it imposes additional uncertainty as to timing and outcome and further increases transaction costs. The Advisory Committee heard testimony relating to multiple agency review of mergers during its Fall and Spring hearings and at its Advisory Committee

137 ABA Int'l Antitrust Law Committee Members Submission, at 2-3.

138 *Id.,* at 3-4.

meetings on March 17, 1999 and July 14, 1999. The Committee also invited an expert to prepare a paper addressing this issue in the United States.[139]

The majority of Advisory Committee members believe that the overlapping review in the United States is more often than not a defect of the U.S. system and that a more rational or sensible approach would be to give exclusive federal jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to the DOJ and FTC. Of course, sectoral regulators would continue to be responsible for other public policy considerations that pertain to the regulation of the sector rather than to assessment of proposed mergers from the perspective of competition policy. Other Advisory Committee members agree that the federal antitrust authorities are better positioned to conduct antitrust merger review. These members, however, recommend creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.[140] At a minimum, this approach would mean that the analyses are properly weighted in merger decisions by sectoral or state regulators. Other feasible approaches advocated for the short run would encourage soft convergence strategies as well as greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

This section first reviews in greater detail the competition policy system in the United States in merger review and considers the impact of this multiplicity on transaction costs as well as global harmonization and cooperation efforts. It next discusses several cases that shed light on these concerns and considers possible approaches to reducing costs and achieving domestic policy harmonization. Finally, the section highlights several issues relating to overlapping agency review that deserve further study.

The U.S. Competition Policy System in Merger Review

In the United States, several entities have power to challenge a transaction. The DOJ and FTC share authority to review mergers and formulate competition policy. The agencies use a clearance process,

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[139] Much of the discussion in this section is drawn from the paper prepared for the Advisory Committee by William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," (March 15, 1999) [hereinafter Kovacic Submission] and the discussions and deliberations by Advisory Committee members that followed.

[140] On this point Advisory Committee Member John T. Dunlop adds: The five federal agencies listed in Annex 3-B to this chapter were not asked to state their views on this issue to the Advisory Committee. Moreover, the estimation of potential efficiencies, market consequences and effects on national policies are matters in which these agencies have been charged with legislative responsibilities. I have not objected to the antitrust enforcement agencies stating their analyses and views to these agencies in a case and these agencies being required to consider and to respond to the analyses in decisions on mergers in their responsibility. Perhaps further study would propose different policies among these agencies in their relations to the antitrust enforcement agencies. Advisory Committee Co-Chair Paula Stern concurs.

based primarily on past experience and expertise, to determine which agency will be responsible for reviewing each proposed transaction.

In several industry sectors, public authorities also are vested with responsibility for formulating and implementing merger policy. Shared authority is most often found in industries that previously have been the subject of comprehensive regulation that governs entry, exit, and rate making. Prominent illustrations are described in Annex 3-B.

State attorneys general also enjoy power to review individual transactions on competition policy grounds. Acting under federal or state antitrust laws (or both), individual states may challenge mergers as anticompetitive. States have participated in several investigations with the DOJ and FTC; entered into settlement agreements along with the DOJ or the FTC or in separate consent decrees following joint federal-state investigations; and investigated and obtained consent decrees in transactions in which neither the DOJ nor the FTC participated.[141]

In addition to public enforcement, private parties also have the power to challenge mergers. Competitors, takeover targets, customers, and suppliers of the merging parties all have lodged formal challenges, although Supreme Court decisions place formidable standing hurdles in the path of competitors and takeover targets. Nonetheless, challenges by rivals remain a possibility, as demonstrated by a number of successful efforts by rivals to enjoin transactions.[142]

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[141] Ilene Knable Gotts and Phillip A. Proger, *Hot Topics in Antitrust Review of Transactions*, THE M&A LAWYER, May 1999 [hereinafter Gotts and Proger]; Fox & Fox, CORPORATE ACQUISITIONS AND MERGERS, Chapter 17 at §17.03 (Bender 1999)[hereinafter Fox & Fox]. The HSR Act, however, does not provide states with any express role in the federal premerger review process or with rights to HSR Act filing information. In 1985 the United States Courts of Appeals for the Second and Fifth Circuits both held that the HSR Act confidentiality provision prohibited the FTC (and, by extension, the DOJ) from granting state antitrust officials access to HSR Act filings and documents generated by the FTC in connection with two separate oil company mergers. *See* Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985). Partly in reaction to the *Mattox* and *Lieberman* decisions, state attorneys general began seeking alternative ways of obtaining access to premerger filings. The states and the federal antitrust agencies have developed cooperation agreements that promote cooperation in reviewing transactions of common interest.

[142] *See* Fox & Fox, Chapters 6, 7A, 21. Successful challenges may be attributable, in part, to intervention-oriented substantive standards developed in Supreme Court cases of the 1960s. Although subsequent Supreme Court decisions dealing with nonmerger antitrust issues have cast doubt upon the continued vitality of the merger jurisprudence of the 1960s, the Supreme Court has never repudiated its earlier merger rulings. As there has been no Supreme Court decision involving substantive merger standards since 1975, the older precedents remain fair game for litigants and may constitute a starting point for analysis by the lower courts. Kovacic Submission, at 2-3, 9-10.

No other legal system in the world distributes decisionmaking power for competition policy issues so widely.[143] Still, overlapping competition policy regimes in other countries pose problems.[144] In other countries conflicts arise between multinational regional competition policy regimes and the antitrust laws of individual member states;[145] the operation of national competition regimes and sectoral regulatory frameworks;[146] decisions by national competition authorities and regional competition policy bodies;[147] and national competition authorities who share power to review mergers.[148] These features may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

Impact of Multiplicity

The Advisory Committee recognizes that Congress has vested sectoral regulators with competition policy oversight and charged these government agencies with concurrent jurisdiction to pursue different (and perhaps conflicting) goals. Nonetheless, the Advisory Committee believes that the costs resulting from this multiplicity must be considered. From an industry participant's perspective, in theory, such costs might include the uncertainty generated when multiple entities possess the authority to review the competitive effects of a transaction or practice, but reach differing conclusions on this issue; the increased transaction costs flowing from the need to defend a proposed transaction before multiple agencies; and the uncertainty created by the agencies' different time frames for review. From the agencies' perspective, agencies suffer when the duplicative expenditure of resources inherent in concurrent jurisdiction creates an inefficient allocation of scarce resources, particularly when the specialized agency is not bound by the recommendations of the competition agencies with respect to an assessment of competitive effects. Further

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143 *See* William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 295 (1992) (describing decentralization of prosecutorial power under U.S. antitrust laws).

144 Kovacic Submission, at 25-26.

145 *See, e.g.,* Testimony of Karel Van Miert, then-European Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearing Transcripts, at 54-55 (testifying to the problem of review of airline alliances in the EU).

146 In the past two years, Germany has liberalized its postal services and telecommunications sectors and has created a new institution to perform residual regulatory tasks (such as setting access prices for bottleneck facilities). The legislation creating the new independent regulatory body does not clearly define the respective competition policy roles of the German Federal Cartel Office and the independent regulator. This ambiguity has led to disputes between the FCO and the regulator concerning a variety of competition policy issues. Kovacic submission at 25.

147 *See* Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. 1, 8-10 (1997) (describing broad distribution of decisionmaking power among national and regional competition officials in Ukraine).

148 *See* Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil*, 67 ANTITRUST L.J. 113 (1999) (describing difficulties that arise from the distribution of antitrust merger oversight authority across three institutions of the national government in Brazil).

inefficiencies (and perhaps bad policy) can be created when one agency has the ultimate authority to make decisions that fall within another agency's area of comparative advantage.[149]

Shared power for making and implementing competition policy also may impede reform efforts designed to achieve substantive harmonization and convergence. The multiplicity of competition policy agents complicates efforts to establish consistent enforcement policies and procedures within a single country. That is, international discussions about procedural and substantive harmonization often assume that individual nations have harmonized such processes and standards within their own borders. For example, when the Advisory Committee speaks of attaining convergence of initial review periods, it tends to assume that the United States has consistent procedures regarding notification and review among the reviewing agencies.

Multiplicity also may impede effective cooperation in individual transactions. This is evident where two or more independent institutions exercise overlapping authority, but no hierarchy of authority makes the decision of one actor binding on the other institutions. The U.S. federal antitrust authorities can cooperate in an investigation with their antitrust counterparts in other jurisdictions and reach a common settlement with the merging parties but must await the decision of sectoral regulators in the same matter. Whereas the U.S. antitrust enforcement agencies have developed close cooperation with a number of its foreign counterparts, there is no effective mechanism by which foreign competition authorities can share information and views with the sectoral regulators in the same way that they share information and views with their antitrust counterparts.[150] In addition, this circumstance may create the perception that the DOJ and the FTC lack the ability to speak authoritatively to foreign governments about a particular transaction or U.S. competition policy in general because their pronouncements do not bind sectoral regulators, who independently exercise policymaking power over a wide range of business activity.

Distributing competition policy power across multiple gatekeepers who can examine (and challenge) specific conduct also may make the grounds for individual decisions less transparent. The multiplicity of reviewing bodies and the use of different standards for judging mergers makes it difficult for foreign firms

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149 *See* James F. Rill, et al., Institutional Responsibilities Affecting Competition in the Telecommunications Industry, A Practicing Lawyer's Perspective, European University Institute, 1998 EU Competition Workshop, at 24.

150 For example, the 1991 U.S.-EC Cooperation Agreement only foresees cooperation with the Department of Justice and the Federal Trade Commission (Article 2B of the agreement defines "competition authorities" as meaning: (I) the European Commission and (ii) the Antitrust Division of the DOJ and FTC). It would therefore appear that other federal agencies, for example, the DOT, which has the ultimate discretion to determine whether an application meets the statutory prerequisites for the granting of antitrust immunity, do not constitute a competition authority within the meaning of the agreement. As a consequence, cooperation may be more limited in the review of, for example, global airline alliances. *See* Reynolds Submission, at 18. Indeed, Fernando Sanchez Ugarte, President of the Federal Competition Commission in Mexico testified at the ICPAC hearings in November that his agency did not have the opportunity to participate as much as it wanted to; first, before the Department of Justice, and secondly, before the Surface Transportation Board in their review of the Union Pacific/Southern Pacific merger. Testimony of Fernando Sanchez Ugarte, President, Federal Competition Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 209-210.

to understand the merger review process. This may have the cumulative effect of decreasing transparency. This possibility is strongest where sectoral regulators, acting under the mandate of broad "public interest" standards, account for competition policy concerns in exercising their jurisdiction over mergers.[151] Sectoral regulators often have authority to take into account social welfare considerations that extend beyond the traditional focus of antitrust analysis. In many instances it may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulators' decision to intervene.[152]

The United States also may have difficulty encouraging foreign governments to cure imperfections in their competition policy rules and procedures unless it first addresses the institutional complexity of the U.S. system.[153]

The Magnitude of the Problem

The Advisory Committee considered several cases that shed light on these concerns. The costs of multiplicity for merger policy are most apparent in industries undergoing the transition from comprehensive public utility regulation to competition. While this summary does not purport to be a comprehensive review of the agencies' record, experience in the telecommunications sector provides several illustrations.

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[151] Sectoral regulators, such as the FCC, have not issued guidelines indicating how they perform competition policy analysis under a public interest standard, although the Federal Energy Regulatory Commission has done so for mergers in the electric power sector.

[152] An additional concern is that sectoral regulatory agencies also are vulnerable to capture by industry and generally more susceptible to political influence compared with the DOJ. *See* Statement of Sen. Bob Kerrey (D-Neb), 141 CONG. REC. S8194 (daily ed. June 12, 1995) ("[The FCC is] vulnerable to political pressure—a lot more vulnerable than the Department of Justice"); *see also See* OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAFFE/CLP (99)8, 10 (June 24, 1999), *reprinted in* OECD JOURNAL OF COMP. LAW & POLICY, Vol. 1, No. 3 (Sept. 1999) ("When dividing tasks between competition agencies and sector-specific regulators, attention must also be paid to the potential for each type of institution to fall prey to regulatory capture, and problems inherent in subjecting competing firms to different sector-specific regulation").

[153] Many of these same issues also arise in overlapping state review of mergers. The states have challenged mergers at thresholds more stringent than those applied by federal authorities, have given decisive effect to concentration data, and used their enforcement power to block business restructurings that would reduce employment within their borders. Indeed, National Association of Attorneys General, *Horizontal Merger Guidelines* (1993), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,406, consider non-competition factors, including the need to protect small local businesses. *See* Kovacic Submission, at 21-23; see also ABA Int'l Antitrust Law Committee Members Submission, at 7-12 (the policies of the National Association of Attorneys General (NAAG) toward mergers are more restrictive than the policies of the federal antitrust agencies). Further, criticism has been levied that states opting out of the federal-state protocol have issued burdensome information requests calling for all documents provided to other states (that is, all HSR material) plus additional requests. *See, e.g.,* Testimony of Phillip A. Proger, Jones, Day, Reavis & Pogue, ICPAC Hearings (April 22, 1999), Hearings Transcript, at 70.

FCC COMMISSIONER STATEMENTS. At least two members of the Federal Communications Commission (FCC) and other public officials have publicly expressed their concern over the seemingly duplicative jurisdiction of the Antitrust Division and the FCC during telecommunications merger reviews.

- Commissioner Michael Powell, in a separate statement regarding FCC approval of the WorldCom/MCI transaction, stated that the FCC should focus its efforts on areas of its own expertise and strive to eliminate duplication of work with DOJ.[154]

- Commissioner Harold Furchtgott-Roth also was concerned about the "cumbersome review process" in the WorldCom/MCI matter. "The heroic efforts of our staff notwithstanding, we have little to add or to subtract from the market analyses or the judgment of this other federal agency but a more detailed public record," he wrote in a separate statement.[155]

- In a recent op-ed piece in the *Wall Street Journal*, Commissioner Furchtgott-Roth argued that the FCC's authority over merger review had become too broad and without the necessary limits and standards.[156]

- Senator Conrad Burns publicly criticized the analysis the FCC has employed as duplicative of the merger analysis performed by the DOJ.[157] This criticism has been made of the Surface Transportation Board (STB) as well.[158]

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[154] Separate Statement of FCC Commissioner Michael Powell Regarding the Application of WorldCom, Inc. and MCI Telecommunications Corp., CC Dkt. No. 97-211, at 4 (Sept. 14, 1998).

[155] Separate Statement of Commissioner Harold Furchtgott-Roth, Regarding Application of WorldCom, Inc. and MCI Communications Corp., CC Dkt No. 97-211, at 1 (Sept. 14, 1998) (also alleging that overlapping review contributes to the lengthiness of the merger review process).

[156] Harold Furchtgott-Roth, *The FCC Racket,* WSJ INTERACTIVE EDITION (Nov. 5, 1999). *But see* Statement of Commissioner Susan Ness, FCC, on Mergers and Consolidations in the Telecommunications Industry before the Committee on the Judiciary, U.S. House of Representatives (June 24, 1998)(While mindful that having both the FCC and DOJ involved in merger review creates a potential for additional costs and delays, Commissioner Ness nonetheless contends that "the FCC and Justice Department can both play constructive roles, avoid unnecessary duplication and delays, build public confidence, and produce better outcomes.").

[157] *See Sen. Burns Says FCC is Duplicating DOJ Antitrust Enforcement in Radio Sales*, COMMUNICATION DAILY, Feb. 20, 1997.

[158] *See* Frank N. Wilner, *Belly of the Beast, Blame the Shermans*, ABI/INFORM, Vol. 21, No. 3, at 72 (Summer 1998)[hereinafter Wilner] (the former chief of staff to Vice Chairman of the Surface Transportation Board argued that the competition analysis performed by the STB inappropriately applies noncompetition standards when evaluating mergers).

CASE SPECIFIC EXAMPLES. During the past several years, several instances also have emerged where the regulatory agency did not follow the DOJ's competitive analysis of a transaction.

- In the Burlington Northern, Inc./Santa Fe Pacific Corp. merger, the Interstate Commerce Commission decision rejected the comments submitted by the Antitrust Division, warning that if the merger proceeded without necessary conditions, competition would be lessened in several markets.[159]

- In the merger between Union Pacific Corporation and Southern Pacific Rail Corporation, the DOJ argued that the merger should not go forward because it would result in a monopoly in several markets and create a rail duopoly throughout the West. Despite that vigorous opposition, the Surface Transportation Board approved the merger.[160] Criticism has been levied that the STB failed to take into account the view of the DOJ.[161]

- The Department of Transportation approved an alliance of Delta Airlines, Swissair, Sabena Airlines, and Austrian Airlines despite concerns expressed by the DOJ about competitive effects in four New York city-pair markets.[162]

- In 1997, the DOJ allowed the merger of Bell Atlantic and NYNEX to proceed without adjustments.[163] The FCC separately reviewed the merger and imposed various competition-related restrictions in reaching a settlement with the parties. Although the FCC's public interest standard includes social welfare considerations, the tone and content of the FCC's opinion allowing the merger subject to conditions suggests that the FCC reached different conclusions than the DOJ concerning possibilities for actual and potential competition between the companies.[164] The FCC's review of recent transactions involving

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[159] 10 I.C.C. 2d 661 (Aug. 16, 1995).

[160] Remarks by Anne K. Bingaman, then-Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Statement on the Surface Transportation Board's Approval of the Union Pacific and Southern Pacific Merger (July 3, 1996).

[161] *See* Wilner ("[T]he STB needs to give the [DOJ's] opinion no more weight than they give to a handscrawled letter submitted by bitter widow Jones whose husband died in a train wreck").

[162] *See Joint Application of Delta Airlines, Inc., Swissair, Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines for Approval of and Antitrust Immunity for Alliance Agreements,* Dep't of Transportation Order 96-6-33 (June 14, 1996).

[163] *See* U.S. Dep't of Justice Press Release, Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger (Apr. 24, 1997) (announcing decision not to challenge merger).

[164] *See* In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 1997 FCC LEXIS 4349, at *20 (Aug. 14, 1997).

AT&T/TCI, Bell Atlantic/GTE, and SBC/Ameritech also has stimulated a debate about the appropriate division of labor between the FCC and the DOJ.[165]

Possible Approaches to Reducing Costs and Achieving Domestic Policy Harmonization

Although the evidence on the record was neither exhaustive nor conclusive, Advisory Committee members think overlapping review in the United States is a serious matter warranting reform. In the course of deliberations, the Advisory Committee considered a variety of proposals for achieving consistency in analytical methods and processes within the United States. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers in federally regulated industries to the DOJ and FTC, to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators in merger review, to imposing timetables and deadlines on the merger review processes, to nonlegislated convergence strategies.

Maintaining the status quo also is, of course, an option.[166] Any proposed solution to the problem of overlapping merger review authority must fully take into account the benefits of the current system. Some have suggested that concurrent review deals with the problems of underenforcement.[167] Another benefit is that review by multiple agencies allows more than just competition issues to be taken into account. Although some individuals consider this feature to be a drawback, the status quo does allow sectoral regulators, who may have more experience dealing with certain industries, to play a leading role in the merger review process and include competition policy in the mix of factors considered.

CLARIFYING THE ROLES OF FEDERAL REGULATORS. One path for legislative change is to simplify the merger review process by clarifying the roles of the DOJ, the FTC and the federal sectoral regulators in merger review. One approach for simplification is to make the DOJ and FTC mere advisors to the sectoral regulators for matters in which the antitrust agencies and the sectoral regulators now share power.[168] This, of course, would be weakening the role of the federal antitrust agencies. Alternatively, and

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165 *See* Kovacic Submission, at 24.

166 Rationales offered in support of multiple agencies with overlapping duties, including multiple federal review of mergers, are interagency competition, diversification, and institutional comparative advantage. *See* Kovacic Submission, at 10-20.

167 Remarks by Deputy Assistant Attorney General Douglas Melamed, ICPAC Committee Meeting (Mar. 17, 1999), Meeting Minutes at 39-40.

168 One expert contends that U.S. experience with entrusting federal merger oversight powers exclusively to sectoral regulators has not been edifying. This expert points to noteworthy examples of seemingly failed experiments with this approach, including DOT's review of airline mergers in the 1980s and the Surface Transportation Board's assessment of railroad mergers in the 1990s. "Sectoral regulators have demonstrated a tendency to overlook important competition policy concerns, partly out of limitations on relevant expertise and partly out of institutional perspectives that de-emphasize competition as a factor for evaluation. There is little evidence in modern U.S. regulatory history that supports

more in line with the view of the Advisory Committee, there is much to be said for removing the competition policy oversight duty from the sectoral regulators and vesting that power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies. This approach would align competition policy assessments of mergers involving previously regulated firms with the same standards that apply to firms in other areas. Another benefit of placing competition policy authority solely in the antitrust agencies is greater transparency. Sectoral regulators would be forced to make clear their reliance on noncompetition factors (such as social and economic policies) when reviewing a proposed transaction.

CLARIFYING THE ROLES OF STATE REGULATORS. The topic of state merger enforcement has been the subject of extensive debate in the academic literature and public policy circles. Some commentators contend that federal preemption of competition policymaking by state regulators is appropriate for the same reasons mentioned above for preempting competition policy review by federal sectoral regulators. If such preemption does not take place, it is argued, federal antitrust regulators will be unable to establish unified national merger principles unless they accommodate the preferences of state governments. That would not only add a great deal of uncertainty to merger policy but also place continuing pressure on federal officials to resist measures that would narrow the scope of enforcement activity.[169] Others question the need for such preemption at this time. As a recent analysis describes, state attorneys general have not been regularly investigating and challenging mergers where the markets are national or international in scope (as opposed to mergers involving foreign companies that control significant retailing operations in a reviewing state).[170] Rather, industries that function on a separate "local market" basis have attracted the most state scrutiny.[171]

IMPOSING DISCIPLINE ON REVIEW PROCESSES. A number of commentators (as well as public officials) have suggested that strict timetables and deadlines for review by sectoral regulators be implemented and rigorously enforced.

NONLEGISLATED CONVERGENCE STRATEGIES. As an alternative to those approaches, all of which would require legislation to implement, public officials could pursue a variety of soft convergence strategies to achieve greater consistency and simplicity in competition policy for mergers. These strategies generally involve encouraging the adoption of common analytical methods. Possibilities include creating working groups of representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions, and

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a measure that would dedicate all merger oversight duties at the federal level to the sectoral regulator." Kovacic Submission, at 28.

169 *Id.,* at 29; *see also* ABA Int'l Antitrust Law Committee Members Submission, at 7-12.

170 ABA Int'l Antitrust Law Committee Members Submission, at 10-11.

171 Gotts and Proger.

encouraging public bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt FTC-DOJ Guidelines). Identifying differences among reviewing bodies in competition policy methodologies would make existing processes and standards more transparent and could stimulate discussion and adjustments.

This type of approach has been undertaken in the past. For example, in 1994, there was an Interagency Task Force on Bank Competition, chaired by the DOJ and composed of the senior staff from the various banking agencies: Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Reserve Board, Treasury Department, and the Federal Deposit Insurance Corporation. The mandate of the task force was to identify the common principles of bank competition. The task force met monthly to discuss a highly organized agenda. The end result was a set of interagency bank merger screening guidelines, which were issued in July 1994. The task force also produced a bibliography and an overview of the discussions, which addressed similarities and differences in the agencies' approaches to issues, data, and information in the bank merger process. This pilot study might serve as a useful model for other sectoral task forces. It is also an example of what could be done to get the relevant international agencies together to discuss and agree on common principles and issues and review key aspects of theory, application, or enforcement.

In addition, provided *ex parte* rules are not implicated, many of the recommendations to facilitate cooperation and harmonization among antitrust authorities in the multijurisdictional merger review process also could be applied to agencies with concurrent jurisdiction in the domestic context, including enhanced information sharing and an exchange of staffing resources. A great deal of cooperation already takes place today between the DOJ and FTC and the states pursuant to a Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General. As described more fully in Chapter 2, this protocol sets forth a general framework for the conduct of joint federal-state investigations with the goals of maximizing cooperation between enforcement agencies and minimizing the burden on private parties.[172]

To some extent cooperation also occurs between the federal antitrust enforcement agencies and at least one sectoral regulator, the Department of Defense (DOD). The DOJ works closely with the DOD in reviewing defense mergers, with the DOD playing a unique role as the primary (and often only) U.S. consumer for defense industry products. As one DOJ official noted: "After you make a premerger notification filing, you can expect that Antitrust Division staff [and staff from the Office of the Secretary of Defense] will work closely to review it. When the Antitrust Division learns about a transaction we . . . do not terminate that initial review until the Department of Defense signs off on it. When a more detailed investigation is justified, the two agencies jointly investigate it....The cooperation between antitrust and the

[172] Protocol For Joint Federal/State Merger Investigations (Mar. 11, 1998), *reprinted at*, 6 Trade Reg. Rep. (CCH) ¶13,420.

[Office of the Secretary of Defense] staffs likely assures that the United States government will speak with one voice on defense mergers."[173]

Recommendations and Issues for Further Study

The Advisory Committee is of the view that the federal antitrust authorities are better positioned to conduct antitrust merger review than federal sectoral regulators.[174] The majority of Advisory Committee members recommend removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies.[175] At this juncture, however, some Advisory Committee members recommend instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. Additional approaches advocated in the short run consist of encouraging soft convergence strategies including greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits challenging international transactions. For example, appropriate cases may be challenges of transactions that the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties granted waivers of confidentiality.

All of the Advisory Committee members agree that several issues relating to overlapping agency review deserve further study. Among these issues are: How does the specialized agency (and state) process differ from the antitrust agency review process? In what ways do the substantive standards of

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173 Robert Kramer, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, Antitrust Considerations in International Defense Mergers, Presentation before the American Institute of Aeronautics and Astronautics, at 9 (May 4, 1999).

174 According to one expert, an assessment of the institutional capability of sectoral regulators and the federal antitrust agencies to perform competition policy assessments would show that the sector regulators have a great distance to travel before they approximate the skills of the antitrust agencies. In recent years, both the FCC and FERC have attempted to bolster their analytical capability by hiring highly respected competition policy specialists. Each agency has established bureaus that specialize to a large degree in competition policy issues. Yet the antitrust agencies remain decidedly preeminent in their capacity to examine competition policy questions in the communications and energy sectors. Only significant increases in resources and experience would enable the FCC or FERC to match the skills of DOJ and the FTC in this field. See Kovacic Submission, at 24.

175 Making the federal antitrust agencies' conclusion about the likely competitive effects of a proposed transaction binding may not be outcome determinative where such assessment is only one of many factors considered in the decisionmaking process.

review differ (for example, what noncompetition factors are taken into account)? Would a unified solution be appropriate or do the agencies present different challenges or different problems? The Advisory Committee's hearings record includes anecdotal discussions of concerns, but it does not exhaustively review the track records of interactions and conflicts between the relevant agencies. The historical record of agency interaction is crucial to understanding the extent of the problem posed by overlapping merger review authority. To develop this record, postmerger audits could be conducted on those matters where the federal competition agencies came to different conclusions or opposed a transaction that was subsequently approved by another regulator. Such a study should also assess the capacity of those agencies, apart from the DOJ and the FTC, that undertake competition analyses to conduct competition review and whether and to what extent these reviews duplicate the efforts of the DOJ and FTC. A related issue is whether the DOJ and the FTC have the necessary expertise to undertake merger analysis across different industries.

Certainly any proposed solution to the problem of overlapping merger review authority must fully take into account the ramifications of costs and benefits of a change to the status quo. For example, does concurrent review deal with problems of underenforcement? Does a competition analysis by the sectoral regulators temper the use of noncompetition related factors? Should competition policy be part of the mix of factors to consider, or by its elimination, would it be diminished?

Additionally, any solution would have to take into account the position of the other reviewing agencies. Toward this end, a dialogue might usefully take place among the DOJ, the FTC, and other state and federal agencies responsible for merger review in order to learn the views of the agencies and state regulators toward the possible approaches.

Further examination of the experience in other jurisdictions with local and national bodies that set competition policy could prove useful as could further study of the work undertaken by international organizations, such as the OECD, with respect to overlapping merger review authority.[176]

SUMMARY OF RECOMMENDATIONS

Casting the Merger Review Net Appropriately: Notification Thresholds

1. In establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction.

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[176] See, e.g., OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAFFE/CLP (99)8, 10 (June 24, 1999), *reprinted in* OECD JOURNAL OF COMP. LAW & POLICY, Vol. 1, No. 3 (Sept. 1999).

- This can be accomplished, first, by implementing threshold tests that include an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction.

- Second, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions. The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are too low and require the reporting of too many nonproblematic transactions. Low notification thresholds may result from a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. If an indexing mechanism is not employed, the Advisory Committee recommends that jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.

2. Additional steps that can be taken at this stage to reduce costs for international mergers include establishing *objectively based notification thresholds*.

3. Jurisdictions also should ensure their merger regimes are transparent in general. Particular efforts to improve transparency should include identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.

4. To better ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds. Although the federal antitrust agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.
5. Any efforts to revise notification thresholds also must consider the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including the federal antitrust agencies in the United States. Ideally, no competition agency should be dependant on filing fees for its budget, staff salaries, or bonuses. To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds or "delinking" filing fees.

Reducing Burdens on Transactions that Come within the Merger Review Net

To ensure that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process, merger review should be conducted in a two-stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

Review Periods and Timing

1. The first stage should occur within one month or 30 days following notification. ICPAC hearings testimony suggests that marginal differences in the initial review periods are inconsequential because they are manageable from a transaction planning standpoint. Reform efforts should focus, therefore, on jurisdictions in which the initial review period substantially exceeds one month or is undefined. Jurisdictions that are unable to terminate investigations before the expiration of the initial or second-stage review periods also should be given the authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).

2. To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation, the international community should promote harmonization of rules pertaining to when parties are permitted to file premerger notification. This can be accomplished by eliminating definitive agreement requirements and postexecution filing deadlines and encouraging all jurisdictions to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

3. For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy review periods should adopt more expedited time frames for review. The Advisory Committee made a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

Notification Forms and Information Requests

1. To eliminate excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that initial information requests seek the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.

2. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal

and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option, leaving it to the notifying parties to choose in the first instance which form to use. The short form would allow the parties to provide less extensive information in transactions that do not raise competitive problems. The long form would require more information concerning the products produced, supplied, or distributed by the parties and the overlapping or vertical markets in which they operate. Alternatively, reviewing authorities may encourage merging parties to voluntarily provide sufficient information to allow the agencies to resolve any potential antitrust issues or engage in a focused inquiry that narrowly targets the antitrust issues.

3. Initial filing requirements in many jurisdictions may be statutorily imposed, and revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) explaining why the transaction does not raise competitive concerns.

4. To facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of a second-stage inquiry the competitive concerns that are driving the investigation. This summary could be conveyed orally or in writing. Written summaries should be short and plain statements of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority's discretion to pursue any new theories of competitive harm if new information comes to light.

5. Competition authorities around the world could assess their own performance with respect to those transactions they challenge. One way to do this is an *after-the-fact audit* of merger challenges to examine decisions to prosecute or to refrain from prosecuting specific matters. The audit also could examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases. Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

6. There also is much that can be gained from multilateral efforts at soft procedural harmonization of the type undertaken by the OECD. The United States should continue to support OECD efforts to develop a framework for notification, including the development of common definitions. The OECD should continue to focus its efforts on identifying the minimum information necessary as categories of data that may be useful to resolve potentially problematic transactions. As part of this effort, consideration also should be given to ways to reduce unnecessary burden, including translation costs and overly burdensome certification and other procedural requirements.

Targeted Reform in the United States: Notification Thresholds

1. The HSR Act already ensures that only transactions with a nexus to the jurisdiction must be notified to the U.S. authorities by providing exemptions from HSR reporting requirements for certain transactions involving non-U.S. companies ("foreign person exemptions"). The foreign person exemptions, however, have not been adjusted for many years. Thus, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons to ensure that only transactions with an appreciable nexus to the United States must be notified to the U.S. antitrust authorities.

2. The thresholds currently employed by the premerger notification system in the United States deserve careful review. While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed in the United States are too low and capture too many lawful transactions. The most straightforward way to decrease the number of required filings, while not materially compromising the agencies' enforcement mission, is to increase the size-of-transaction threshold for acquisitions of both voting securities and assets. Depending on the base year and deflator used, increasing the threshold commensurate with inflation translates into an HSR threshold of $33 to $43 million when measured in 1998 dollars. The majority of Advisory Committee members suggest raising the thresholds within this range. Three members suggest raising the threshold even higher, to $50 million.

3. Indexing the size-of-transaction threshold to account for future inflation has many benefits, but an automatic indexing mechanism also may produce arbitrary results. If an indexing mechanism is not employed, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.

4. The Advisory Committee believes that, ideally, filing fees should be delinked from funding for the agencies. However, given that filing fees currently provide 100 percent of the U.S. agencies' budgets, any effort to delink filing fees or raise thresholds must occur in an environment where sufficient funds are assured from other sources. It is critical to the agencies' enforcement mission that resources are not reduced. This could be accomplished by direct funding from general revenue. If funds are not directly appropriated, this could be accomplished in a variety of ways including increasing the filing fee or creating a sliding scale fee (although the latter alternatives would not accomplish delinking the budget from fees).

Targeted Reform in the United States: Review Periods and Timing

1. A consensus exists among Advisory Committee members on the need for certainty in merger review periods and that merger review should be conducted within reasonable time frames. Advisory Committee members are not of a shared view on the appropriate mechanisms for addressing these concerns, however. Some members of the Advisory Committee believe that fixed maximum review periods are necessary to provide certainty and discipline in the merger review process. Most members of the Advisory Committee feel this would be extremely difficult to achieve under the U.S. system and might result in enforcement errors. There also is concern that maximum time periods would effectively turn into standard or minimum review periods. A majority of Advisory Committee members therefore recommend that alternative steps be taken to provide the greater certainty required for effective transaction planning. For example, the agencies could employ nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. For example, the Canadian Competition Bureau has addressed timing issues with "service standard" guidelines: 14 days for non-complex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The 5 month review period employed for very complex mergers coincides with the aggregated five-month review period employed by the EC for mergers that are subjected to second-phase investigations.

Targeted Reform in the United States: Notification Forms and Information Requests

1. The Advisory Committee encourages the FTC to implement changes to better focus the HSR form. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way lies in creating a model voluntary submission list that identifies the categories of data that merging parties usefully may submit in facially problematic cases.

2. Another useful practice that should be formalized is that of permitting the merging parties voluntarily to withdraw and refile the acquiring person's HSR form (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has been useful when the reviewing agency has been unable to clear a transaction within the initial 30-day review, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. Publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option and could alleviate concerns that doing so would only add an additional 30 days to the process.

3. When they issue a second request, the agencies should provide the merging parties (either in writing or orally) with their reasons for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the issuance of the second request will facilitate transparency in the merger review process and will expedite the process by further enabling the merging parties to focus on and respond to the agencies' concerns. Further, it will assist parties in understanding that the second request is based on genuine substantive concerns. In designing second requests, moreover, the agencies should tailor their requests for additional information to the issues prompting the need for further review.

4. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearings participants, among others, however, is that this reform helped reduce burdens only marginally. In attempting to identify the appropriate components of a useful and effective model second request, an after-the-fact audit of merger challenges could be undertaken. Such an audit could consider whether the agencies are requesting the right types of information and whether this information subsequently was used at trial (or if discovery tools are sufficient). The answers to these questions might enable the agencies to revise the model second request to reduce compliance burdens on businesses.

5. Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary among agency staff members and counsel for merging parties, and modification requests are sometimes not resolved in a timely fashion. In an attempt to institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating modifications to the scope of requests and to do so in a timely fashion. Success in this endeavor also requires a willingness to cooperate on the part of merging parties and their advisors.

6. When modification negotiations break down, parties should be encouraged to use the appeals process, which currently is used hardly at all. Concerns raised to the Advisory Committee about the appeals process include potential stigma from using it, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency. To this end, the Advisory Committee recommends that the agencies implement measures to make the appeals procedure more attractive to merging parties, including making the appeals process more expeditious, its outcome more transparent, and actively encouraging merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.

7. The Advisory Committee also considered ways to reduce foreign productions and translation requirements. The agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations of only those documents the

agencies deem particulary relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that in appropriate cases, the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

Targeted Reform in the United States: Multiple Review of Mergers

1. Shared power has the potential to generate inconsistent policy approaches within a single jurisdiction. As a result, it can make global harmonization efforts and cross-border cooperation more difficult. In addition, it imposes heightened uncertainty as to timing and outcome and further increases transaction costs. In its deliberations, the Advisory Committee identified a number of possible policy approaches to address these issues. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers to the DOJ and FTC to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators, to imposing timetables and deadlines on the merger review process, to non-legislated convergence strategies.

2. The Advisory Committee believes that the federal antitrust authorities are best positioned to conduct antitrust merger review. The majority of the Advisory Committee would remove competition policy oversight from the sectoral regulators and vest it exclusively with the federal antitrust enforcement agencies. At this juncture, other members advocate the creation of a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.

3. With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits. For example, appropriate cases may be challenges to transactions the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties agreed to waive confidentiality.

4. Other feasible approaches in the short run consist of soft convergence strategies and greater cooperation between agencies exercising concurrent jurisdiction over mergers to encourage the adoption of common analytical methods. Possibilities include creating working groups or representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions and encouraging reviewing bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt the DOJ/FTC Horizontal Merger Guidelines).

5. All Advisory Committee members agree that a number of issues relating to overlapping agency review deserve further study. Further studies should include analyzing the relationship among the DOJ, the FTC, and other federal and state regulators; identifying the differences in review processes with respect to both substantive approaches and procedure; assessing the expertise of the federal antitrust agencies to undertake merger analyses in regulated industries on the one hand, and the capacity of federal sectoral and state regulators to conduct antitrust analyses on the other; assessing the ramifications of a change in the status quo; and gathering the views of the reviewing agencies.

PRESS RELEASE

Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy

Monday, April 27, 2015

For Immediate Release

Office of Public Affairs

Applied Materials Inc. and Tokyo Electron Ltd. abandoned their plans to merge after the Department of Justice informed the companies that their remedy proposal failed to resolve the department's competitive concerns.

"The companies' decision to abandon this merger preserves competition for semiconductor manufacturing equipment," said Acting Assistant Attorney General Renata B. Hesse of the Justice Department's Antitrust Division. "The semiconductor industry is critically important to the American economy, and the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors."

The proposed merger of Applied Materials and Tokyo Electron would have combined the two largest competitors with the necessary know-how, resources and ability to develop and supply high-volume non-lithography semiconductor manufacturing equipment.

During the investigation, the division cooperated with the Korean Fair Trade Commission, China's Ministry of Commerce, Germany's Federal Cartel Office and competition agencies from several other jurisdictions.

Applied Materials, based in Santa Clara, California, is the largest provider of non-lithography semiconductor manufacturing equipment with approximately $9 billion in 2014 revenue.

Tokyo Electron, based in Tokyo, is the second-largest provider of non-lithography semiconductor manufacturing equipment with approximately $6 billion in 2014 revenue.

Updated February 4, 2016

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 15-513

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Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

The Justice Department's Antitrust Division and Federal Trade Commission (FTC) today jointly submitted a public comment to the Federal Energy Regulatory Commission (FERC) urging it to consider the competitive risks...

April 25, 2024

PRESS RELEASE

TopBuild Abandons Proposed Acquisition of SPI After Antitrust Division Concerns

TopBuild Corp. announced its decision today to abandon its proposed $960 million acquisition of its rival, SPI Parent Holding Company (SPI). The abandonment comes after the department's competition concerns.

April 22, 2024

PRESS RELEASE

Federal Agencies Launch Portal for Public Reporting of Anticompetitive Practices in Health Care Sector

The Justice Department, Federal Trade Commission (FTC) and the Department of Health and Human Services (HHS) today launched an easily accessible online portal for the public to report health care...

April 18, 2024

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PRESS RELEASE

Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates

Thursday, July 14, 2016

For Immediate Release

Office of Public Affairs

The Department of Justice announced today that the restructuring of the $1.5 billion transaction between Tullett Prebon Group Ltd. (Tullett Prebon) and ICAP plc addresses the Department's concerns that the transaction would violate Section 8 of the Clayton Act by creating an interlocking directorate. An interlocking directorate is where one person – or an agent of one person or company – sits on the board of directors of two competitors.

As originally structured, the transaction would have resulted in ICAP owning 19.9 percent of Tullett Prebon and having the right to nominate one member of Tullett Prebon's board of directors. Given that ICAP and Tullett Prebon would continue to compete after the transaction, the department had serious concerns that ICAP's ability to nominate a Tullett Prebon board member would create an interlocking directorate in violation of Section 8 of the Clayton Act. The revised agreement will provide that ICAP will not own any part of Tullett Prebon after the transaction and will have no right to nominate a member of Tullett Prebon's board of directors.

"Robust competition depends on competitors being actually independent of each other – that's what Section 8 requires," said Principal Deputy Assistant Attorney General Renata Hesse of the department's Antitrust Division. "As originally proposed, this deal would have violated that core principle – creating a cozy relationship among competitors."

Section 8 of the Clayton Act was enacted to provide a bright line rule prohibiting interlocking directorates which could otherwise facilitate coordination among competitors. Section 8 serves a prophylactic purpose "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates," according to *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

During the investigation, the division cooperated with the United Kingdom's Competition and Markets Authority, the Australian Competition and Consumer Commission and the Competition Commission of Singapore.

Tullett Prebon, a publicly-held British corporation headquartered in London, United Kingdom, and operating in the United States, is a leading provider of voice, hybrid and purely electronic brokerage services across asset classes. Tullett Prebon reported 2015 annual revenues of $1.18 billion.

ICAP is also headquartered in London and operates in the United States. After the transaction, the company will be called NEX Group Ltd. and will focus on providing electronic trading platforms for numerous asset classes and associated market data and services. ICAP reported annual revenues of $1.78 billion for its fiscal year ending March 2016.

Updated July 14, 2016

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 16-811

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PRESS RELEASE

Four Additional States Join Justice Department's Suit Against Apple for Monopolizing Smartphone Markets

The Attorneys General of Indiana, Massachusetts, Nevada and Washington today joined the civil antitrust lawsuit brought by the Justice Department, 15 states and the District of Columbia against Apple in...

June 11, 2024

SPEECH

Deputy Assistant Attorney General Andrew Forman Delivers Remarks at the 2024 Hal White Antitrust Conference

Washington

June 3, 2024

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Assistant Attorney General Jonathan Kanter Delivers Remarks at the Promoting Competition in Artificial Intelligence Workshop

Stanford

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SPEECH

Assistant Attorney General Makan Delrahim Delivers Remarks at the Public Workshop on Competition in Labor Markets

Monday, September 23, 2019

Location

Washington, DC
United States

Good morning and welcome to the Robert F. Kennedy Main Justice Building. I am so pleased to open today's workshop on competition in labor markets.

This workshop has been a long time in the making. Late last year, we set out to facilitate a conversation between labor and IO economists, antitrust practitioners, academics, and policymakers for a multi-dimensional discussion about the role of antitrust enforcement in labor markets. By hearing from experts who focus on different aspects of worker welfare, the Division could obtain a more nuanced understanding of the marketplace for the employment services of the American worker, and for the role of antitrust enforcement therein.

I supported that effort wholeheartedly, and I am thrilled to see that vision realized today. I would like to thank Doha Mekki, one of our front office Counsel to the Assistant Attorney General, for her leadership in organizing today's workshop. Doha's passion for the areas of labor and antitrust are second to none, and without her hard work we would not have such an impressive array of speakers here today.

Thank you to our exceptional participants and their respective organizations for agreeing to participate in this program. Indeed, the value of today's panels and presentations is two-fold. First, it will help inform our competition enforcement and advocacy in this area. Second, thoughtful discussion between people with wide-ranging viewpoints, experiences, and areas of expertise is an essential public good. It is the bedrock of our democracy and a hallmark of an open society.

I thank you for being with us today and I look forward to hearing your perspectives.

That antitrust law applies to labor markets is at once a powerful statement -- and an admittedly dispassionate one.

Broadly speaking, there is something special about work. People are the very objects of the law's solicitude and, for many Americans, one's labor is essential to his or her sense of dignity. Labor is both a unit with economic value and an expression of identity or values.

This reminds me of a story I read in a speech by former Attorney General Robert Jackson. In 1942, shortly after he became an Associate Justice of the Supreme Court, Jackson recounted a parable about three stonecutters who were asked to describe their work. The first stonecutter focuses on how the job benefits him. He says, "I am earning a living." The second narrowly describes his personal task: "I am cutting stone." The third man lights up as he explains what the work means to others: "I am helping to build a cathedral."

Other great Americans also attached personal values to labor. For example, in 1859, Abraham Lincoln gave an address before the Wisconsin State Agricultural Society in which he famously said, "Labor is prior to and independent of capital."

Of course, Lincoln's conception of "free labor" was Lockean and grounded in the view that each person should have the right to enjoy the fruits of his or her own labor. For him, labor was an essential aspect of property rights. As he put it, albeit with more flourish, "I always thought the man that made the corn should eat the corn."

Any good antitrust lawyer will tell you the best part of our field is learning about product markets. From rocket parts to digital markets and everything in between, we get to learn about products and services that have a discernable impact on the daily lives of American consumers. During the 129 years of Sherman Act enforcement, and 105 years of Clayton Act enforcement, labor cases have comprised a smaller portion of our docket than enforcement actions involving tangible goods and services.

A labor market, like any other, is ripe for manipulation due to potential anticompetitive conduct and transactions. Accordingly, enforcer sand courts alike have reaffirmed that antitrust law seeks to preserve the free market opportunities of buyers and sellers of employment services.

Indeed, the Antitrust Division has taken corporations to court in wage-fixing and no-poach agreements in order to give meaning to this fundamental proposition of law.

The idea that unlawful corporate power can harm both buyers and sellers rests in the foundation of U.S. antitrust law. In supporting the passage of the law that came to bear his name, Senator John Sherman of Ohio warned that monopoly power:

> [C]an control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. [...] The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and . . . by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals.

The concept of employer collusion was not even a novel idea in 1890 when the Sherman Act was passed. More than 100 years earlier, Adam Smith observed:

> We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual price.

That Adam Smith is simultaneously revered as the father of free-market economics and also someone who was concerned about the position of workers parallels another important point: sound competition enforcement and policy can help promote a competitive market place for both buyers and sellers of employment services.

In my view, Smith's observations and worldview offer a broader lesson to all of us: labor competition matters do not belong to the political left or the ideological right. They are not inherently pro-worker or pro-business. Labor issues, broadly speaking, are quite complex. While antitrust is not a panacea for every issue facing the American worker, we know that timely and effective antitrust enforcement can go a long way towards promoting robust competition in the marketplace for employment services. Such action is grounded in the rule of law, and faithful to Congress's intent.

Undoubtedly, the history of antitrust enforcement in labor markets has been uneven. While several early cases marshaled the antitrust laws against labor unions, in the modern era, enforcement has largely focused on mergers, information exchanges, and collusive agreements.

For example, in *United States v. Utah Society for Healthcare Human Resources Administration*, the Division sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current wage information about registered nurses. The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low. In 2007, the Division sued the Arizona Hospital and Healthcare Association, a trade group acting on behalf of Arizona hospitals, that used a registry program to fix certain terms and conditions about temporary nursing personnel. It also set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses.

Between 2010 and 2012, the Division sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and eBay for entering into unlawful no-poach agreements. Most recently, the Division sued two train equipment manufacturers, Knorr-Bremse and Wabtec, for entering into unlawful no-poach agreements.

With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge. Those cases make clear that the consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market, not just a downstream product market.

One labor competition topic that is not on today's workshop agenda is criminal enforcement. While we cannot comment on the status or the timing of our criminal no-poach and wage-fixing investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division. As former Attorney General Robert Jackson observed, justice is neither automatic nor blind. The success of the department in this initiative is not based on quantitative metrics, but on the qualitative performance of our investigative work. That is especially true in matters implicating an individual's liberty interest.

Today's workshop will explore thought-provoking issues and trends at the intersection of competition law and labor.

After a framing presentation about the economics of labor markets and key questions for the workshop, Dr. Ron Drennan, one of the Division's most talented economists, will moderate a discussion about approaches to defining labor markets. After a lunch break, guests will return for the afternoon session, which will open with remarks from Mr. Ramogi Huma of the National College Players Association. A former UCLA football player himself, he will talk about his experience advocating for college athletes, a fascinating and distinctive group of laborers, in antitrust cases and through policy proposals. After Mr. Huma's remarks, a truly stellar panel will discuss agreements affecting worker mobility in complex business settings, with special focus on franchises and the "gig" economy. After a short break, we will conclude the day's substantive programming with a panel about the statutory and non-statutory antitrust exemptions for collective bargaining and other labor union activity. That panel will feature outstanding panelists, including lawyers, a professor, and a senior official from the U.S. Department of Labor.

As you may know, today's workshop is the first in a two-part series that we are hosting in partnership with the Federal Trade Commission. The second day of the workshop will be hosted by the FTC and will focus on issues associated with the use of non-compete clauses in employment contracts. The workshop will examine the current state of economic research on the effects of non-compete clauses, and whether additional research would allow the agencies to better understand the short-term and long-term micro and macro effects of such clauses. We and the Commission will provide the date and agenda for the second workshop in an upcoming announcement.

Workshops like these give our agencies the opportunity to have a candid substantive dialogue with stakeholders and thought leaders to ensure that we have the benefit of their expertise and experience. They also help identify and incentivize areas for continuing research and study.

Again, I want to thank each of our panelists for your willingness to participate in this workshop and for the perspectives you bring. I look forward to the discussion.

With that, let me now introduce Professors Ioana Marinescu and Ellie Prager. Dr. Marinescu is a labor economist and a Professor in the School of Social Policy and Practice at the University of Pennsylvania. Her research expertise includes antitrust and workers, online job search, employment contracts, unemployment insurance, and policies designed to enhance employment, productivity, and economic security. She is also a faculty research fellow at the National Bureau of Economic Research. Dr. Prager is a Professor at the Kellogg School of Management at Northwestern University, where she teaches data analysis and economics. Her research focuses on predetermination, insurance plan design, and the drivers and effects of mergers in the health care sector. In 2018, she co-authored a significant paper that measured wage growth for workers following consolidation by examining a decade worth of hospital mergers. We could not have asked for better presenters to kick off our event. Thank you, Ioana and Ellie. I'll turn it over to you.

Speaker

[Former Assistant Attorney General, Makan Delrahim]

Topic

ANTITRUST

Attachment

Remarks as Delivered [PDF, 53 KB]

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Updated September 23, 2019

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SPEECH

Associate Attorney General Vanita Gupta Delivers Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium

Tuesday, September 14, 2021

Location

Washington, DC
United States

Remarks as Prepared

Thank you for that kind introduction and for inviting me to speak at the 15th Annual Global Antitrust Enforcement Symposium hosted by Georgetown Law School. I bring greetings from the Attorney General.

As you may know, the Attorney General has said that antitrust law was his "first love in law school." In defining the Justice Department's top priorities, the Attorney General has placed reinvigorating antitrust enforcement at the center of the department's focus on "Ensuring Economic Opportunity and Fairness."

As the Associate Attorney General, I have the privilege of supervising some of the core litigating divisions of the department – the Antitrust Division, Civil Division, Civil Rights Division, Environment & Natural Resources Division and Tax Division – as well as the department's grantmaking components that work closely with state and local jurisdictions to support criminal justice issues, victims services and the prevention of violence against women. It is a portfolio that touches upon a wide range of issues: everything from voting rights and police practices to competition and consumer protection; as well as efforts to ensure that we improve the quality of indigent defense and enhance civil legal representation for low-income litigants.

I am excited to be overseeing the Antitrust Division at this dynamic time in antitrust. What was once regarded as a narrow, highly technical field has become an important part of our national dialogue. The concentration of economic power is on the minds of members of Congress and people across America. It has captured headlines and the attention of governments around the world. What explains this renewed interest in antitrust? I think it's the realization that robust antitrust enforcement is critically important for advancing economic justice. As President Biden said in his recent Executive Order on Competition, "the American promise of a broad and sustained prosperity depends on an open and competitive economy."

I have spent my entire career pursuing justice for the most vulnerable among us, including communities of color, immigrants and refugees, victims of violence and people who are incarcerated. I believe we are all better off when our country lives up to its promise of liberty and justice for all. When we right our past wrongs. When we pursue fairness and due process.

That is why it is so important that the department pursue economic justice through vigorous antitrust enforcement. Too often, powerful companies exploit consumers and tilt the playing field in favor of the already powerful. But everyone deserves to benefit from a free, fair and competitive economy. That includes anyone who buys beef, pork, chicken, tuna or dairy; workers who haven't had a raise or want better working conditions; and families navigating health care or insurance markets. Competition benefits consumers, workers, entrepreneurs and innovators. Competition benefits everyone.

Unlawful monopolies only benefit monopolists. A lack of competition means fewer new products and higher prices. It means the owners of powerful firms make more without having to grow the size of the pie for anyone else. As the President's Executive Order explained, weak competition "den[ies] Americans the benefits of an open economy and widen[s] racial, income, and wealth inequality." I believe our country can do better.

The department's antitrust enforcement efforts prevent and restrain the abuse of market power by dominant corporations, resulting in more choice, more products in people's hands and more money in their wallets. Robust competition grows the size of the pie for everyone.

We therefore welcome Congress' interest in providing new tools and resources for antitrust enforcement. The department also stands ready to work with other federal agencies in implementing the President's Executive Order on Competition and in advancing sound competition policy more generally. But we recognize that antitrust policy is not a solution for all of the economic and social issues facing us today. That is why we must build strong partnerships with other federal agencies to combine competition policy with a whole-of-government approach to building a more fair and inclusive economy.

This work is urgently needed. In many industries, consolidation is greater now than it was even just 20 years ago. For example, today, dominant health systems can approach 50% control of a relevant local or regional market. The largest shipping alliances control 80% of the market. The four largest beef packers have a similar share in their industry. Major airlines control over 80%. Millions of Americans have only one or two high-speed internet providers available to them. America has ten thousand fewer banks today than it did in the mid-1980s, and since the Great Recession, 25% of bank branch closures in rural communities occurred in communities of color. A few digital platforms exercise an incredible control over what we read, how we communicate and what happens to our personal information.

This kind of consolidation can be detrimental to our economy. And the harm is far from abstract or academic. It directly affects millions of families by growing the digital divide, creating banking deserts in too many communities of color and making it more difficult or expensive for Americans to eat, to travel or to go to the doctor.

The list of industries that are increasingly consolidated is long, but the trend is not inevitable. The fair enforcement of our country's antitrust laws can help stop, and in some cases, reverse this trend. Antitrust enforcement can also deter conduct that forces consumers to pay higher prices and forces workers to accept lower wages.

The Justice Department will therefore vigorously enforce the antitrust laws to protect consumers, workers and less advantaged communities, and to promote a more free and fair economy for everyone. That starts with many of the initiatives already underway at the department.

Take digital markets. Many have raised concerns that "digital gatekeepers" maintain their position through a combination of anticompetitive mergers and outright anticompetitive conduct. We take these concerns seriously, and the department has made it a priority to understand and, where appropriate, address them.

Acquisitions involving potential or nascent competitors are one category of particularly concerning transactions because they undermine competition that can disrupt monopolies. As the D.C. Circuit recognized in *Microsoft*, acquiring firms before they can become a competitor — sometimes called a "killer acquisition" — is a classic tool for monopolists. The department's case against Visa's proposed acquisition of Plaid is a prime example. Our investigation revealed that Visa was trying to buy up a rival before it could disrupt the industry and so we sued to block the merger. In response, the parties abandoned their transaction. Plaid now remains an independent company.

The department will not shy away from similar challenges in the future. Killer acquisitions can sideline or silence ideas that might eliminate the barriers keeping too many Americans out of banking, housing and health care markets. We will therefore closely scrutinize acquisitions involving dominant firms and would-be rivals. In doing so, we should be careful not to discourage investment in new startups. But we should also remember that startups cannot thrive without a competitive economy.

The department's lawsuit against Google for monopolizing search and search advertising markets remains a major priority as well. Our complaint focuses on how Google's anticompetitive conduct has harmed competition, similar to how Microsoft did decades ago in favoring Internet Explorer and locking out Netscape. It also highlights how Google's anticompetitive conduct has affected a huge range of consumer choices.

The bottom line is that we will not stand by and watch dominant digital platforms thwart competition. Digital markets may involve new technologies, but the tactics of these digital platforms are nothing new. Buying would-be rivals. Boxing out firms who won't be bought. Leveraging a monopoly position in one market to grow a position in another. The Department of Justice has dealt with these tactics from the likes of Standard Oil and Microsoft. We will do so again whenever the facts and the law demand action to protect the economy, no matter how powerful the violator.

Our merger enforcement must remain vigilant in the range of other industries undergoing consolidation as well. Most of us understand that when we have fewer choices for where to work or where to buy goods then prices go up and quality goes down. Corporate mergers work the same way. They can leave Americans with fewer choices, shifting power away from consumers and workers and concentrating it among fewer and fewer large companies. That is particularly true when mergers leave just a few competitors in the market. For example, in July 2021, the department successfully blocked a merger between Aon and Willis Towers Watson, two of the three largest insurance brokers in the world. The merger would have turned an industry dominated by a "Big Three" into an industry dominated by a "Big Two." It would've left companies that rely on insurance brokers to lower the cost of health care and retirement plans with little to no alternatives. Ultimately, that means higher prices and lower quality for employees and retirees.

The department's success in stopping the merger of Aon and Willis Towers Watson was an important victory. It is also an important warning sign to companies contemplating similar deals. I know Antitrust Division officials have said this before, but I hope companies are, in this moment, paying close attention: anticompetitive mergers should not make it out of the boardroom. If they do, we will not hesitate to challenge those mergers. And, if we litigate, the department – from leadership to our extremely talented career attorneys, economists and staff – is committed to winning these cases.

The department is also committed to criminally prosecuting executives and companies who violate the antitrust laws. When executives or companies make the decision to collude, rather than compete, they cheat consumers, workers and taxpayers out of the benefits of market competition.

The department has been particularly focused on executives and businesses who fix wages or allocate workers through so-called "no-poach" agreements. For example, the department recently indicted a medical care center "for agreeing with competitors not to solicit senior-level employees." We took a similar approach with a healthcare staffing company and one of its executives who entered into agreements with competitors not to raise wages for nurses in a Las Vegas-area school district. These kinds of agreements deprive people of the chance to bargain for better work or better working conditions. They are also per se illegal. The department is therefore committed to investigating, prosecuting and ultimately ending these kinds of practices. American workers who are struggling to make ends meet may not always be able to stand up to their employer, but the department can and will.

Our criminal enforcement efforts also demonstrate that the department will stand up for American consumers. For example, we have prosecuted pharmaceutical companies and their executives for colluding to fix the price of generic drugs. We also successfully prosecuted several companies who fixed the price of canned tuna. And we have pursued companies and executives who fixed prices for broiler chicken products, including Pilgrim's Pride, who pleaded guilty in February 2021 and was fined $107 million for its role in the conspiracy. At the end of the day, Americans should not have to pay more for food, medicine or anything else because executives decide to enrich themselves at the expense of American families.

Nor should American taxpayers have to pay more because executives distort the public procurement process. That is why the department has cracked down on bid rigging and other forms of collusion where federal, state and local governments — and ultimately taxpayers — are the victim.

This underscores another important priority for our criminal program. To deter criminal antitrust violations, the consequences cannot be felt by the companies alone. When wrongdoing comes from the C-Suite, we will hold executives responsible.

The department is also committed to working with our international partners on civil and criminal antitrust enforcement. We communicate with our international counterparts nearly every day to identify issues of common interest, strengthen our approach on those issues, and avoid inconsistent outcomes. That includes cooperating with 14 jurisdictions on 21 civil merger and non-merger matters just since January.

This work is particularly important when it comes to digital markets. International dialogue and discussion in these circumstances is not just a good idea — it is necessary to ensure that policies across different jurisdictions promote competition and aren't incompatible with one another. While much of this work is done in bilateral discussion with our partners, we are also active in multilateral forums. For example, the division recently participated in an Organisation for Economic Co-operation and Development (OECD) hearing that focused on data portability and interoperability. The division has also been an active participant in the International Competition Network (ICN), including its ongoing project on the intersection of competition, consumer protection and privacy.

In addition to working with our international partners, we work with other federal agencies and state and local governments here at home. This kind of approach is essential for addressing many of the issues I've talked about today.

In many industries, executive agencies can use existing authority to constrain monopoly power and promote competition. That is the focus of the President's Executive Order on Competition, which the department is working to implement alongside our executive agency partners.

The department has always worked with other federal agencies to advance sound competition policy, from filing public comments to providing technical assistance and coordinating on merger reviews. But the Executive Order has expanded those efforts. For example, the Antitrust Division has been providing technical assistance to the U.S. Department of Agriculture (USDA) as it strengthens rules implementing the Packers & Stockyards Act, the 100-year-old law that was originally designed to protect poultry and hog farmers and cattle ranchers from unfair, deceptive and anticompetitive practices in the meat markets. We are also strengthening partnerships with agencies who have the ability to review and approve transactions that can affect competition. Taking a consistent approach in enforcing the antitrust laws and other agencies' public interest mandates is critical for addressing market concentration, removing barriers to entry and promoting competition.

All of these efforts — the department's commitment to vigorously enforcing the antitrust laws, our partnerships with international competition authorities and our cross-department collaborations to advance competition — underscore three key points.

First, the Antitrust Division's career staff has done an extraordinary job, particularly during the challenges of the pandemic, to serve American consumers, workers and taxpayers, and to help build a more free, fair and competitive economy. Their commitment to the Antitrust Division's mission is inspiring and getting to work with these dedicated public servants is one of the best parts of my job.

Second, the benefits of competition are an essential part of securing a free and fair economy. As John Sherman said long ago, "[i]f we will not endure a king as political power, we should not endure a king over the production, transportation and sale of any of the necessities of life." When a company undermines competition, they make it more difficult for Americans to afford their necessities. Raising prices on chicken means more families struggle to put food on the table. Lowering wages could be the difference between someone working one job or two.

At the same time, markets that lack competition shift power from consumers and workers to powerful corporations. Promoting competition through antitrust enforcement levels that playing field and plays a critical part in promoting economic opportunity and equity.

Finally, the department takes antitrust enforcement seriously. That means if conduct threatens to harm competition, we will dedicate the time and energy necessary to challenge it. Companies, executives, boardrooms and shareholders should take note: if your company approves a merger that may lessen competition, we will block it. If you fix prices, rig bids or divide markets, we will prosecute you whether your scheme cheats consumers or harms workers. And if you monopolize markets to maintain a dominant position, even in a high-tech industry, we will intervene to put a stop to it. The department's responsibility to pursue justice in the American economy demands no less.

Thank you.

Speaker

Vanita Gupta, Associate Attorney General

Topic

ANTITRUST

Components

Antitrust Division | Office of the Associate Attorney General

Updated March 24, 2022

Related Content

PRESS RELEASE

Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

The Justice Department's Antitrust Division and Federal Trade Commission (FTC) today jointly submitted a public comment to the Federal Energy Regulatory Commission (FERC) urging it to consider the competitive risks...

April 25, 2024

PRESS RELEASE

TopBuild Abandons Proposed Acquisition of SPI After Antitrust Division Concerns

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April 22, 2024

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April 18, 2024

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U.S. Department of Justice

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PRESS RELEASE

Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster

Tuesday, November 2, 2021

For Immediate Release

Office of Public Affairs

Merger Would Create Publishing Behemoth, Harming Authors and Consumers

The U.S. Department of Justice filed a civil antitrust lawsuit today to block Penguin Random House's proposed acquisition of its close competitor, Simon & Schuster. As alleged in the complaint filed in the U.S. District Court for the District of Columbia, this acquisition would enable Penguin Random House, which is already the largest book publisher in the world, to exert outsized influence over which books are published in the United States and how much authors are paid for their work.

"The complaint filed today to ensure fair competition in the U.S. publishing industry is the latest demonstration of the Justice Department's commitment to pursuing economic opportunity and fairness through antitrust enforcement," said Attorney General Merrick B. Garland.

"Books have shaped American public life throughout our nation's history, and authors are the lifeblood of book publishing in America. But just five publishers control the U.S. publishing industry," the Attorney General continued. "If the world's largest book publisher is permitted to acquire one of its biggest rivals, it will have unprecedented control over this important industry.

American authors and consumers will pay the price of this anticompetitive merger – lower advances for authors and ultimately fewer books and less variety for consumers."

"In stopping Penguin Random House from extending its control of the U.S. publishing market, this lawsuit will prevent further consolidation in an industry that has a history of collusion," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "I want to thank the Attorney General and senior leadership of the department for their support of antitrust enforcement."

As described in the complaint, publishers compete to acquire manuscripts, which they edit, package, market, distribute and sell as books. Publishers pay authors advances for the rights to publish their books. In most cases, the advance represents an author's total compensation for their work.

The publishing industry is already highly concentrated, as the complaint details. Just five publishers, known as the "Big Five," are regularly able to offer high advances and extensive marketing and editorial support, making them the best option for authors who want to publish a top-selling book. Most authors aspire to write the next bestseller and selling their rights to the Big Five offers the best chance to do so.

While smaller publishers occasionally win the publishing rights to anticipated top-selling books, they lack the financial resources to regularly pay the high advances required and absorb the financial losses if a book does not meet sales expectations. Today, Penguin Random House, the world's largest publisher, and Simon & Schuster, the fourth largest in the United States, compete head-to-head to acquire manuscripts by offering higher advances, better services and more favorable contract terms to authors. However, as the complaint alleges, the proposed merger would eliminate this important competition, resulting in lower advances for authors and ultimately fewer books and less variety for consumers.

The complaint alleges that the acquisition of Simon & Schuster for $2.175 billion would put Penguin Random House in control of close to half the market for acquiring publishing rights to anticipated top-selling books, leaving hundreds of individual authors with fewer options and less leverage. According to its own documents as described in the complaint, Penguin Random House views the U.S. publishing market as an "oligopoly" and its acquisition of Simon & Schuster is intended to "cement" its position as the dominant publisher in the United States.

Courts have long recognized that the antitrust laws are designed to protect both buyers and sellers of products and services, including, as relevant here, authors who rely on competition between the major publishers to ensure they are fairly compensated for their work. As the complaint makes clear, this merger will cause harm to American workers, in this case authors, through consolidation among buyers – a fact pattern referred to as "monopsony."

The Antitrust Division's Horizontal Merger Guidelines lay out a straightforward framework to analyze monopsony cases, and under those guidelines this transaction is presumptively anticompetitive. Simply put, if Penguin Random House acquires Simon & Schuster, the two publishers will stop competing against each other. As a result, authors will be paid less for their work. Authors who are paid less write less, which, in turn, means that the quantity and variety of books diminishes too.

Penguin Random House LLC is a subsidiary of Bertelsmann SE & Co. KGaA and is headquartered in New York, New York. Penguin Random House publishes 2,000 new trade books in the United States annually. In 2019, Penguin Random House reported revenues of $2.4 billion from U.S. publishing.

Simon & Schuster Inc. is a subsidiary of ViacomCBS Inc. and is headquartered in New York, New York. Simon & Schuster publishes 1,000 new trade books in the United States annually. In 2019, Simon & Schuster reported revenues of $760 million from U.S. publishing.

Updated November 2, 2021

Attachment

Complaint - PRH and S&S.pdf [PDF, 626 KB]

Topic

ANTITRUST

Components

Antitrust Division | Office of the Attorney General

Press Release Number: 21-1081

Related Content

PRESS RELEASE

Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

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PRESS RELEASE

Departments of Justice and Labor Strengthen Partnership to Protect Workers

Thursday, March 10, 2022

For Immediate Release

Office of Public Affairs

The Agencies Will Enhance Enforcement Efforts Through Greater Coordination and Information Sharing, Cross-Agency Training and Outreach

The Justice Department's Antitrust Division and the Labor Department signed a memorandum of understanding (MOU) today to strengthen the partnership between the two agencies to protect workers from employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility. The objectives of the President's Executive Order on Promoting Competition in the American Economy will be supported by this continued partnership.

"Protecting competition in labor markets is fundamental to the ability of workers to earn just rewards for their work, to live out the American dream, and to provide for their families," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "By cooperating more closely with our colleagues in the Department of Labor, we can share enforcement information, collaborate on new policies, and ensure that workers are protected from collusion and unlawful employer behavior. Protecting the right of workers to earn a fair wage is core to the work of both our agencies, and it will continue to receive extraordinary vigilance from the Antitrust Division."

"Anticompetitive practices harm both workers and high road employers," said Solicitor of Labor Seema Nanda. "The Department of Labor looks forward to collaborating with the Antitrust Division to ensure there is a level playing field in the labor market and that workers receive their fair pay. Through this partnership, we will work together to tackle unlawful behavior that we are seeing across industries – including misclassification and wage fixing. This is an important moment in recognizing that protecting competition protects workers. Working with the Justice Department to root out these unscrupulous practices will help us empower workers and improve job quality."

The Departments of Justice and Labor share an interest in promoting competitive labor markets. Both agencies are charged with protecting workers who have been harmed or may be at-risk of being harmed by anticompetitive and unlawful conduct, including through the use of business models designed to evade legal accountability and business practices, such as illegal agreements to fix wages or inappropriate use of noncompete agreements, that cause direct harm to employees.

The MOU signed today by Assistant Attorney General Kanter and Solicitor Nanda announced new steps the two agencies will take to strengthen this partnership. Through greater coordination in information sharing, enforcement activity and training, the two agencies will maximize the enforcement of federal laws, including worker protection laws under the Labor Department's jurisdiction and the antitrust laws enforced by the Justice Department's Antitrust Division. In particular, this MOU will allow the two agencies to refer cases of potentially illegal activity to each other, as appropriate, and to coordinate on policy, strategy and training.

This announcement follows the Department of Treasury releasing a report March 7 highlighting how lack of competition affects workers' wages and opportunities. The MOU is a further step for the departments in addressing some of the challenges highlighted in the report.

The Labor Department is responsible for protecting and empowering workers through enforcing and administering standards on wage and hour, mine safety, workplace-related benefits, occupational safety and health, and whistleblower protection. The Justice Department is charged with promoting and protecting competition by enforcing the antitrust laws of the United States.

Information about possible antitrust violations or potential anticompetitive activity should be reported to the Antitrust Division Citizen Complaint Center. To learn more about how to seek whistleblower protection under the Criminal Antitrust Anti-Retaliation Act, please go to https://www.whistleblowers.gov/complaint_page.

Updated March 10, 2022

Attachment

DOL-DOJ Antitrust MOU.pdf [PDF, 170 KB]

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 22-219

Related Content

PRESS RELEASE

Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

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PRESS RELEASE

Justice Department and National Labor Relations Board Announce Partnership to Protect Workers

Tuesday, July 26, 2022

For Immediate Release

Office of Public Affairs

Agencies Will Enhance Enforcement Efforts Through Greater Coordination and Information Sharing, Cross-Agency Training and Outreach

The Justice Department's Antitrust Division and the National Labor Relations Board (NLRB) signed a memorandum of understanding (MOU) today to strengthen the partnership between the two agencies to better protect competitive labor markets and ensure that workers are able to freely exercise their rights under the labor laws. By strengthening their partnership, the agencies also achieve the objectives of the President's Executive Order on Promoting Competition in the American Economy just days after the Order's one-year anniversary.

"Protecting competition in labor markets is fundamental to the ability of workers to earn just rewards for their work, to live out the American dream, and to provide for their families," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "By cooperating more closely with our colleagues in the NLRB, we can share information on potential violations of the antitrust and labor laws, collaborate on new policies and ensure that workers are protected from collusion and unlawful employer behavior. As the department noted in the amicus brief we submitted in the NLRB's recent *Atlanta Opera* matter, we support the Board's ongoing efforts to update its guidance to ensure that workers are properly classified under the labor laws. Protecting the right of workers to earn a fair wage is core to the work of both our agencies, and it will continue to receive extraordinary vigilance from the Antitrust Division."

"Under the National Labor Relations Act (NLRA), workers have the right to organize to improve their pay and working conditions," said NLRB General Counsel Jennifer Abruzzo. "When businesses interfere with worker organizing, either through creating structures designed to evade labor law or through anticompetitive practices, it hinders our economy and our democracy. This MOU will strengthen the federal government's ability to effectively stop this kind of unlawful activity and, therefore, to better protect workers' right to freely associate with one another to improve their wages and working conditions and to collectively bargain through freely chosen representatives."

The Department of Justice and the NLRB share an interest in promoting open and competitive labor markets, including through protecting American workers from collusive or anticompetitive employer practices and unlawful interference with employees' right to organize. Through greater coordination in information sharing, enforcement activity and training, the two agencies will maximize the enforcement of federal laws, including the labor laws under the NLRB's jurisdiction and the antitrust laws enforced by the Justice Department's Antitrust Division. In particular, this MOU will allow the two agencies to refer to each other, as appropriate, and to coordinate on policy, strategy and training.

Information about possible antitrust violations or potential anticompetitive activity should be reported to the Antitrust Division Citizen Complaint Center. To learn more about how to seek whistleblower protection under the Criminal Antitrust Anti-Retaliation Act, please go to https://www.whistleblowers.gov/complaint_page.

Workers who believe that their labor rights have been violated can call 1-844-762-6572 for assistance filing an unfair labor practice charge. Or they can contact their closest NLRB Field Office or submit a charge on the NLRB's website.

Updated July 26, 2022

Attachment

Memorandum of Understanding [PDF, 1 MB]

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 22-802

Related Content

PRESS RELEASE

Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

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PRESS RELEASE

Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates

Thursday, March 9, 2023

For Immediate Release

Office of Public Affairs

Antitrust Division Continues to Focus on Competitors Sharing Company Directors in Violation of Section 8 of the Clayton Act

The Justice Department announced today that five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to the Antitrust Division's enforcement efforts around Section 8 of the Clayton Act (Section 8). Section 8, which Congress made a *per se* violation of the antitrust laws, prohibits directors and officers from serving simultaneously on the boards of competitors, subject to limited exceptions. Today's announcement brings the number of interlocks unwound or prevented as a result of the division's recent efforts to at least thirteen directors from ten boards.

"Enforcement of Section 8 will continue to be a focus for the division just as Congress intended," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "We will continue to enforce the antitrust laws when necessary to address illegal board interlocks."

The following companies and directors unwound interlocks or declined to appoint board members, without admitting liability:

- **Qualys, Inc., SumoLogic, Inc., and F5, Inc.** – Qualys, SumoLogic, and F5 are providers of cloud security assessments, audit and compliance services, and firewall and monitoring products and services. One director served simultaneously on the boards of all three companies. After the division expressed concerns about the alleged interlock, the director recently resigned from Qualys's board and declined to stand for reelection to F5's board.
- **N-able, Inc., Dynatrace, Inc., and SolarWinds Corp.** – N-able, Dynatrace, and SolarWinds are software companies. Representatives of the investment firm Thoma Bravo sat on all three companies' boards. As the department previously announced in October 2022, three Thoma Bravo representatives resigned from the SolarWinds's board in response to the division's concerns about the alleged interlock between Dynatrace and SolarWinds. Shortly thereafter, in November 2022, two separate Thoma Bravo designees resigned from the N-able board.
- **Brookfield Asset Management Inc. and American Equity Investment Life Holding Company (AEL)** – AEL and a Brookfield Asset Management subsidiary's wholly-owned company American National are both insurance companies. Brookfield and/or its subsidiary appointed the officers or directors on the American National board. Additionally, the Brookfield subsidiary has the contractual right to appoint a director to the AEL board, and in December 2022, the Brookfield subsidiary announced that it would exercise that right. After the division raised concerns regarding the potential interlock, the Brookfield subsidiary announced it had changed course and it was withdrawing its proposed nomination to the AEL board.
- **Sun Country Airlines Holdings, Inc. and Atlas Air Worldwide Holdings, Inc.** – Sun Country and Atlas Air both provide crew, maintenance, and insurance for domestic air freight routes. In August 2022, an investment group led by Apollo Global Management, Inc. proposed acquiring all of Atlas Air's outstanding shares. At the time, two Apollo-affiliated individuals sat on the Sun Country board of directors. After the division raised concerns regarding a potential interlock arising from Apollo's proposed acquisition of Atlas Air, the two Apollo-affiliated directors resigned from the Sun Country board.

Anyone with information about potential interlocking directorates or any other potential violations of the antitrust laws is encouraged to contact the Antitrust Division's Citizen Complaint Center at 1-888-647-3258 or antitrust.complaints@usdoj.gov.

Updated March 9, 2023

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 23-263

Related Content

PRESS RELEASE

Justice Department and OSHA Issue Statement on Non-Disclosure Agreements That Deter Reporting of Antitrust Crimes

Today, the Justice Department's Antitrust Division and Department of Labor, Occupational Safety and Health Administration (OSHA), jointly affirmed that corporate non-disclosure agreements (NDAs) that deter individuals from reporting antitrust crimes...

January 14, 2025

PRESS RELEASE

Justice Department Sues KKR for Serial Violations of Federal Premerger Review Law

The Justice Department today filed a civil lawsuit against KKR & Co. Inc. and over a dozen of its investment advisors and funds (collectively, KKR) for repeatedly flouting the premerger...

January 14, 2025

PRESS RELEASE

Four Defendants Plead Guilty in Ongoing Bid-Rigging, Fraud and Bribery Investigation Related to U.S. Government IT Purchases

Four defendants pleaded guilty in the District of Maryland for their roles in schemes to rig bids, defraud the government and pay and receive bribes in connection with the sale...

January 14, 2025

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PRESS RELEASE

Antitrust AAG Kanter Statement After Adobe and Figma Abandon Merger

Monday, December 18, 2023

For Immediate Release

Office of Public Affairs

Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division issued the following statement after Adobe Inc. abandoned its proposed acquisition of Figma Inc.:

"The Antitrust Division remains committed to protecting competition in technology markets. The decision to abandon this acquisition ensures that designers, creators, and consumers continue to get the benefit of the rivalry between the two companies going forward. I am grateful for the tireless efforts of our talented staff of lawyers, economists, paralegals, and others at the Antitrust Division who conducted a thorough investigation of this proposed merger and do such a tremendous job safeguarding competition."

Updated December 18, 2023

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 23-1439

Related Content

PRESS RELEASE

Justice Department and FTC Submit Joint Comment to FERC Explaining that Common Ownership by Investment Companies Can Raise Competition Concerns

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Budget and Performance

Office of the Inspector General Reports

Inspector General Audits/Reports | Reporting Evidences of Waste, Fraud or Abuse to the IG

Agency Financial Reports

2023 | 2022 | 2021 | 2020 | 2019 | 2018 | 2017

Annual Performance Report

FY 2021 | FY 2020

Annual Performance Report & Annual Performance Plan

FY 2023/FY 2025 | FY 2022/FY 2024 | FY 2019/FY 2021 | FY 2018/FY 2020 | FY 2017/FY 2019 | FY 2016/FY 2018

For older Financial and Performance Plans and Reports, please see the Archive.

GAO High–Risk Improvement Plans
The Department of Justice does not currently have a GAO High Risk Implementation Plan. If we are asked to develop one, we will post it to this page as soon as it is available. In the meantime, please see the main GAO.gov website to see a list of plans from other federal agencies.

Budget Information

Budget and Performance Summary

FY 2025 | FY 2024 | FY 2023 | FY 2022 | FY 2021 | FY 2020 | FY 2019 | FY 2018 | FY 2017

Budget Fact Sheets

FY 2025 | FY 2024 | FY 2023 | FY 2022 | FY 2021 | FY 2020 | FY 2019 | FY 2018 | FY 2017

Congressional Budget Submission

FY 2025 | FY 2024 | FY 2023 | FY 2022 | FY 2021 | FY 2020 | FY 2019 | FY 2018 | FY 2017

Exhibit 300s

FY 2020 | FY 2019 | FY 2018 | FY 2017

For older budget documents, please see the Justice Management Division Archives.

Departmental Strategic Plans

DOJ Strategic Plan, Fiscal Years 2022 - 2026

DOJ Information Technology Strategic Plan, FY 2022-2024

Enterprise-wide Strategic Framework for Equal Employment Opportunity, 2023 - 2026

For older Strategic Plans, please see the Archives.

Updated August 16, 2024

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington DC 20530

Contact the Department

Phone: 202-514-2000

TTY/TDD: 800-877-8339

PRESS RELEASE

Justice Department and the FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging

Friday, January 26, 2024

For Immediate Release

Office of Public Affairs

The Justice Department's Antitrust Division and the Federal Trade Commission (FTC) today announced that both agencies are updating language in their standard preservation letters and specifications for all second requests, voluntary access letters and compulsory legal process, including grand jury subpoenas, to address the increased use of collaboration tools and ephemeral messaging platforms in the modern workplace. These updates reinforce longstanding obligations requiring companies to preserve materials during the pendency of government investigations and litigation.

"These updates to our legal process will ensure that neither opposing counsel nor their clients can feign ignorance when their clients or companies choose to conduct business through ephemeral messages," said Deputy Assistant Attorney General Manish Kumar of the Justice Department's Antitrust Division. "The Antitrust Division and the Federal Trade Commission expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges."

"Companies and individuals have a legal responsibility to preserve documents when involved in government investigations or litigation in order to promote efficient and effective enforcement that protects the American public," said Director Henry Liu of the FTC Bureau of Competition. "Today's update reinforces that this preservation responsibility applies to new methods of collaboration and information sharing tools, even including tools that allow for messages to disappear via ephemeral messaging capabilities."

Companies continue to adopt new technologies to do their work, and in recent years there has been an increase in use of collaboration tools and ephemeral messaging applications, such as Slack, Microsoft Teams and Signal. Some of these technologies allow, or even automatically enable, immediate and irretrievable destruction of communications and documents. Documents created through use of these technologies have long been covered by Justice Department and the FTC document requests. However, companies have not always properly retained these types of documents during government investigations and litigation.

Today's announcement underscores the continued cooperation between the Antitrust Division and FTC's Bureau of Competition on criminal enforcement of antitrust laws and related issues that arise in antitrust actions.

Updated January 26, 2024

Topic

ANTITRUST

Component

Antitrust Division

Press Release Number: 24-95

Related Content

PRESS RELEASE

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REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL ISSUED TO [WEEBYEWE CORPORATION]

Unless otherwise indicated or modified by the Department of Justice, each specification of this Request requires a complete search of the Company. In the Department's experience, modifications to the Request may reduce the burden of searching for responsive documents and information in a way that is consistent with the Department's needs. The Company is encouraged to propose such modifications, but all modifications must be agreed to in writing by the Department.

Submit the information requested in Specification 1 promptly to facilitate discussions about any potential modifications to this Request including the scope of the Company's search.

INFORMATION REQUESTED

The Company & This Request

1. Submit:

    a. one copy of each organization chart and personnel directory for the Company as a whole and for each of the Company's facilities or divisions involved in any activity relating to any Relevant Product;

    b. for each Relevant Product and each Relevant Area, a list of the persons responsible for establishing the Company's policies, practices, and procedures, or for approving any exceptions thereto, including for (1) pricing (including list prices, discounts, or final/negotiated prices); (2) sales or marketing; (3) research and development; and [(4) manufacturing or output]; and include a brief description of the role and responsibility of each person listed;

    c. a list of persons responsible for (1) negotiating the Transaction; (2) analyzing the Transaction; (3) recommending that the Transaction be approved; (4) approving the Transaction; and (5) post-closing integration planning and implementation; include a brief description of the role and responsibility of each person listed;

    d. a list of all the Company's agents and representatives, including investment bankers, retained in relation to the Transaction or to the development, production, marketing, or sales of any Relevant Product;

    e. a list of persons most knowledgeable about the Company's electronic data systems and policies or practices regarding responsive electronically stored information, including each database or data set responsive to Specification 2;

    f. a description of each database or data set responsive to Specification 2, including: (1) its software platform; (2) its type (e.g., flat, relational, or enterprise); (3) the sources (e.g., other databases or individuals) used to populate the database; (4) a Data Dictionary; (5) for relational or enterprise databases, documents specifying the relationships among tables (e.g., an entity relationship diagram); (6) any query forms; and (7) any regularly prepared reports produced from that database; and

g. for each Collaborative Work Environment maintained by the Company that contains responsive documents or information, a description of the environment and a list of the employees who have access to the environment.

2. Submit each database or data set used or maintained by the Company relating to each Relevant Product at any time after January 1, **[Yr-3]** that contains information relating to the Company's:

   a. products;

   b. facilities;

   c. shipments;

   d. purchases;

   e. bids, estimates, quotes, proposals, or responses to requests for information, submission, or proposal;

   f. prices, costs, or margins;

   g. discounts or rebates;

   h. sales;

   i. sales call reports or win/loss reports;

   j. intellectual property;

   k. research and development projects;

   l. marketing, promotions, or advertising;

   m. customers or customer relationships; or

   n. competitors.

3. Submit all minutes (including attachments) of meetings of the Company's Board of Directors and all materials submitted to the Board.

4. List separately for each subpart below each federal judicial district in which the Company:

    a. has an agent to receive service of process (include each agent's name, current business and home addresses, and telephone numbers);

    b. has an office or a facility; for each office or facility, list the address and the individual in charge (with his or her title), and if the office or facility is in the District of Columbia, indicate whether the office or facility's sole purpose is to contact federal governmental agencies; and

    c. inhabits, is found, or transacts business, and is incorporated or licensed.

    The Company may respond to this specification by agreeing to personal jurisdiction and to accept service of process in all federal judicial districts.

5. Submit documents sufficient to show (and to the extent not reflected in such documents, describe) the Company's policies and practices relating to (a) the retention and destruction of documents, and the retention, storage, deletion, and archiving of electronically stored information, including e-mail, and (b) the use of personal electronic devices for work purposes.

6. List the persons responsible for preparing the response to this Request and submit a copy of all instructions prepared by the Company relating to the steps taken to respond to this Request. Where oral instructions were given, list the person who gave the instructions and describe the content of the instructions and the persons to whom the instructions were given. For each specification, list the persons who assisted in the preparation of the response and list, by name and corporate title or job description, the persons whose files were searched.

Products & Facilities

7. List each Relevant Product sold by the Company, and for each:

    a. describe any identifying information such as brand name or catalog number, and end-uses; and

    b. identify the business unit of the Company that provides or has provided it.

8. List each facility the Company owns or operates that produces or has been used to produce any Relevant Product and state for each:

    a. its address;

    b. the date it began operation;

c. whether it was leased, acquired, or built by or for the Company;

d. the current estimated replacement cost and time necessary to replace it;

e. the number of production lines of the facility;

f. the current nameplate and practical capacity, and the annual capacity utilization rate for production of each Relevant Product manufactured at the facility, specifying all other factors used to calculate capacity, the number of shifts normally used at the facility, and the feasibility of increasing capacity, including the costs and time required; and

g. the length of time and cost in dollars required to open the facility from initial plan to full production (limited to facilities built within the last 10 years).

Customers & Sales

9. For each Relevant Product in each Relevant Area, for each year of the last three calendar years, state separately in units and dollars:

   a. the Company's sales;

   b. that portion of the Company's sales that was of products purchased from sources outside the Company and later resold; and

   c. [that portion of the Company's sales that was of products manufactured outside the United States.]

10. List separately by units and dollars the names and contact information of the Company's 20 largest customers for each Relevant Product in each Relevant Area.

Competitors & Entry

11. List the names and contact information of the Company's competitors (including any person that has competed or has attempted to compete with the Company for the past ten years) for the provision of each Relevant Product in each Relevant Area, and for each such competitor, submit all documents relating to that competitor's efforts to compete in the provision of each Relevant Product, including:

    a. pricing;

    b. sales;

    c. features or quality;

    d. expansion or retrenchment plans;

e. plans to introduce a new Relevant Product;

f. plans to construct, modify, change the output of, or close any facility producing a Relevant Product;

g. plans to exit (or actual exit of) the provision of any Relevant Product in any Relevant Area;

h. market shares; and

i. relative strengths and weaknesses.

12. List the names and contact information of each person that has plans to enter or expand output of, has entered or expanded output of, or has attempted to enter or expand output of the provision of any Relevant Product [in any Relevant Area] in the last 10 years, and for each such plan, entry, expansion, or attempt:

    a. describe the plan, entry, or attempt, including identifying the Relevant Products and the Relevant Areas; and

    b. describe the Company's estimate of costs and time to enter, steps necessary to entry, and any entry barriers (including any necessary regulatory approvals and the minimum viable scale required for entry);

    Submit all documents relating to the plans to enter or expand or actual or attempted entry or expansion into any Relevant Product in any Relevant Area.

13. **[Optional**] Submit all documents relating to the minimum viable scale; the minimum and optimum plant size, production line size, capacity utilization rate, and production volume; requirements for multi-area, multi-plant, multi-product, or vertically integrated operations; and other factors required to attain any available cost savings, economies of scale or scope, or other efficiencies necessary to compete profitably in the provision of each Relevant Product in each Relevant Area.

14. **[Optional]** Describe all quotas, tariffs, and transportation costs relating to imports into, or exports from, each Relevant Area for each Relevant Product.

15. **[Optional]** Submit all documents relating to actual and potential imports into, or exports from, each Relevant Area for each Relevant Product.

Marketing & Competition

16. *Submit all documents relating to any actual or potential changes in the supply, demand, cost, price, or output of any Relevant Product as a result of competition.

17. *Submit, for each Relevant Product, all documents relating to the Company's:

    a. prices, terms of sale, pricing plans, pricing strategies, or profitability;

    b. business plans or short-term or long-term strategies or objectives;

    c. advertising, marketing, and promotional plans, including selling aids;

    d. annual budgets and financial projections;

    e. expansion or retrenchment plans;

    f. research and development efforts;

    g. plans to reduce costs, improve products, introduce new products, or otherwise become more competitive; and

    h. plans to construct or to change the use or output of any facility.

18. Describe how the Company prices each Relevant Product in each Relevant Area, including all factors considered, the extent to which prices are set through individualized negotiations, and the type of discounts offered by the Company.

19. List by title and submit copies of market studies, forecasts, surveys, or any regularly produced reports relating to output levels, pricing, sales, or marketing of each Relevant Product in any Relevant Area.

20. Submit, for each Relevant Product, all documents relating to:

    a. discount requests or approvals (including rebates and other promotions);

    b. sales call reports;

    c. meeting competition requests or approvals;

    d. win/loss reports;

    e. prices, quotes, estimates, or bids submitted to any customer; and

    f. the results of any price, quote, estimate, or bid submitted to any customer or prospective customer.

21. *Submit all documents relating to any allegation that the Company, its employees, or any of its current or potential competitors is behaving in an anticompetitive manner, including customer and competitor complaints; threatened, pending, or completed lawsuits; or federal or state investigations.

22. [**OPTIONAL** List all employees, officers, or directors who have discussed prices, terms of sale, production or sales volumes, or the quality and feature sets of any Relevant Product with any employee, officer, director, or agent of any other company that competes with the Company to provide any Relevant Product; list the persons with whom they discussed these topics; and submit all documents relating to these discussions.]

The Transaction & Its Potential Efficiencies

23. Describe the reasons for the Transaction and the costs to complete it; all plans and the rationales for any change in the Company's or [Beeside]'s business as a result of the Transaction and the costs to achieve them; and all risks associated with the Transaction.

24. Describe the timetable for the Transaction and describe, and submit documents sufficient to show:

    a. all actions that must be taken before its completion, including each domestic or foreign regulatory, competition, or antitrust authority that the Company has notified (or intends to notify) of the Transaction;

    b. the timing for each such action, including for each authority notified, the dates (or expected dates) the authority was (or is expected to be) notified and did or will complete its review;

    c. any harm that would result if the Transaction is delayed or not completed; and

    d. any terms or conditions of the Transaction that are not reflected in the merger or sale agreement between the parties or other documents supplied in response to this Request.

25. *Submit all documents relating to the Transaction, including:

    a. documents relating to all statements or actions by any person in support of or in opposition to the Transaction, or otherwise expressing any view about the Transaction or its likely effects;

    b. documents submitted or to be submitted (whether in draft or final form) to any domestic or foreign regulatory, competition, or antitrust authority in connection with its review of the Transaction, including notifications and appendices, actual or potential remedies submitted to a reviewing authority, white papers, responses to requests for information, and competitive impact submissions;

    c. draft or final orders, decisions, or other statements or formal objections (whether public or nonpublic, final or interim) by any domestic or foreign regulatory, competition, or antitrust authority in connection with its review of the

Transaction, including any decision to enter a new phase of investigation or request additional information; and

d. communications between the Company and any agency or representative of the U.S. government other than the Antitrust Division, or between the Company and any agent or representative of any federal, state, or local government agency.

26. **[OPTIONAL]** *For each undocumented communication relating to the Transaction made between the Company and any agency or representative of the U.S. government, except the Antitrust Division, [or between the Company and any agent or representative of any state or local government agency]:

   a. state the date of the communication and its location;

   b. list by name and employer (or governmental organization) each person participating in the communication; and

   c. describe the subject matter and substance of the communication, including each product, program, and project mentioned in the communication.

27. *Describe any benefits that the Company anticipates will result from the Transaction (including all costs savings, economies, new products, product improvements, or other efficiencies or synergies) relating to any Relevant Product in any Relevant Area or which are inextricably linked to any Relevant Product in any Relevant Area, including:

   a. all steps the Company expects to take in achieving each benefit, the risks involved in achieving each benefit, and the time and costs required to achieve each benefit;

   b. a quantification of each benefit and of the costs to achieve each benefit, an explanation of how the quantification was calculated, the source and identity of all assumptions and inputs to the calculation of the quantification, and separate quantifications of the one-time fixed cost savings, recurring fixed cost savings, and variable costs savings (in dollars per unit and dollars per year) of each benefit;

   c. how the Transaction would allow the Company to achieve each benefit, each alternative to the Transaction by which the Company could achieve each benefit, and why the Company could not achieve each benefit without the Transaction;

   d. how each benefit would accrue to consumers or customers; and

   e. the identity of each person (including title and contact information) employed or retained by the Company with any responsibility for achieving, analyzing, or quantifying each benefit.

Submit all documents relating to any benefit, quantification, cost, or alternative identified or described above, or any other efficiency or synergy that will or is expected to arise from the Transaction.

28. **[Optional]** Submit all documents relating to any plans or [actual transactions], other than the Transaction, by the Company or any other person for any acquisition, sale, joint venture, or merger involving the provision of any Relevant Product that were:

    a. reviewed or prepared by or for any officer, director, shareholder, or debtholder, or reviewed by or prepared for any management, executive, or board committee; or

    b. submitted to any domestic or foreign regulatory, competition, or antitrust authority.

    Only one copy of documents responsive to subpart (b) need to be submitted.

***Trade Associations* [Optional]**

29. List each trade association, information service, or other organization relating to the provision of any Relevant Product of which the Company is a member, in which the Company participates, or to which the Company subscribes, and identify any representative of the Company that represents the Company in that organization.

30. Submit one copy of all documents or data relating to production, shipments, sales, prices, competition, or entry conditions of any Relevant Product that the Company or any other person has submitted to or received (including via subscription) from any trade association, information service, or other organization, or any agent of any such association, service, or organization.

***Products of Discovery* [Optional]**

31. Submit all products of discovery the Company or its agents produced or received by any means of discovery, regardless of date, in the suit captioned **[full case name]**.

32. Submit all pleadings, filings, motions, transcripts, rulings, and orders from any proceeding or hearing in the suit captioned **[full case name]**.

***Failing Firm/Bankruptcy Sale* [Optional]**

33. Describe:

    a. if applicable, the reasons why the Company, or any division thereof, considers itself to be "failing" as the term is used in Section 11 of the Department of Justice & Federal Trade Commission's *Horizontal Merger Guidelines*;

b. any considerations by the Company at any time to cease provision of the Relevant Product in any Relevant Area, including the persons involved and each step taken as a result of those considerations;

c. each actual, proposed, possible, or suggested plan by the Company for the closing or sale of any of its facilities, including any computation of valuations; and

d. the process the Company undertook to find a buyer.

34. List each person the Company or any of its agents has contacted in an attempt to sell any facilities or other assets used to provide the Relevant Product.

35. State whether the Company believes that the Company's current share of the market for any Relevant Product (based upon sales or installed base) accurately reflects the Company's current or future competitive position in the market for that product, and, if not, describe the Company's reasons for that belief, and submit all documents relied on in support of that belief.

36. Submit all documents relating to:

a. any actual or potential bankruptcy proceedings involving the Company and relating to any plan to cease provision of the Relevant Product in any Relevant Area;

b. reports to or prepared by the Company relating to periodic financial statements, aging of receivables and payables, and cash flow related to claims of a failing firm, plans to cease provision of a Relevant Product, or bankruptcy or insolvency of the Company;

c. each actual, proposed, possible, or suggested plan by the Company for the closing or sale of any of its facilities, including any computation of valuations of the company;

d. contacts the Company or any of its agents has made in an attempt to sell any facilities or other assets used to provide the Relevant Product, including any bids or offers the Company, or any of its agents, has received to purchase any of the facilities or other assets used to provide any Relevant Product; and

e. the process the Company undertook to find a potential buyer.

***Transportation Costs* [Optional]**

37. For each Relevant Product, describe:

a. the cost of transporting each Relevant Product by (1) rail; (2) truck; and (3) any other method, including multi-modal forms of transportation;

b. the extent to which the cost varies with distance of shipment;

c. the extent to which the Company assumes the transportation costs of each Relevant Product;

d. the significance of transportation costs to the Company's ability to compete for sales of each Relevant Product; and

e. the transportation costs per unit of shipments made to any customer in any Relevant Area since January 1, 20**[**]** by any method of delivery.

Submit all documents relating to studies, surveys or analyses of the transportation costs for each Relevant Product.

***Bids* [Optional]**

38. Describe each bid, estimate, quote, proposal, or response to any request for information, submission, or proposal ("bid") the Company has drafted or submitted since **[YR – 3]** to supply the Relevant Product, and for each list:

    a. the potential customer and that customer's contact information;

    b. the date the bid was submitted;

    c. each Relevant Product for which the bid was submitted;

    d. the request for bid;

    e. the total amount, in units and in dollars, of the company's bid;

    f. any additional terms in the bid related to price or quantity (e.g., incentives not to switch; discounts, rebates, pre-bates, cash awards; the products covered; the geography covered);

    g. if the Company declined to bid, an explanation for that decision;

    h. the incumbent provider, if any, of the Relevant Product at the time of the request for bid;

    i. the ranking of any bids received, including which person or persons were selected as finalists for the bid and which won all or part of the bid or bids, the date of the award, the price and terms of the winning bid, and the Relevant Products included;

j. whether the potential customer requested any rebids, and if so, the identities of each person that rebid, and the amount and date of such person's rebid; and

k. whether any bids were rejected for failing to meet the purchaser's technical, product support, or other specifications, and a description of each such rejection.

Submit all documents relating to the bids identified above, including all proposed, draft, or submitted contracts.

DEFINITIONS

The following definitions apply for the purposes of this Request:

1. The terms "**the Company**," or "**[Weebyewe]**" mean [Weebyewe Ltd., plc], its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "parent," "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.

2. The term "**[Beeside]**" means [Beeside Corporation, Inc.], its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "parent," "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between [Beeside] and any other person.

3. The term "**Collaborative Work Environment**" means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each one of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft Sharepoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems (CMS) (e.g., Drupal), wikis, and blogs.

4. The term "**Data Dictionary**" means documentation of the organization and structure of the databases or data sets that is sufficient to allow their reasonable use by the Department, including, for each table of information: (a) the size (number of records and overall volume); (b) a general description; (c) a list of field names; (d) a definition for each field as it is used by the Company, including the meanings of all codes that can appear as field values; (e) the format, including variable type and length, of each field; and (f) the primary key in a given table that defines a unique observation.

5. The term “**documents**” means all written, printed, or electronically stored information of any kind in the possession, custody, or control of the Company, including information stored on social media accounts like Twitter or Facebook, chats, instant messages, and documents contained in Collaborative Work Environments and other document databases. “Documents” includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, “documents” excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

6. The term “**person**” includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

7. The term “**plans**” includes preliminary proposals, recommendations, or considerations, whether finalized or adopted.

8. The term “**Relevant Area**” means, <u>and information must be submitted separately for,</u> (a) the United States and (b) worldwide **[or regional or local markets]**.

9. The term “**Relevant Product**” means, <u>and information must be submitted separately for,</u> each **[list products or services]**.

10. The term “**sales**” means net sales, i.e., total sales after deducting discounts, returns, allowances, and excise taxes. “Sales” includes sales of the relevant product whether manufactured by the Company itself or purchased from sources outside the Company and resold by the Company.

11. The term “**Transaction**” means **[description of the proposed transaction]**.

[OPTIONAL DEFINITIONS]

12. The term “**agreement**” means any understanding, formal or informal, written or unwritten.

13. The term “**documents sufficient to show**” means documents sufficient to provide the Department with a true and correct disclosure of the factual matter requested.

14. The term “**identify**” means to state:

    a. in the case of a person other than a natural person: name, principal address, and telephone number;

    b. in the case of a natural person other than a former employee of the Company: name, employer, business address, business telephone number, business email, and title or position;

c. in the case of a former employee of the Company: name, current address, telephone number and email address, and the date that the employment with the Company ended; and

d. in the case of a communication: a description of the substance of the communication; the names of all participants in the communication; the identity of witnesses to the communication; and the date, time, and place of the communication.

15. The term "**Senior Management**" means any Company officer or employee above the level of vice president or general manager, and board members, and **[specify additional titles]**.

16. The term "**sunk costs**" means the acquisition costs of tangible and intangible assets necessary to provide or sell the Relevant Product that cannot be recovered through the sale or redeployment of these assets for other uses.

INSTRUCTIONS

Timing

1. All references to year refer to calendar year. Unless otherwise specified, this Request calls for documents, data, and other information created, altered, or received by the Company within two years of the date on which this Request was issued. For interrogatory responses, submit a separate response for each year or year-to-date unless otherwise specified. If calendar-year data are not available, supply the Company's fiscal-year data indicating the twelve-month period covered, and submit the Company's best estimate of calendar-year data.

2. Unless otherwise specified, this Request requires the production of all responsive documents, data, and other information in the possession, custody, or control of the Company on the date that this Request was issued.

    a. If the Company complies fully with this Request within 90 days of issuance, then only specifications marked with an asterisk (e.g., *) are continuing in nature. If the company complies fully with this Request more than 90 days after it was issued, then all of the specifications in this Request are continuing in nature.

    b. Specifications that are continuing in nature require production of documents, data, and information created or obtained by the Company up to 30 calendar days before the Company complies fully with this Request, except for materials that require translation into English. Materials that must be translated into English, as described in Instruction 6 below, must be produced if they are created, altered, or received by the Company up to 45 calendar days before the Company complies fully.

Production Format

3. Department representatives must approve the format and production method of any documents, data, or other information before the Company makes an electronic production in response to this Request. Before preparing its production, the Company must contact the Department to explain what materials are available and how they are stored. This discussion must include Company personnel who are familiar with its electronically stored information and databases/data sets.

4. Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Company must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and company terminology. For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically-significant samples of documents categorized as non-responsive documents by the algorithm.

5. If the Department agrees to narrow the scope of this Request to a limited group of custodians, a search of each custodian's files must include files of their predecessors; files maintained by their assistants or under their control; and common or shared databases or data sources maintained by the Company that are accessible by each custodian, their predecessors, or assistants.

6. Responses to this Request must be submitted in a reasonably usable format as required by the Department in the letter dated **[DATE]**. Documents must be complete and unredacted, except for privilege. Documents must be submitted as found and ordered in the Company's files and must not be shuffled or otherwise rearranged. Documents written in a language other than English must be translated into English, and the foreign-language document must be submitted with the English translation. The Company is encouraged to submit copies of hard-copy documents electronically (with color hard copies where necessary to interpret the document) in lieu of producing original hard-copy documents. Absent a Department request, electronic documents must be produced in electronic form only. Electronic productions must be free of viruses. The Department will return any infected media for replacement, which may delay the Company's date of compliance with this Request. The Department may retain documents or copies of any documents or electronic media for law enforcement purposes or pursuant to the Federal Records Act.

7. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") before discussing the information with the Department representatives. If any document responsive to a particular request contains Sensitive PII or SHI that is not responsive to that request, redact the unresponsive Sensitive PII or SHI before producing the document. To avoid any confusion about the reason for the redaction, produce a list of such redacted documents by document control number.

   Sensitive PII includes a person's Social Security Number; or a person's name, address, or phone number in combination with one or more of their: (a) date of birth; (b) driver's license number or other state identification number, or a foreign country equivalent; (c) passport number; (d) financial account number; or (e) credit or debit card number.

   Sensitive Health Information includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

8. Provide a master list in sortable and searchable electronic form showing: each custodian's name and the corresponding consecutive document control number(s) used to identify that custodian's documents. The Department representatives will provide a sample master list upon request.

9. **[OPTIONAL – If the production from the prior CID is identified and available to the team]** If the Company previously produced a document responsive to this Request to the Department pursuant to Civil Investigative Demand Number [], it is not required to produce that document again; however, for any such documents, the Company must submit the document control numbers.

10. Data called for by this Request must be submitted electronically in a reasonably useable compilation that will allow the Department to access the information it contains. Producing a database or data set in its entirety often does not satisfy this requirement. For the Department to be able to access and interpret data, the Company must respond to Specification 1(f) including, for each database, a Data Dictionary that includes, for each table in the database:

    a. the name of the table;

    b. a general description of the information contained;

    c. the size in both number of records and megabytes;

    d. a list of fields;

    e. the format, including variable type and length, of each field;

f. a definition for each field as it is used by the Company, including the meanings of all codes that can appear as field values;

g. the fields that are primary keys for the purpose of identifying a unique observation;

h. the fields that are foreign keys for the purpose of joining tables; and

i. an indication of which fields are populated.

It is likely that only a subset or compilation of the contents of any particular database or data set will need to be produced. After providing the information above, counsel and knowledgeable personnel from the Company should discuss with Department representatives what constitutes a sufficient production from the database or data set in a reasonably useable format.

11. The Company must continue to preserve documents and ESI contained in disaster recovery systems or back-up media that may contain information responsive to this Request even if the Company contends that the system or media or the information contained on the media is not reasonably accessible. Department representatives retain sole discretion to determine whether a search of the backup tapes or media is necessary to respond fully to this Request.

12. All non-privileged portions of any responsive document (including non-privileged or redacted attachments) for which a privilege claim is asserted must be produced. Each document withheld in whole or in part from production based on a claim of privilege must be assigned a unique privilege identification number and separate fields representing the beginning and ending document control numbers and logged as follows:

    a. Each log entry must contain, in separate fields: privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; date of the document; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the anticipated litigation for any work-product claim and the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter sufficiently detailed to enable the Department to assess the privilege claim and the facts relied upon to support that claim.

    b. Include a separate legend containing an alphabetical list (by last name) of each name on the privilege log, identifying titles, company affiliations, the members of any group or email list on the log (e.g., the Board of Directors) and any name variations used for the same individual.

c. On the log and the legend, list all attorneys acting in a legal capacity with the designation ESQ after their name (include a space before and after the "ESQ").

d. Produce the log and legend in electronic form that is both searchable and sortable. Upon request, the Company must submit a hard copy of the log and legend.

e. Department representatives will provide an exemplar and template for the log and legend upon request.

f. Any document created by the Company's in-house counsel or the Company's outside counsel that has not been distributed outside the Company's in-house counsel's office or the Company's outside counsel's law firm does not have to be logged. But if the document was distributed to any attorney who does not work exclusively in the Company's in-house counsel's office or who has any business responsibilities, it must be logged. Unlogged documents are subject to any preservation obligations the Company or counsel may have.

13. If the Company is unable to answer a question fully, it must supply all available information; explain why such answer is incomplete; describe the efforts made by the Company to obtain the information; and list the sources from which the complete answer may be obtained. If the information that allows for accurate answers is not available, submit best estimates and describe how the estimates were derived. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to estimate, provide an explanation.

14. If documents, data, or other information responsive to a particular request no longer exists for reasons other than the Company's document retention policy, describe the circumstances under which it was lost or destroyed, describe the information lost, list the specifications to which it was responsive, and list persons with knowledge of such documents, data, or other information.

15. To complete this Request, the Company must submit the attached certification form, executed by the official supervising compliance with this Request, and notarized.

Any questions the Company has relating to the scope or meaning of anything in this Request or suggestions for possible modifications thereto should be directed to **[staff members]** at **[telephone numbers]**. The response to this Request must be addressed to the attention of Ms. **[***staff person***]** and delivered between 8:30 a.m. and 5:00 p.m. on any business day to 450 Fifth Street, NW, Suite **[***]**, Washington, DC 20001. If the company wishes to submit its response by U.S. mail, please call [*****staff person***]** for mailing instructions.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Annual Competition Reports

Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976

(Jointly With The Antitrust Division of the United States Department of Justice)

- 45th Report (FY 2022) (2.84 MB)
- 44th Report (FY 2021) (2.83 MB)
- 43rd Report (FY 2020) (1.67 MB)
- 42nd Report (FY 2019) (1.74 MB)
- 41st Report (FY 2018) (917.04 KB)
- 40th Report (FY 2017) (783.04 KB)
- 39th Report (FY 2016) (1.41 MB)
- 38th Report (FY 2015) (856.22 KB)
- 37th Report (FY2014) (512.83 KB)
- 36th Report (FY2013) (523.63 KB)
- 35th Report (FY2012) (1.34 MB)
- 34th Report (FY2011) (716.42 KB)
- 33rd Report (FY 2010) (406.52 KB)
- 32nd Report (FY 2009) (1.08 MB)
- 31st Report (FY 2008) (1.43 MB)

- 30th Report (FY 2007) (283.2 KB)
- 29th Report (FY 2006) (600.52 KB)
- 28th Report (FY 2005) (1012.01 KB)
- 27th Report (FY 2004) (269.02 KB)
- 26th Report (FY 2003) (264.85 KB)
- 25th Report (FY 2002) (364.5 KB)
- 24th Report (FY 2001) (594.77 KB)
- 23rd Report (FY 2000) (7.89 MB)
- 22nd Report (FY 1999) (233.53 KB)
- 21st Report (FY 1998)
- 20th Report (FY 1997)
- 19th Report (FY 1996) (2.68 MB)
- 18th Report (FY 1995) (1.31 MB)
- 17th Report (FY 1994) (2.29 MB)
- 16th Report (FY1993) (1.8 MB)
- 15th Report (FY 1992) (1.93 MB)
- 14th Report (FY 1991) (5.12 MB)
- 13th Report (FY 1990) (2.24 MB)
- 12th Report (FY 1989) (1.66 MB)
- 11th Report (FY 1988) (2.06 MB)
- 10th Report (FY 1987-86) (4.72 MB)
- 9th Report (FY 1985) (5.95 MB)
- 8th Report (FY 1984) (1.36 MB)
- 7th Report (FY 1983) (2.89 MB)
- 6th Report (FY 1982) (709.64 KB)
- 5th Report (FY 1981) (501.15 KB)
- 4th Report (FY 1980) (537.99 KB)
- 3rd Report (FY 1979) (818.67 KB)

- 2nd Report (FY 1978) (199.39 KB)
- 1st Report (FY 1977) (222.29 KB)
- Federal Trade Commission (Bureau of Competition) and Department of Justice (Antitrust Division): Hart-Scott-Rodino Annual Report: Fiscal Year 2013: Section 7A of the Clayton Act, 15 U.S.C. 18a (The Hart-Scott-Rodino Antitrust Improvements Act of 1976) (523.63 KB)
- Federal Trade Commission (Bureau of Competition) and Department of Justice (Antitrust Division): 42nd Hart-Scott-Rodino Annual Report (FY 2019) (1.74 MB)

Annual Antitrust Enforcement Activities Reports

Starting in 2009, the Annual Antitrust Enforcement Reports have been discontinued and have been replaced by the online FTC Competition Enforcement Database.

- Spring 2008 Report (785.46 KB)
- Spring 2007 Report (746.23 KB)
- Spring 2006 Report (1.17 MB)
- Spring 2005 Report (3.26 MB)
- Spring 2004 Report (3.31 MB)
- Spring 2003 Report (521.77 KB)
- Spring 2002 Report (2.37 MB)
- Spring 2001 Report (2.24 MB)
- Spring 2000 Report (2.54 MB)
- Spring 1999 Report (2.06 MB)
- Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study (970.5 KB)

Federal Antitrust Developments in the United States

The following reports are Annual Reports to the Competition Committee of the Directorate For Financial and Enterprise Affairs of the Organisation for Economic Co-operation and Development (Jointly With The Antitrust Division of the United States Department of Justice).

- 2015 Annual Report on Competition Policy Developments in the United States (481.36 KB)
- 2014 Annual Report on Competition Policy Developments in the United States (863.06 KB)
- 2013 Annual Report on Competition Policy Developments in the United States (842.43 KB)
- 2012 Annual Report on Competition Policy Developments in the United States (418.57 KB)
- 2011 Annual Report on Competition Policy Developments in the United States (339.27 KB)
- 2010 Annual Report on Competition Policy Developments in the United States (325.97 KB)
- 2009 Annual Report on Competition Policy Developments in the United States (293.98 KB)
- 2008 Report (320.27 KB)
- 2007 Report (290.47 KB)
- 2006 Report (494.28 KB)
- 2005 Report (279.94 KB)
- 2004 Report (154.89 KB)
- 2003 Report (145.08 KB)
- 2002 Report (128.77 KB)
- 2001 Report (139.23 KB)
- 2000 Report (157.68 KB)
- 1999 Report (190.89 KB)
- 1998 Report (97.35 KB)
- 1997 Report (92.08 KB)

Data on Merger Investigations and Challenges

- Horizontal Merger Investigation Data, Fiscal Years 1996-2007 (98.54 KB)
- Horizontal Merger Investigation Data, Fiscal Years 1996 – 2005 (299.36 KB)
- Merger Challenges Data, 1999 – 2003 (287.99 KB)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

January 2, 1979

Honorable James O. Eastland
President Pro Tempore
United States Senate
2241 Dirksen Office Building
Washington, D.C. 20510

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
2231 Rayburn House Office Building
Washington, D.C. 20515

Subject: Second Annual Report to Congress pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976

Gentlemen:

Section 201 of the Hart-Scott-Rodino Improvements Act of 1976, Pub. L. 94-435, added a new § 7A to the Clayton Act, 15 U.S.C. § 18a (hereinafter referred to as ("the Act"). Subsection (j) of the Act provides as follows:

> Beginning not later than January 1, 1978 the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the second annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons of specified size or larger, who intend to make stock or asset acquisitions of specified size or larger, must report their intentions to the Antitrust Division of the Department of Justice and to the Federal Trade Commission and must thereafter wait a prescribed period of time before consummating the transaction.

The waiting period is designed to permit the agencies to determine whether action against a reported acquisition is warranted prior to its consummation. Section 7A(f) of the Act provides for expedited consideration by a Federal district court in the event that either agency seeks a preliminary injunction to prevent consummation of an acquisition.

The Act was signed by the President on September 30, 1976. On December 15, 1976, the Federal Trade Commission, with the informal concurrence of the Assistant Attorney General in charge of the Antitrust Division, issued proposed rules and a proposed Notification and Report Form for public comment; the notice of proposed rulemaking was published in the Federal Register of December 20, 1976. Approximately 130 comments were received in response to those proposed rules and form. In response to the comments, the staff prepared substantial revisions to the proposed rules. On July 25, 1977, the Commission approved revised proposed rules and a revised proposed Notification and Report Form and determined that additional public comment thereon would be desirable. The revised proposed rules and form were published in the Federal Register of August 1, 1977, 42 FR 39040. A total of 116 comments were received in response to the revised proposed rules and form.

Additional changes in the revised proposed rules and form were made after the close of the comment period, and on February 14, 1978, the Commission gave its interim approval to final versions of the rules and form. The Notification and Report Form was then transmitted to the General Accounting Office ("GAO") for review under the Federal Reports Act, 44 U.S.C. § 3502. On February 27, 1978, GAO published in the Federal Register a notice soliciting comments regarding the final version of the form, 43 FR 8038. Seven comments were received. Those comments and a letter requesting the staff's responses to the issues raised in the comments were forwarded to Commission staff on March 22, 1978. The staff responded on April 5, 1978. The staff and GAO then held additional discussions concerning the form at which several modifications were agreed to and incorporated into the final form. GAO submitted its final report to the Commission on May 12, 1978.

The Commission formally promulgated the final rules and form and issued a Statement of Basis and Purpose on July 10, 1978. The Assistant Attorney General gave his formal concurrence on July 18, 1978. The Statement of Basis and Purpose was published in the Federal Register of July 31, 1978, 43 FR 33451 (attached) and the final form was published in the

Federal Register of August 4, 1978, 43 FR 34443. 1/ The rules and form went into effect on September 5, 1978.

As of December 1, 1978, the agencies had received filings covering two hundred ninety-two transactions. The staffs of the two agencies independently review all filings to determine whether an investigation should be opened and, if warranted, a request for additional information or documentary material issued pursuant to § 7A(e) of the Act and § 803.20 of the rules. Prior to opening an investigation and issuing such a request, Commission and Antitrust Division staff determine through normal liaison procedures which agency will conduct an investigation. These procedures are designed to avoid unnecessary duplication of effort by the agencies and unnecessary burdens on persons whose transactions might otherwise be investigated by both agencies.

As of December 1, 1978, the agencies had issued forty-six requests for additional information in twenty-six transactions. Because of the short period of time in which the premerger notification program has been in operation, few investigations of reported acquisitions have been completed.

In a number of cases, initial notification reports provided information that enabled the staffs of the agencies to determine whether to open an investigation. Such information had not previously been available to the staff and has provided valuable assistance in the expeditious preliminary review of acquisitions involving large persons. Information submitted in response to requests for additional information has made possible a more detailed review and analysis of transactions which the agency staffs believe may pose antitrust questions. To date, information provided by the premerger notification program has been employed in two motions for preliminary injunctions; United States v. Occidental Petroleum Corp., Civ. No. C-3-78-288 (S.D. Ohio, filed October 11, 1978), and United States v. United Technologies, Inc., Civ. No. 78-CV-580 (N.D.N.Y., filed November 13, 1978). The staffs believe that additional motions for preliminary injunctions will be filed in the near future.

Of the two hundred ninety-two transactions reported through December 1, 1978, early termination of the waiting period was requested pursuant to § 7A(b)(2) of the Act in twenty-five cases. Early termination was granted and appropriate notice in the Federal Register published in twelve of these cases. The balance were denied.

1/ A version of the form was published with the Statement of Basis and Purpose on July 31, 1978, but, because of extensive Federal Register omissions, had to be republished on August 4, 1978. The attached reprint embodies the August 4 corrections.

On the effective date of the rules, Commission staff instituted a compliance monitoring program to insure that acquisitions covered by the Act and rules are being reported under the premerger notification program. The staffs have also made a concerted effort to inform and educate the public concerning the operation of the program. In addition to writing a detailed Statement of Basis and Purpose, staff members have discussed the program at numerous bar association seminars, discussion groups and meetings. Most recently, Commission staff held a series of premerger notification seminars in New York City, Chicago, Dallas, and San Francisco, which were jointly sponsored by the Commission and the Federal Bar Association.

Since September 5, 1978, one formal interpretation (attached) pursuant to § 803.30(c) of the rules has been issued by Commission staff with the concurrence of the Assistant Attorney General. At the present time, a number of additional formal and informal interpretations by Commission staff are under consideration.

Because of the Commission's limited experience under the premerger notification program, it is unable fully to assess the effects of the program on the law enforcement activities of the agencies, reporting persons, and merger and acquisition activity in the economy as a whole. The Commission does not believe that revisions of the Act by Congress are necessary at the present time.

The Assistant Attorney General has indicated his concurrence with this annual report.

By direction of the Commission.

Signed and hand-delivered

Carol M. Thomas
Secretary

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

Honorable Warren G. Magnuson
President Pro Tempore
United States Senate
127 Russell Senate Office Building
Washington, D.C. 20510

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
2231 Rayburn House Office Building
Washington, D.C. 20515

SUBJECT: Third Annual Report to Congress pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

Gentlemen:

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a (hereinafter referred to as "the Act"). Subsection (j) of the Act provides as follows:

> Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the third annual report to the Congress mandated by subsection (j) of the Act.

In general, the Act creates a mechanism under which persons with sales and assets greater than a specified amount who intend to make a stock or assets acquisition of a specified size or larger must report their intentions to the Antitrust Division of the Department of Justice and to the Federal Trade Commission. Thereafter the parties must wait a prescribed period of time, usually 30 days, before consummating the transaction.

The waiting period is designed to permit the antitrust enforcement agencies to determine whether action against a reported acquisition is warranted prior to its consummation. The Act authorizes the enforcement agencies during the waiting period to issue requests for additional information or documentary material. Such a request in most cases extends the waiting period while the requested information or documentary material is compiled for submission to the requesting agency and for an additional time, usually 20 days, after that agency receives those materials. In the event that during this waiting period either enforcement agency seeks a preliminary injunction to prevent consummation of the reported acquisition, the Act provides for expedited consideration by a Federal district court.

The legislative history suggests several complementary purposes underlying the Act. First, Congress clearly intended to eliminate the large "midnight merger," which is negotiated in secret and announced just before, or sometimes only after, the closing takes place. Second, Congress wanted to assure that large acquisitions were subjected to meaningful scrutiny under the antitrust laws. Third, Congress provided an opportunity for the enforcement agencies to seek a court order enjoining the completion of those transactions which the agencies deemed to present significant antitrust problems. Finally, Congress sought to facilitate an effective remedy where a challenge by one of the enforcement agencies proved successful. Thus the Act requires that the agencies receive prior notification of significant acquisitions between sizeable parties, provides certain tools to facilitate a prompt but thorough investigation, assures an opportunity to seek a preliminary injunction before the parties are legally free to complete the transaction, and eliminates the problem of unscrambling the assets when one of the agencies obtains an order enjoining consummation of the acquisition.

Operation of the premerger notification program

The Act authorizes the Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Justice Department, to promulgate implementing rules. Prior reports to the Congress have described the steps taken to implement the program, which became effective on September 5, 1978. The second annual report to Congress covered only the first few months of the program's operation (to December 1, 1978) and thus did not present any comprehensive overview of the operation or impact of the program. While a definitive overview and assessment of the program would still be premature after only fifteen months experience, it is possible at this time to provide Congress with considerably more information about the operation of the program and its impact to date.

The rules implementing the Act[1] define the terms in the statute, specify the means for determining whether a transaction is reportable under the Act, detail certain procedures for compliance with the requirements of the Act, and create certain

1 16 C.F.R. Parts 801-803 (1979).

exemptions from those requirements. In addition, the rules state (in an appendix to Part 803) the information to be submitted on the Notification and Report Form, which must be completed by both parties to a reportable acquisition.[2]

In general, receipt of completed Notification and Report Forms from both parties begins the waiting period.[3] At this time, the staffs of both enforcement agencies review these filings and make separate initial determinations whether the reported transaction may raise significant antitrust issues which warrant further investigation. If neither agency believes that further inquiry is needed, the waiting period is allowed to expire or the agencies may entertain requests for early termination of the waiting period from either or both parties.[4]

If either or both agency staffs believe that significant antitrust issues may be raised by a reported transaction, an established liaison arrangement is used to determine which of the two agencies will investigate the matter further. Either agency may investigate a given transaction, but the Act does not permit both agencies to request additional information from the same parties with respect to the same transaction. Thus, if only one of the agencies believes an investigation is necessary, generally that agency will proceed. If both agencies desire to investigate an acquisition, unnecessary duplication of effort by the agencies and burden on reporting persons are avoided by a decision as to which agency will proceed.

Once an investigation is authorized, the agency conducting the investigation may use any tools at its disposal to probe further and to facilitate its determination whether to challenge the proposed transaction. Frequently the investigating agency issues to either or both parties requests for additional information or documentary material ("second requests") under § 7A(e) of the Act and § 803.20 of the rules. With the information from the initial notification forms, the responses to second requests and any other information available to it, the investigating agency then determines whether a challenge to the transaction is appropriate. If not, then the extended waiting period is allowed to expire, or requests for early termination may be considered.

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2 A comprehensive Statement of Basis and Purpose, which explains the operation, purpose, and need for each of the rules, was published along with the final rules. 43 Fed. Reg. 33450 (July 31, 1978).

3 Certain types of transactions, specified in § 801.30 of the rules, have waiting periods which begin when only the acquiring person files notification.

4 Requests for early termination have been received in 111 of the 814 transactions reported so far this year; 61 of the requests were granted and 50 were denied.

If, however, the reported transaction is thought to present significant antitrust problems, the investigating agency may seek a preliminary injunction in Federal district court to stay the consummation of the transaction pendente lite. If the matter is thought inappropriate for a preliminary injunction proceeding, the agency may decide to challenge the transaction without seeking an injunction. The Antitrust Division of the Justice Department challenges an acquisition by filing a complaint in Federal district court; the Commission challenges an acquisition by issuing an administrative complaint which is tried before an administrative law judge, subject to a right of appeal to the full Commission and thereafter to a United States court of appeals.

Acquisitions challenged during 1979

Throughout the first eleven months of calendar year 1979, the agencies have received filings with respect to 814 transactions.[5] Upon review of these filings, the Commission and the Antitrust Division initiated 95 investigations in which second requests were issued to one or both parties.[6] After receipt of the requested information, some of these investigations were closed without further action; others are continuing as of this date. The remainder resulted in enforcement action by the agencies as detailed below.

The Commission has sought to enjoin three acquisitions under the premerger notification program so far this year. In a challenge to the acquisition of Applebaums' Food Markets by National Tea Company, a preliminary injunction was denied by the District Court in Minnesota on June 25, 1979, and the denial was affirmed by the Court of Appeals for the Eighth Circuit on July 16, 1979.[7] Even though the courts held that an injunction should not be granted, the Commission's administrative complaint challenging the now-consummated acquisition is scheduled for trial in early 1980. In July, the proposed acquisition of Reliance Electric Co. by Exxon Corp. was challenged by the

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5 Sixty-three transactions were reported during the month of December, 1978, after the second annual report to Congress had been reported, making the total number of 1978 transactions 355.

6 A total of 179 requests were issued in 95 transactions. Thus in most, but not all, investigations in which second requests were issued, both parties received them.

7 FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979).

Commission in the District Court for the District of Columbia. The district court issued a temporary restraining order on July 28, 1979.[8] After further hearings, however, the court issued an order permitting the acquisition but requiring that Exxon hold a portion of the Reliance assets separate for the duration of the Commission's administrative proceedings.[9] Finally the Commission sought a preliminary injunction to prevent the acquisition of Harnischfeger Corp. by Mannesmann A.G.[10] Before the district court could rule on that motion, Mannesmann withdrew its offer to purchase Harnischfeger. Mannesmann publicly announced that it had canceled its proposed acquisition because of the Commission's challenge.[11]

The Antitrust Division has so far sought preliminary injunctions six times during 1979.[12] In United States v. Tracinda Investment Corp.,[13] the Division sought to enjoin an acquisition of the stock of Columbia Pictures Industries, Inc. by Tracinda, which, along with its controlling shareholder, already held 48% of the stock of Metro-Goldwyn-Mayer, Inc. The

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8 FTC v. Exxon Corp., 5 Trade Reg. Rep. (CCH) ¶ 62,763 (D.D.C., July 28, 1979).

9 FTC v. Exxon Corp., 5 Trade Reg. Rep. (CCH) ¶ 62,972 (D.D.C., October 26, 1979).

10 FTC v. Harnischfeger Corp., Civ. No. 79-2601 (D.D.C., filed September 28, 1979).

11 Wall Street Journal, November 5, 1979, at 2, col. 3.

12 The second annual report to Congress listed two cases in which the Division had sought preliminary relief during 1978. After that report was completed, Occidental Petroleum Corp. announced that it was withdrawing its cash tender offer for the shares of Mead Corp., and the court therefore did not rule on the motion for a preliminary injunction. United States v. Occidental Petroleum Corp., Civ. No. C3-78-228 (S.D. Ohio, filed October 11, 1978). The District Court for the Northern District of New York denied the Division's motion to enjoin the takeover of Carrier Corp. by United Technologies, Inc., United States v. United Technologies, Inc., 1978-2 Trade Cases (CCH) ¶62,393 (N.D.N.Y., December 6, 1978), aff'd, 1978-2 Trade Cases (CCH) ¶62,405 (2d Cir., December 18, 1978). The district court, however, imposed a hold separate order pending the outcome of further proceedings on the merits. United States v. United Technologies, Inc., 1979-1 Trade Cases (CCH) ¶62,512 (N.D.N.Y., February 9, 1979). The matter is still pending before that court.

13 464 F. Supp. 660 (C.D. Cal. 1979).

injunction was denied and the matter went to trial. After a two-week trial the court dismissed the suit,[14] and the Justice Department has filed an appeal.

On March 22, 1979, the Antitrust Division filed an application for a temporary restraining order to prevent the acquisition by Emerson Electric Co. of Skil Corp. The district court denied the application for a temporary restraining order,[15] but on March 23, 1979, the court issued an order which required Emerson Electric Co. to hold separate the operations of Skil Corp. pending the resolution of the government's case.

Efforts to enjoin the acquisition of American Investment Company by Household Finance Corporation were initially unsuccessful. On a record in which all issues except the relevant product market had been stipulated by the parties, the District Court for the Northern District of Illinois declined to issue an injunction. On appeal, however, the Seventh Circuit reversed,[16] and divestiture was ordered. Defendants have petitioned the United States Supreme Court for the issuance of a writ of certiorari.

In three other cases, the Antitrust Division sought preliminary injunctions to prevent consummation of acquisitions which had been reported under the premerger notification program. In each case the defendants entered into consent agreements with the Division before the courts ruled on the preliminary injunction motions. United States v. Martin Marietta Corp. (acquisition of the assets of Wedron Silica Company, a subsidiary of Twentieth Century-Fox Corp.), Civ. No. 79-C-3626 (N.D. Ill., filed August 31, 1979) (divestiture of certain assets was required); United States v. Beneficial Corp. (acquisition of Southwestern Investment Company, a subsidiary of Beatrice Foods Co.), Civ. No. 79-C-3550 (N.D. Ill., filed September 24, 1979) (divestiture of 23 Southwestern offices was required); United States v. Beneficial Corp. (acquisition of Capital Finance Services, Inc., a subsidiary of the Continental Corp.), Civ. No. 79-C-3551 (N.D. Ill., filed August 29, 1979) (divestiture of 112 Capital offices was required).

There have been two other challenges to reportable acquisitions this year; although a preliminary injunction was not sought in either, both matters are now in litigation. The

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14 5 Trade Reg. Rep. (CCH) ¶62,889 (C.D. Cal., September 14, 1979).

15 United States v. Emerson Electric Co., Civ. No. 79-C-1144 (N.D. Ill., March 22, 1979).

16 United States v. Household Finance Corp., 602 F.2d 1255 (7th Cir. 1979).

Antitrust Division filed a complaint challenging the merger of Cross Company with Kearney and Trecker Corp.[17] The Commission filed a complaint challenging the acquisition by BASF A.G. of the Pigments Division of Chemetron Corp., a subsidiary of Allegheny Ludlum Industries.[18]

A number of additional acquisitions investigated by the Commission under the premerger notification program resulted in agreements under which complaints challenging the transactions were issued simultaneously with divestiture orders, under the Commission's consent docket. This procedure was followed with respect to the acquisition by Crane Co. of Medusa Corp. (Docket No. C-2959, issued April 5, 1979); the acquisition of Gardner Denver Co. by Cooper Industries, Inc. (Docket No. C-2970, issued June 18, 1979); Schering Plough Corp.'s acquisition of Scholl, Inc. (Docket No. C-2986, issued August 10, 1979); the acquisition by Liquid Air Corp. of the industrial gases assets of Chemetron Corp., a subsidiary of Allegheny Ludlum Industries (Docket No. C-2990, issued September 5, 1979); and the acquisition of Daylin, Inc., by W.R. Grace & Co. (File No. 791-0073, consent agreement placed on the public record for comments on October 30, 1979).

A consent order was also entered in a case challenging the acquisition of certain assets of Keystone Portland Cement Co. by Lone Star Industries, Inc. (Docket No. 9122). On January 25, 1979, the Commission issued a complaint and authorized its staff to seek a preliminary injunction in Federal district court, but the acquisition was abandoned when Lone Star learned of the Commission's action. The order prevents the contemplated acquisition from being accomplished without prior notice to the Commission.

The success of the premerger notification program cannot be judged on formal challenges and consent orders alone, although these are the most obvious and visible measures of merger law enforcement efforts by both agencies. Other indicators of the program's effectiveness are described below.

In the first eleven months of 1979, a number of transactions reportable under the program were abandoned after second requests were issued.[19] Frequently there is no announcement of the

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17 U.S. v. Cross and Trecker Corp., Civ. No. 973-737 (E.D. Mich., filed September 25, 1979).

18 In re BASF Wyandotte Corp., Docket No. 9125 (filed April 4, 1979).

19 Fourteen transactions were abandoned during Commission investigations. The Antitrust Division does not keep specific data on this aspect of the program.

reasons for abandoning a reportable merger. Obviously, one cannot conclude that the likelihood of an antitrust challenge was the basis for every decision to cancel; on the other hand, one cannot totally discount this phenomenon and the implications it raises concerning the program's effect on merger law enforcement.

It is also possible that the inception of the premerger notification program itself has deterred companies from entering into merger agreements which might violate the antitrust laws because of the parties' awareness that their transactions will be subjected to more careful scrutiny than in the past. There is, of course, no way of measuring this impact, but Congress, by passing the Act, has clearly made it more difficult for large companies to make an acquisition which violates established precedent and guidelines without the agencies knowing about it. It is therefore likely that the Act has resulted in the alteration of acquisition strategies of some large companies.

Rules changes

During the past year, the Commission staff undertook a review of the filings received during the first six months that the premerger notification program had been in operation. The staff compared the size of each reported transaction with the level of enforcement interest by either agency and discovered that a significant number of the smaller reportable transactions did not result in any investigation or challenge. As a result, the Commission proposed a revision of the so-called "minimum dollar value exemption," § 802.20 of the rules. This revision increased the dollar value reporting thresholds for certain transactions, thus providing exemption from the requirements of the Act for many of these smaller transactions.

The Commission's Notice of Proposed Rulemaking was published for comment in the Federal Register of August 10, 1979 (volume 44 at page 47099). Nine comments were received in response to this proposal, and a revision of § 802.20 was formally promulgated on November 13, with the concurrence of the Assistant Attorney General, and published in the Federal Register of November 21, 1979 (volume 44 at page 66781). The new rule became effective on November 21, 1979.

Based on the experience of both enforcement agencies, the Commission estimated that approximately 20% of the transactions reportable prior to the change would be exempt under the revised rule. The revision was designed both to reduce the burden of filing requirements for relatively small firms and to make additional agency resources available for review of other transactions. It represented a judgment by the enforcement agencies that this change could be implemented without impairing the effectiveness of the premerger notification program, while substantially reducing paperwork burdens for smaller companies.

Further information concerning this rule revision is attached to this annual report, including the Federal Register notices announcing the proposed change and the final rule, copies of the nine comments received in response to the proposal, and a copy of the press release issued by the Commission after the revision had been issued (Exhibits "A" through "L").

Litigation

The Commission and the Antitrust Division were named as defendants in a suit related to the premerger notification program and filed in the Federal District Court in Delaware by Borg-Warner Corporation on June 21, 1979. Borg-Warner had submitted a Notification and Report Form and later responded to a second request issued by Commission staff in connection with a proposed merger with the Firestone Tire & Rubber Company. The merger was subsequently abandoned, and Borg-Warner requested the return of all documents it had submitted. The Commission declined to return any documents on grounds that the Act does not require it, and that the documents may be necessary for subsequent use in an administrative or judicial action or proceeding. Borg-Warner sought a temporary restraining order, which was denied on June 22, 1979. The parties submitted briefs on cross motions for summary judgment, and oral argument was heard on November 29, 1979. No decision has been issued by the court to date.

Other effects of the premerger notification program

The impact of the premerger notification program on the antitrust enforcement agencies can be seen in part from the cases they have brought. Some additional observations may be useful, however, with respect to the way in which the agencies conduct their merger enforcement activities.

First, it is clear that one of the goals of the Act has been met, merely by the creation of the premerger notification program. Implementation of the Act largely ended the phenomenon of the "midnight merger," because only under the most unusual circumstances can a significant acquisition occur in the United States without prior notification to the enforcement agencies and compliance with a waiting period.

Second, the procedural tools which the Act provides to the enforcement agencies have had a significant impact on the ability of the agencies to investigate reportable mergers and acquisitions efficiently and effectively. The information provided by the parties on completed Notification and Report Forms is sufficiently comprehensive to permit a determination, in a substantial majority of cases, that no significant antitrust issues are raised by the transaction. That information also provides a useful focus and starting point with respect to those transactions which may raise such issues. In short, the Form has worked quite well during the first full year of the program's operation, and major revisions in the substance of those requirements seem unnecessary.[20]

The other key procedural tool which has strengthened the agencies' ability to investigate acquisitions which may violate the antitrust laws is the second request. Even though only one second request can be issued to each party the importance of this device is that the parties receiving such requests generally have a strong incentive to provide full responses as quickly as possible. Coupled with the Act's provision for extending the waiting period while responses to second requests are being prepared by recipients and for a short time thereafter, the second request permits the agencies to gather from the parties most or all of the information needed by the agencies to make their final determination whether to challenge certain transactions. The delays frequently encountered at the discovery stage of other types of litigation cannot benefit the parties to a reportable acquisition, who must defer consummation of the transaction until responses to second requests have been submitted and the waiting period has expired. At the same time, the government's ability to delay a transaction for a long period is limited by the fact that the waiting period can be extended only once.

The agencies have generally received a high degree of cooperation from the recipients of second requests, and areas of disagreement have been frequently narrowed and to date always resolved through negotiation. The second request and extended waiting period mechanism appear to have strengthened the investigative powers of the enforcement agencies, while permitting them to complete their investigations of significant acquisitions more efficiently and more quickly.

Another important aspect of the Act is that it gives the agencies an opportunity to seek a preliminary injunction to prevent consummation of a transaction which the agencies believe may violate the antitrust laws. It is too early for the agencies to make definitive judgments concerning the effectiveness of the Act in this respect. There simply have not been enough cases to support confident generalizations concerning the impact of the Act on the ability of the agencies to obtain preliminary injunctions in merger cases. It appears, however, that the

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20 It is anticipated that the Notification and Report Form will be updated shortly to provide for the submission of 1977 Economic Census data instead of the 1972 data currently required.

opportunity to seek an injunction has already been useful.

It would be misleading, however, to imply that all, or even most, future challenges to mergers and acquisitions by the agencies will necessarily be by preliminary injunction. While the Act significantly strengthens the agencies' investigative powers, it does not mean that injunctions will be sought in all situations in which the agencies believe that a transaction would violate the antitrust laws, and it certainly does not guarantee that the agencies will be more successful in obtaining injunctions when they are sought.[21]

Implicit in the Act is an assumption that at least some government antitrust challenges to mergers and acquisitions can be thoroughly investigated in a short time, that the government's case can be assembled quickly, and that a Federal district judge can feasibly and responsibly hear and decide such challenges in a preliminary injunction proceeding. The complexity of the legal and factual issues, the necessity of obtaining information from third parties who cannot be served with second requests under the Act and competing public interest considerations make some cases inappropriate for resolution in an injunction context. It would be incorrect, therefore, to assume that the Act will prevent the consummation of all large mergers or acquisitions which may violate the antitrust laws. The Act provides significant benefits to competition by improving the ability of the agencies to discover, investigate and challenge anticompetitive transactions, but it is not a panacea. Its utility should not be judged solely by reference to the number of injunctions successfully obtained by the enforcement agencies under its provisions. Instead, its full impact on the antitrust law enforcement process should be assessed. After the first full year of operation, that impact appears to be positive.

It is possible also to offer some observations at this juncture concerning the impact of the program on persons whose transactions are reportable under it. First, compliance with the program has exceeded even the most optimistic expectations of the agencies. Both agencies have informally monitored announcements of consummated acquisitions to ensure that the parties to transactions covered by the Act are in compliance. When the program was first implemented, the agencies assumed that it might be necessary to bring some actions under §7A(g)(1) of the Act, which provides for penalties of up to $10,000 per day for

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21 That is why the provisions of § 7A(i) are so important. Congress there provided, first, that neither action nor inaction by either agency under the Act can bar any other proceeding or action with respect to the same transaction under any other provision of law; and, second, that the Act does not limit the agencies' authority to obtain information from any person under any other provision of law.

violations of the premerger notification requirements. No such actions have been filed to date.

One possible explanation for the absence of § 7A(g)(1) actions is the efforts of both agencies to disseminate information about the program. Personnel from both agencies have given a number of speeches about the program this year,[22] and the Commission prepared a "Compliance Guide," that was distributed in substantial numbers early this year. The Commission staff receives hundreds of telephone inquiries a month, and a significant portion of staff time is spent explaining the operation of the program and assisting persons with questions and problems that arise under the Act and the rules. Four formal interpretations of the Act and rules have been issued by Commission staff with the concurrence of the Antitrust Division, under § 803.30(c) of the rules, and distributed both to the public and to the media which cover antitrust and corporate matters (Exhibits "N" through "Q").[23]

Based on experience to date, it also does not appear that compliance with the initial notification requirement is inordinately difficult or unreasonably expensive. Filing persons have not had significant problems providing the information and documentary materials required by the Notification and Report Form.

The agencies have received complaints from certain recipients of second requests who objected to the breadth of those requests or to specific items contained in the requests. To a large extent, the breadth of second requests stems from the dual role of the request under the Act. First, the agencies have to include in a second request whatever they believe they have to learn from the recipient in order to make a determination whether to challenge the transaction. Second, if a decision is made to challenge the transaction, the second request is one of the

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22 For example, on August 14, 1979, Malcolm R. Pfunder, Assistant Director for Evaluation in the Commission's Bureau of Competition, delivered a speech on the subject of premerger notification to the annual meeting of the Antitrust Section of the American Bar Association in Dallas, Texas. The speech was entitled "Premerger Notification After One Year -- A Staff Perspective from the Federal Trade Commisson." Mr. Pfunder has been responsible for the administration of the premerger notification program at the Commission since April, 1977, and the speech represented his personal views. A copy of the speech is attached as Exhibit "M."

23 One formal interpretation was issued in late December of last year after the second annual report to Congress had been prepared, and is attached as Exhibit "R."

primary means by which evidence is gathered to support the agency's case in Federal district court. Moreover, because the agencies must prepare their second requests within a very short time -- relying solely on information contained in the initial notifications, information which is publicly available, and information previously in their possession -- second requests are sometimes inadvertently broader than would be necessary if more information had been available at the time they were prepared.

The agencies have attempted to mitigate these problems by adopting an approach toward second request recipients that is both practical and flexible. The staffs of both agencies have been highly receptive to negotiations with recipients, both as to the content of the request and as to the manner of compliance. It seems particularly significant that neither agency has sought a court order under § 7A(g)(2) of the Act, which authorizes each agency to seek from a Federal district court an order requiring compliance, a further extension of the waiting period, or other equitable relief. The fact that § 7A(g)(2) actions have not proved necessary suggests that the agencies have so far successfully found a reasonable balance between the use of the Act's investigative tools and reasonable and responsible accommodation of the interests of the parties to those transactions.

Another impact on the parties to a reportable transaction results from the extension of the waiting period when second requests are issued.[24] Extension of the waiting period may or may not create inconvenience or hardship to the parties, depending upon whether consummation of the transaction is delayed, and if so, the consequences resulting from that delay. The purpose of the delay is to permit the enforcement agencies to conduct a more thorough investigation and to decide whether to challenge the transaction prior to consummation. Thus some delay is necessary to carry out the purposes of the Act.

This delay, however, may be mitigated. The parties can

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24 When a second request is issued to the acquiring person in a cash tender offer, the 15-day waiting period is extended until 10 days after the response to the second request has been received. When a second request is issued to the acquiring person in a non-cash tender offer, the 30-day waiting period is extended until 20 days following receipt of the response. A second request issued to the acquired person in either type of tender offer has no effect on the waiting period, regardless of how long it takes for the recipient to compile its response, although the rules require that the response be provided within a reasonable time. A second request issued to either or both parties in a non-tender offer transaction extends the 30-day waiting period until 20 days after all recipients have responded.

request early termination, which would normally be granted if a good business reason is provided to support the request and if, after receiving the second request responses, the investigating agency determines not to challenge the transaction. In many cases the parties, by filing their initial notifications earlier or by scheduling the consummation of the transaction for a date later than immediately following the originally anticipated expiration of the waiting period, can minimize the possibility that delay may adversely affect them.

There have been a number of situations during the past year in which recipients of second requests, for whatever reason, have simply not responded promptly. In a few cases, the parties have provided no response for a number of months. On the other hand, a review of all cases in which second requests have been issued reveals that the time necessary for receipt of all responses which affected the length of the waiting period was less than 20 days about as often as it was longer than 20 days. Thus experience to date does not appear to suggest that second requests are inappropriately lengthy or complex, or that waiting period extensions have been unduly long or damaging to the parties to transactions under investigation.

While conclusions based on only one year's experience must of necessity be somewhat tentative, the agencies have attempted to exercise the powers conferred on them by the Act in a responsible manner, while at the same time seeking to carry out the Congressional mandate to subject all significant acquisitions to careful antitrust scrutiny. Interference with mergers and acquisitions that do not raise significant antitrust issues appears to have been minimized, while transactions questionable under the antitrust laws have been investigated and prosecuted more effectively under the Act.

Recommendation for a possible revision of the Act

The agencies do not believe that any major revisions of the Act are needed at this time. There is one area, however, in which a relatively minor change might be appropriate. Section 7A(h) provides that any information filed with the agencies under the Act is confidential and may not be made public "except as may be relevant to any administrative or judicial action or proceeding." The agencies have taken the position, in response both to informal requests and to requests under the Freedom of Information Act, that the fact of filing is itself part of the information protected from disclosure under § 7A(h). The agencies do not disclose the fact that parties to a transaction have filed notification under the Act because this may reveal information filed with the agencies under the Act, such as the sizes of the parties, the size of the transaction, the likely consummation date, and other information the Act intended to keep confidential. However, section 7A(b)(2), which authorizes the agencies to grant early termination of the waiting period, requires that notice be published in the Federal Register when early termination is granted. Section 7A(b)(2), therefore, appears to be in conflict with § 7A(h).

This problem was pointed out in the comments received when the implementing rules were under consideration. See 43 Fed. Reg. 33514 (July 31, 1978). The Commission at that time interpreted the mandatory publication requirement in § 7A(b)(2) to be "a necessary exception to section 7A(h)" even though it had the effect of revealing the fact of filing.

The agencies believe, however, that parties to a reportable transaction should not have to choose between keeping confidential the fact that their transaction has been reported under the premerger notification program and requesting early termination of the waiting period. In no other respect is confidential information received under the program required to be made available to the public. The Commission and the Assistant Attorney General thus recommend that § 7A(b)(2) be amended by deleting that portion of the subsection which follows the word "section," as indicated below:

> The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section~~, and shall cause to be published in the Federal Register notice that neither intends to take any action within such period with respect to such acquisition~~.

The Assistant Attorney General has indicated his concurrence with this annual report.

By direction of the Commission.

Carol M. Thomas
Secretary

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Annual Report to Congress
Fiscal Year 2000

Pursuant to Subsection (j) of Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Twenty-Third Report)

Robert Pitofsky
Chairman
Federal Trade Commission

John M. Nannes
Acting Assistant Attorney General
Antitrust Division

INTRODUCTION

Merger activity remained strong and as a result, the antitrust enforcement agencies concluded another extremely active year, receiving a record high of 4,926 HSR filings in fiscal year 2000.[1] (*See* Figure 1 below). This represents about a 6.1 percent increase from the 4,642 filing transactions reported in 1999, and a 222.1 percent increase in the 1,529 transactions reported in fiscal year 1991.[2]

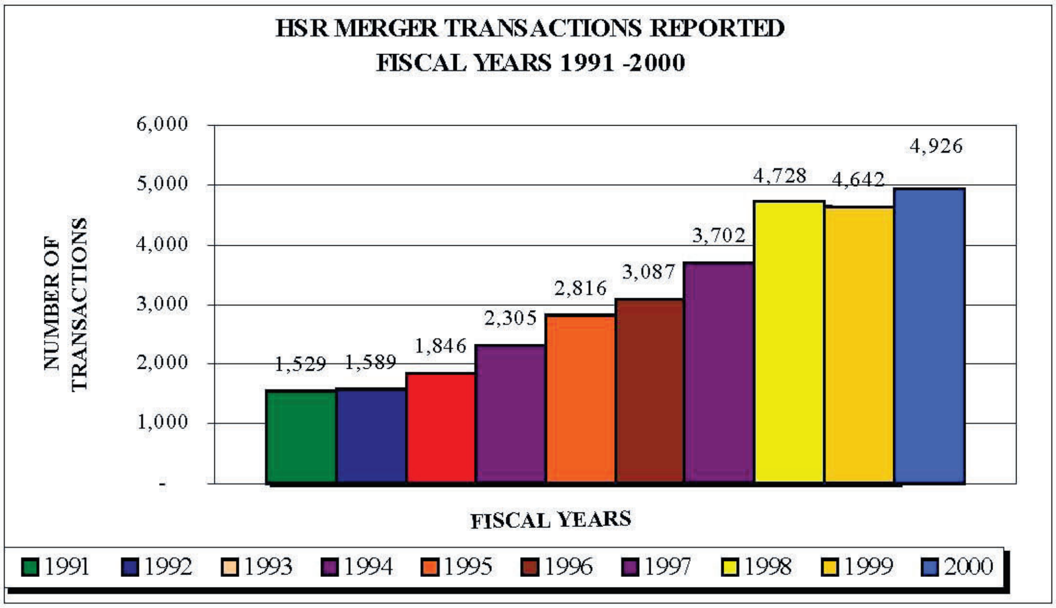

Figure 1

The Hart-Scott-Rodino ("HSR") Act,[3] together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, gives the Federal Trade Commission (the "Commission") and the Antitrust Division of the Department of Justice (the "Antitrust Division" or "Division") the opportunity to obtain effective preliminary relief against anticompetitive mergers and to prevent interim harm to competition and consumers. The premerger program was instrumental in detecting transactions that were the subject of the numerous enforcement actions brought in fiscal year 2000 to protect consumers -- individuals, businesses, and government -- against anticompetitive mergers. The Commission challenged 32 transactions, leading to 18 consent orders, nine abandoned transactions, and five preliminary injunction proceedings authorized, including *BP Amoco p.l.c. and Atlantic*

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[1] This increase in filings is short-lived. Legislation that raised the size-of-transaction threshold from $15 million to $50 million and made other changes to the filing requirements took effect February 1, 2001. *See* Pub. L. No. 106-553, 114 Stat. 2762. A dramatic decline in the number of filings is expected in FY 2001.

[2] *See* Appendix A.

[3] Because the amendments were enacted and took effect after the end of FY 2000, the HSR Act as described in this Report is the Section 7A of the Clayton Act prior to those amendments.

Richfield Company[4] which would have created the largest U.S. oil producer and refiner and resulted in significantly reduced competition in the exploration and production of Alaska North Slope crude oil. The Antitrust Division challenged 48 transactions – 18 of these challenges were resolved by consent decrees, 29 transactions were either restructured or abandoned after the Antitrust Division sued or informed the parties that it intended to sue, including the merger of Worldcom, Inc. and Sprint Corporation[5] which would have reduced competition in many of the nation's most important telecommunications services markets, and one was litigated in district court and won by the Division.

Despite the increased activity, the agencies continued their efforts to minimize the enforcement burden on business. While the number of merger investigations was at a record high, both the percentage and the number of transactions resulting in requests for additional information from merging parties ("second requests") declined, and the percentage and number of early termination requests granted increased.[6]

In addition to the Commission's and the Antitrust Division's review of a record number of filings in fiscal year 2000, the Commission's Premerger Notification Office ("PNO") continued to respond to thousands of telephone calls seeking information concerning the reportability of transactions under the HSR Act and the details involved in completing and filing premerger notification forms. The HSR website[7] has enhanced the PNO's efficiency by improving access to information necessary to the notification process. The website, expanded in fiscal year 2000, includes such information as the premerger notification filing form and instructions, the HSR Statement of Basis and Purpose, the PNO Sourcebook, the premerger rules, formal interpretations of the rules, filing fee instructions, grants of early termination, information regarding HSR events, procedures for submitting post-consummation filings, tips for completing the Notification and Report Form, frequently asked questions regarding the HSR filing requirements, and other useful information.

BACKGROUND

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. §18a ("the Act"). Subsection (j) of Section 7A provides:

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[4] *See infra* p. 20.

[5] *See infra* p. 17.

[6] *See* Appendix A.

[7] www.ftc.gov/bc/hsr/

> Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and the need for any rule promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the twenty-third annual report to Congress pursuant to this provision. It covers fiscal year 2000 -- October 1, 1999 through September 30, 2000.

In general, the Act requires that certain proposed acquisitions of voting stock or assets must be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and the size of the parties as measured by their sales and assets. Small acquisitions, acquisitions involving small parties, and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information necessary to conduct this antitrust review. Much of the information for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to the proposed transactions and thus is immediately available for review during the waiting period.

However, if either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to request additional information or documentary materials from both of the parties to a reported transaction (a "second request"). A second request extends the waiting period for a specified period[8] after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, it may seek an injunction in federal district court to prohibit consummation of the transaction.

[8] The waiting period was extended until 20 days after second request compliance (10 days in the case of a cash tender offer or a bankruptcy sale) during the time period covered by this report. Under the statutory changes cited in footnote 1, this waiting period extension was increased to 30 days for most transactions. The 10-day waiting period extension for cash tender offers and bankruptcies remained the same.

The Commission promulgated final rules implementing the premerger notification program with the concurrence of the Assistant Attorney General on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was also published containing a section-by-section analysis of the rules and an item-by-item analysis of the Premerger Notification and Report Form. The program became effective on September 5, 1978. During the twenty-three years that the rules have been in effect, the Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the Form on several occasions to improve the program's effectiveness and to lessen the burden of complying with the rules. [9]

STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for a ten-year period, the number of transactions reported,[10] the number of filings received, the number of merger investigations in which second requests were issued, and the number of transactions in which requests for early termination of the waiting period were received, granted, and not granted. Appendix A also shows for fiscal years 1991 through 2000 the number of transactions in which second requests could have been issued, as well as the percentage of transactions in which second requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 1991 through 2000.

The statistics set out in these appendices show that the number of transactions reported in FY 2000 increased approximately 6.1 percent from the number of transactions reported in FY 1999. In FY 2000, 4,926 transactions were reported, while 4,642 were reported in FY 1999. The statistics in Appendix A show that the number of merger investigations in which second requests were issued in FY 2000 decreased approximately 11.8 percent from the number of merger investigations in which second request were issued in FY 1999. Second requests were issued in 98 merger investigations in FY 2000, while second requests were issued in 111 merger investigations in FY 1999.

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[9] 43 Fed. Reg. 3443 (August 4, 1978); 43 Fed. Reg. 36053 (August 15, 1978); 44 Fed. Reg. (November 21, 1979); 45 Fed. Reg. 14205 (March 5, 1980); 48 Fed. Reg. 34427 (July 29, 1983); 50 Fed. Reg. 46633; 51 Fed. Reg. 10368 (March 26, 1986); 52 Fed. Reg. 7066 (March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 54 Fed. Reg. 214251 (May 18, 1989); 55 Fed. Reg. 31371 (August 2, 1990); 60 Fed. Reg. 40704 (August 9, 1995); 61 Fed. Reg. 13666 (March 28, 1996); 63 Fed. Reg. 34592 (June 25, 1998).

[10] The term "transaction", as used in Appendices A and B, and Exhibit A to this report, does not refer only to separate mergers or acquisitions. A particular merger, joint venture or acquisition may be structured such that it involves more than one transaction. For example, cash tender offers, options to acquire voting securities from the issuer, or options to acquire voting securities from someone other than the issuer, may result in multiple acquiring or acquired persons that necessitate separate HSR transaction numbers to track the filing parties and waiting periods.

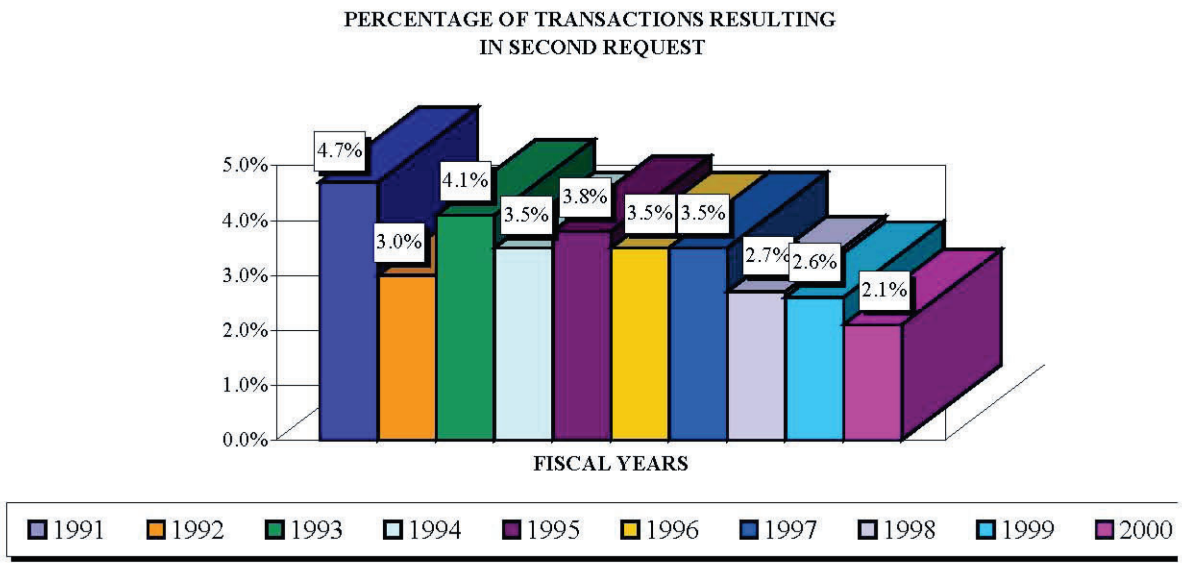

Figure 2

The statistics in Appendix A also show that in recent years, early termination was requested in the majority of transactions. In FY 2000, early termination was requested in 87.8 percent (4,324) of the transactions reported while in FY 1999 it was requested in 88.5 (4,110) percent of the transactions reported. The percentage of requests granted out of the total requested increased from 75.5 percent in fiscal year 1999 to 81.3 percent in fiscal year 2000.

Statistical tables (Tables I through XI) in Exhibit A contain information about the agencies' enforcement interest in transactions reported in FY 2000. The tables provide, for various statistical breakdowns, the number and percentage of transactions in which clearances to investigate were granted by one antitrust agency to the other and the number of merger investigations in which second requests were issued. Table III of Exhibit A shows that, in FY 2000, clearance was granted to one or the other of the agencies for the purpose of conducting an initial investigation in 7.1 percent of the total number of transactions in which a second request could have been issued.

The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. The total dollar value of reported transactions has risen dramatically during the last seven years from less than $375 billion to about $3 trillion.

The tables provide the number of transactions based on the industry group 2-digit SIC code in which the acquiring person or the acquired entity derived revenue. Figure 3 illustrates the percentage of reportable transactions within industry groups for FY 2000 based on the acquired entity's operations.

PERCENTAGE OF TRANSACTIONS BY
INDUSTRY GROUP OF ACQUIRED ENTITY
FISCAL YEAR 2000

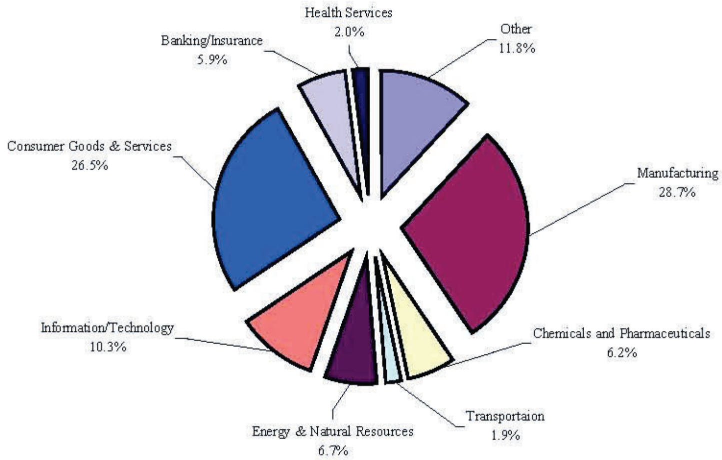

Figure 3

DEVELOPMENTS IN FISCAL YEAR 2000 RELATING TO COMPLIANCE WITH THE PREMERGER NOTIFICATION RULES AND PROCEDURES

1. Compliance

The Commission and the Department of Justice continued to monitor compliance with the premerger notification program's filing requirements and initiated a number of compliance investigations in FY 2000. The agencies monitor compliance through a variety of methods, including the review of newspapers and industry publications for announcements of transactions that may not have been reported in accordance with the requirements of the Act. In addition, industry sources, such as competitors, customers and suppliers, and interested members of the public provide the agencies with information about transactions and possible violations of the filing requirements. Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting requirements is liable for a civil penalty of up to $11,000 for each day the violation continues.[11]

[11] Effective November 20, 1996, dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction were adjusted for inflation in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 (April 26, 1996). The adjustments included, in part, an increase from $10,000 to $11,000 for each day during which a person is in violation under Section 7A(g)(1), 15 U.S.C. 18a(g)(1). 61 Fed. Reg. 54548 (October 21, 1996), corrected at 61 Fed. Reg. 55840 (October 29, 1996).

2. Formal Interpretations of the Rules

In FY 2000, the Commission's Premerger Notification Office, with the concurrence of the Assistant Attorney General, issued one formal interpretation of the premerger notification rules.

Amendments to the HSR Act made by the Gramm-Leach-Bliley Act[12]

Formal Interpretation 17[13] describes the PNO's position regarding certain "mixed" transactions that may occur under the Gramm-Leach-Bliley Act ("GLB Act"), enacted on November 12, 1999, that have some portions subject to advance competitive review by a banking agency and other non-bank portions that are not subject to such review. Under the GLB Act, bank holding companies and banks are allowed to affiliate with companies that participate in financial services markets that were previously off limits to such entities. The HSR Act exempts from HSR premerger antitrust review certain classes of acquisitions that require premerger competitive review by a specialized regulatory agency. Formal Interpretation 17 confirms that the PNO's longstanding treatment of mixed transactions is to be applied to transactions involving the banking industry. Under the Interpretation, the non-bank portion of such a transaction is subject to the reporting requirements of the HSR Act regardless of whether the non-bank business is housed in an affiliate of a financial holding company or a financial subsidiary of a bank.

3. New Procedures for Requests for Additional Information

During April 2000, the Commission and the Division each announced a series of new procedures and initiatives to improve the handling of second requests issued by the Commission and the Division during HSR premerger investigations. The adopted procedures provide that all second requests will get centralized high level review prior to issuance. Agency staff will convene a conference with the parties promptly following the issuance of the second request to discuss the competitive issues raised by the proposed transaction and will provide a quick turn-around on the parties' requests for modifications of the second request to afford the parties greater opportunities for more efficient and better-directed records searches. In addition, the agencies announced that they would be implementing new procedures for appealing second request issues when second request modification issues are not resolved with agency staff.

[12] Pub. L. No. 106-102 (November 12, 1999).

[13] 65 Fed. Reg. 17880 (April 5, 2000).

MERGER ENFORCEMENT ACTIVITY DURING FISCAL YEAR 2000[14]

1. Department of Justice

The Antitrust Division challenged 48 merger transactions that it concluded could lessen competition if allowed to proceed as proposed during FY 2000. In 21 of the transactions, the Antitrust Division filed a complaint in U.S. District Court. Eighteen of these cases were settled by consent decree, two transactions were abandoned after filing of the complaint and one case was litigated in district court and won.

In the other 27 challenges during FY 2000, the Antitrust Division informed the parties to a proposed transaction that it would file suit challenging the transaction unless the parties restructured the proposal to avoid competitive problems or abandoned the transaction altogether.[15] In 16 instances, the parties restructured the proposed transactions, and in 11

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[14] All cases in this report were not necessarily reportable under the premerger notification program. Because of provisions regarding the confidentiality of the information obtained pursuant to the Act, it would be inappropriate to identify which cases were initiated under the program.

[15] In 11 instances, the Department of Justice issued press releases: December 6, 1999 --Joint venture between Bell Atlantic Corporation and Vodafone AirTouch Plc (wireless mobile telephones); December 8, 1999 -- Zions Bancorporation and First Security Corporation -- Utah and Idaho banks (business banking services); January 24, 2000 -- Centura Banks Inc. and Triangle Bancorp Inc. merger -- North Carolina banks (business banking services); March 30, 2000 -- Hearst's Corporation proposed acquisition of the San Francisco Chronicle (newspapers); May 22, 2000 -- Wells Fargo & Company's merger with First Commerce Bancshares Inc. -- Nebraska banks (business banking services); June 21, 2000 -- Old National Bank merger with Permanent Bank -- Evansville, Indiana banks (business banking services); July 14, 2000 -- Entercom Communications Corporation's proposed acquisition of KCFX-FM, KQRC-FM, KCIY-FM and KXTR-FM from Sinclair Broadcast Group (Kansas radio stations); July 18, 2000 --Citadel Communications Corporation's proposed acquisition of WTCF-FM and WHNN-FM from Liggett Broadcast Inc. (Michigan radio stations); August 1, 2000 -- Allied Waste Industries Inc.'s acquisition of Waste Management Inc.'s Waste Collection and Disposal assets in Mississippi and Ohio (refuse systems); August 15, 2000--NBT Bancorp Inc. and BSB Bancorp Inc. bank merger -- New York banks (business banking services); September 14, 2000 -- Wells Fargo & Company's acquisition of First Security Corporation -- New Mexico, Nevada, Utah, and Idaho banks (business banking services).

In addition to the 11 in which it issued press releases, the Department of Justice in 16 instances informed the parties that their proposed acquisition was likely to have anticompetitive effects: proposed acquisition of Kvaerner AsA by A. Ahlstrom Corporation (paper industries machinery); acquisition of Delta and Pine Land Company, Inc. by Monsanto (cotton seeds); Wells Fargo's proposed acquisition of First Place Financial Corporation -- New Mexico and Colorado banks (business banking services); acquisition of WICS-TV and WICD-TV from Sinclair Broadcast Group by Hicks, Muse, Tate & Furst Equity Fund III, L.P. (television stations in Champaign-Springfield-Decatur, Illinois); merger of Burlington Northern Santa Fe and Canadian National Railway Co.; BB&T's acquisition of One Valley Bancorp -- Virginia banks (business banking services); Cumulus Broadcasting's acquisition from Mustang Broadcasting of three radio stations (Grand Junction, CO radio market); Allegheny Power System, Inc.'s proposed acquisition of DQE (electric utility services); Tri-State Generation and Transmission Association merger with Public Service Company of New Mexico (electric utility services); proposed acquisition of Third Wave Technologies, Inc. by PE Corporation (PE Biosystems Group); proposed acquisition of Dime Bancorp and the Dime Savings Bank of New York by North Fork Bancorporation -- NY instances, the parties abandoned the proposed transactions.

In *United States v. Harsco Corporation, Pandrol Jackson Limited and Pandrol Jackson, Inc.*,[16] the Division challenged Harsco Corporation's $89 million acquisition of certain assets of Pandrol Jackson Inc. and Pandrol Jackson Limited. The complaint alleged that the acquisition, as originally structured, would substantially lessen competition in the switch and crossing and transit grinding equipment market. Switch and crossing grinders and transit grinders are machines designed to restore the tracks of railroads and transit systems to their original shapes and are used to repair deformations caused by the rubbing of train wheels on rails used in railroad track switches, railroad track crossings and transit systems. Harsco and Pandrol were the only two manufacturers of switch and crossing and transit grinding equipment and the only two providers of railroad switch and crossing grinding services in North America. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, Harsco was required to divest the Pandrol switch and crossing and transit grinding assets. The Court entered the consent decree on March 8, 2000.

In *United States v. Compuware Corporation and Viasoft, Inc.*,[17] the Division sued to block Compuware Corporation's acquisition of Viasoft Inc. The Division alleged that the acquisition would have reduced competition significantly in the markets for two types of software products for mainframe computers: testing and debugging software, which is used to check for errors as program code is written and used in production to fix code in the event of a processing failure; and fault management software, which detects and diagnoses the errors that cause a processing failure. The complaint alleged that Compuware is the world's dominant producer of both mainframe testing and debugging software and mainframe fault management software. It also alleged that Viasoft is Compuware's closest rival in the market for testing and debugging software and that Viasoft is a recent entrant in the market for fault management software, with a promising product that should enable it to become a significant competitor to Compuware. With the trial scheduled to begin April 3, 2000, Compuware and Viasoft agreed to terminate their proposed merger on January 19, 2000.

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banks (business banking services); Firstar Corporation's acquisition of Mercantile Bancorporation -- Iowa/Illinois banks (business banking services); proposed acquisition of Z-Spanish Media Corporation by Entravision Communication Corporation (Spanish television); proposed joint venture between Transportacion Maritima Mexicana, S.A. de C.V. and Stolt-Nielsen, S.A. (chemical tankers); proposed merger between Alcan Aluminum, Pechiney and ALGROUP (aluminum); Healtheon/WebMD Corporation's strategic agreements with IDX Systems Corporation and ChannelHealth, Inc. (electronic data interchange; physician practice management systems; internet portals for consumer healthcare and internet-based healthcare service).

[16] United States v. Harsco Corporation, Pandrol Jackson Limited and Pandrol Jackson Inc., C.V. No. 1:99CV02706 (D.D.C. filed October 14, 1999).

[17] United States v. Compuware Corporation and Viasoft, Inc., C.V. No. 1:99CV02884 (D.D.C. filed October 29, 1999).

In *United States v. Fiat S.p.A., Fiat Acquisition Corporation, New Holland N.V., New Holland North America, Inc. & Case Corporation,*[18] the Division challenged the $4.3 billion acquisition by New Holland of Case Corporation. The complaint alleged that the acquisition, as originally structured, would have likely resulted in higher prices, lower quality and less innovation for farmers and other purchasers in the approximately $1.5 billion market for agricultural tractors and in the $250 million hay tools markets. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, New Holland was required to sell its four-wheel-drive tractor business (the Versatile line) and its large two-wheel-drive agricultural tractor business (the Genesis line). In addition, Case was required to sell its interest in Hay and Forage Industries (HFI), a joint venture that produces hay tools, such as large and small square balers, and self-propelled windrowers. The consent decree was entered by the Court on March 17, 2000.

In *United States v. Alcoa Inc., ACX Technologies, Inc. and Golden Aluminum Company,*[19] the Division challenged Alcoa Inc.'s $41 million acquisition of Golden Aluminum Company from ACX Technologies, Inc. The complaint alleged that the transaction, as originally structured, would have increased Alcoa's ability to raise prices, reduce quality and decrease production of aluminum can lid stock through the elimination of a low-cost competitor in a highly concentrated industry. Alcoa controlled over 50 percent of the aluminum can lid stock market in North America, and Golden was one of only four other companies that manufactured lid stock in North America. Lid stock is aluminum sheet that is used by can manufacturers to make the ends, tabs, and lids of food and beverage cans. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree required Alcoa to divest Golden's Fort Lupton, Colorado manufacturing facility in order to preserve competition in the $1.6 billion market for the manufacture and sale of aluminum can lid stock. The consent decree was entered by the Court on June 30, 2000.

In *United States v. AlliedSignal Inc. and Honeywell, Inc.,*[20] the Division challenged the $16 billion merger between AlliedSignal Inc. and Honeywell, Inc. The complaint alleged that the acquisition, as originally structured, would substantially lessen competition in four product areas -- traffic alert and collision avoidance systems; search and surveillance weather radar; reaction and momentum wheels; and inertial systems -- resulting in higher prices and lower quality for these products. A traffic alert and collision avoidance system is an avionics product that reduces the potential for mid-air collisions between aircraft by identifying a

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[18] United States v. Fiat S.p.A., Fiat Acquisition Corporation, New Holland N.V., New Holland North America, Inc. and Case Corporation, C.V. No. 1:99CV02927 (D.D.C. filed November 4, 1999).

[19] United States v. Alcoa Inc., ACX Technologies, Inc. and Golden Aluminum Company, C.V. No. 1:99CV02943 (D.D.C. filed November 5, 1999).

[20] United States v. AlliedSignal Inc. and Honeywell Inc., C.V. No. 1:99CV02959 (D.D.C. filed November 8, 1999).

collision threat and advising the pilot how to avoid it. The search and surveillance weather radar, a type of radar often used on helicopters during rescue missions, predicts inclement weather and allows the pilot to locate small objects, such as a boat or an oil drilling rig, during poor weather conditions. Reaction and momentum wheels are mechanical devices that move and stabilize satellites by spinning and generating a force to produce rotation. Inertial systems measure an object's velocity, position, and rate of rotation in order to calculate the object's position and heading. Inertial systems employ sophisticated components and technologies, including: micro-electro-mechanical systems ("MEMS"); fiber optic gyroscopes ("FOGs"); ring laser gyroscopes ("RLGs"), or mechanical rate gyroscopes ("MRGs"). In each of the identified product areas, the proposed merger would have left at most two or three major competitors. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree required AlliedSignal and Honeywell to divest significant portions of their avionics businesses. In particular, AlliedSignal was to divest its search and surveillance weather radar business in Olathe, Kansas; its space and navigation business in Teterboro, New Jersey, which produces RLGs, FOGs, and reaction and momentum wheels; its MRG business in Cheshire, Connecticut and a related repair business in Newark, Ohio; its MEMS business (based on a technology known as microSCIRAS) in Redmond, Washington, and related MEMS licenses. Also, Honeywell must divest its traffic alert and collision avoidance systems business located in Glendale, Arizona. The consent decree was entered by the Court on March 22, 2000.

In *United States v. CBS Corporation, Infinity Broadcasting Corporation and Outdoor Systems, Inc.,*[21] the Division challenged the $8.3 billion acquisition of Outdoor Systems, Inc. by CBS Corporation/Infinity Broadcasting Corporation. The complaint alleged that the acquisition, as originally structured, would substantially lessen competition in the out-of-home advertising market -- billboards, subway displays, and signs that appear on the sides of buses and bus shelters -- in three geographic markets -- New York, New York, New Orleans, Louisiana and Phoenix, Arizona. Infinity Broadcasting and Outdoor Systems were head-to-head competitors, and, for many advertisers, each other's closest competitor. Thus, the acquisition would have given the parties a dominant share of the out-of-home advertising market. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, the parties were required to divest certain advertising displays in the three geographic markets mentioned above. The consent decree required Infinity Broadcasting and Outdoor Systems to sell a package of advertising displays in New York City generating revenues equal to at least $25.3 million, which constituted Outdoor Systems' billboard advertising business. In addition, the companies were required to divest either Outdoor Systems' bus shelter advertising or its subway advertising operations, if they were still selling both types of advertising in February 2000. In New Orleans, the merging parties were required to divest Infinity Broadcasting's entire bus advertising

[21] United States v. CBS Corporation, Infinity Broadcasting Corporation and Outdoor Systems, Inc., C.V. No. 1:99CV03212 (D.D.C. filed December 6, 1999).

operations. In Phoenix, the merging parties were required to divest either Infinity Broadcasting's bus advertising operations or a package of out-of-home advertising displays generating the same amount of revenues. The divestitures must be at least equal to Infinity Broadcasting's out-of-home advertising sales in both New Orleans and Phoenix. The consent decree was entered by the Court on June 7, 2000.

In *United States v. Miller Industries, Inc., Miller Industries Towing Equipment, Inc., and Chevron, Inc.,*[22] the Division challenged Miller's acquisitions of two competitors -- Vulcan Equipment, Inc. and Chevron, Inc. Miller Industries acquired Vulcan Equipment in September 1996 for Miller stock valued at approximately $8.2 million and Chevron in December 1997 for $10 million. The complaint alleged that the acquisitions lessened competition in the design, manufacture, and sale of light-duty tow trucks and car carriers, substantially increased Miller Industries' ownership of valuable patent rights, and eliminated two competitors that offered customers products with different and competitively significant technology. Miller Industries is the nation's largest supplier of light-duty tow trucks and light-duty car carriers, the two main types of towing and recovery vehicles used to recover and transport disabled cars and light trucks. Miller Industries designs, manufactures, and markets many well-known brands of light-duty tow trucks and light-duty car carriers, including those carrying the Century, Vulcan, Chevron, Holmes, Challenger, and Champion brands. Both Vulcan and Chevron had successfully developed and marketed valuable innovations in product design for towing and recovery vehicles, and offered tow trucks and car carriers with valuable patented features. Prior to the acquisition, Miller and Vulcan used much of the same patented technology pursuant to licensing agreements. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree required Miller Industries to license important technology used in towing and recovery vehicles. Specifically, the decree required Miller Industries to grant licenses under five key patents and also to notify the Division prior to acquiring any interest in a competitor, or related assets or patents, with a value over $5 million. The consent decree was entered by the Court on December 12, 2000.

In *United States v. The Earthgrains Company, Specialty Foods Corporation and Metz Holdings, Inc.,*[23] the Division challenged the $625 million acquisition of Metz Holdings, Inc. by The Earthgrains Company. The complaint alleged that the acquisition, as originally structured, would substantially lessen competition in the sale of white pan bread, which is commonly used for sandwiches, in Des Moines, Iowa, Kansas City, Missouri, and Omaha, Nebraska, as well as in surrounding areas in Iowa, Kansas, Missouri, Nebraska and Illinois. Earthgrains and Metz competed directly in the production, marketing, and sale of white pan bread, and were two of only a small number of companies selling white pan bread in those

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[22] United States v. Miller Industries, Inc., Miller Industries Towing Equipment, Inc. and Chevron, Inc., C.V. No. 1:00CV00305 (D.D.C. filed February 17, 2000).

[23] United States v. The Earthgrains Company, Specialty Foods Corporation and Metz Holdings, Inc., C.V. No. 00C 1687 (N.D. Ill. filed March 20, 2000).

markets. The acquisition would have reduced the number of white pan bread competitors from three to two in Kansas City, Omaha and surrounding areas, and from four to three in Des Moines and surrounding areas. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, Earthgrains must divest its Colonial brand and Metz's Taystee brand of white pan bread. The decree also permits the Division to require the companies to divest Earthgrain's Des Moines bakery and other assets related to the distribution of white bread in the area. The consent decree was entered by the Court on July 3, 2000.

In *United States v. Dairy Farmers of America, Inc., Societe De Diffusion Internationale Agro-Alimentaire and SODIAAL North America Corporation,*[24] the Division challenged Dairy Farmers of America, Inc.'s $36 million acquisition of SODIAAL North America Corporation. The complaint alleged that the acquisition would substantially lessen competition in the sale of branded butter sold at retail outlets in the New York and Philadelphia metropolitan areas. The merger would have resulted in the two remaining firms -- Dairy Farmers of America and Land O'Lakes –- accounting for nearly 100 percent of the sales of branded stick and branded whipped butter in the Philadelphia and New York areas. Unlike SODIAAL, both Dairy Farmers of America and Land O' Lakes are agricultural cooperatives that could "federate" under the Capper-Volstead Act, which authorizes agricultural producers to collectively process, prepare for market, handle, and market their products without fear of antitrust challenge. The United States District Court in Philadelphia on March 31, 2000, issued an order that temporarily blocked the transaction. Thereafter, a proposed consent decree was filed on May 18, 2000, settling the suit. The consent decree prohibits coordination by Dairy Farmers of America with Land O' Lakes, and prohibits Dairy Farmers of America from sharing competitively sensitive information relating to branded butter with Land O' Lakes. In addition, the decree prohibits Dairy Farmers of America from agreeing directly or indirectly with Land O' Lakes to charge Dairy Farmers of America's newly created butter subsidiary, Butter LLC, discriminatory prices for cream, milk or butter. The consent decree was entered by the Court on November 3, 2000.

In *United States v. Alcoa Inc. and Reynolds Metals Company,*[25] the Division challenged the acquisition by Alcoa Inc. of Reynolds Metals Company combining two of the world's largest aluminum companies. The complaint alleged that the proposed $5 billion merger would have substantially lessened competition in the refining and sale of smelter grade alumina ("SGA") and chemical grade alumina ("CGA"). Alumina refineries produce these two types of alumina, a powder refined from bauxite ore. SGA is a critical input in the production of aluminum metal, which is used to produce such products as aluminum foil,

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[24] United States v. Dairy Farmers of America, Inc., Societe De Diffusion Internationale Agro-Alimentaire and Sodiaal North America Corporation, C.V. No. CN00-CV-1663 (E.D. Pa. filed March 31, 2000).

[25] United States v. Alcoa Inc. and Reynolds Metals Company, C.V. No. 1:00CV00954 (D.D.C. filed May 3, 2000).

beverage cans, building materials, and aircraft skin. CGA is used in the production of numerous industrial and consumer products, such as detergents, counter tops, and flame retardants. The acquisition of Reynolds by Alcoa, as originally proposed, would have resulted in higher prices to aluminum manufacturers and their customers, as well as to consumers who purchase products containing alumina. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, Alcoa was required to divest Reynolds' controlling interest in the Worsley refinery, which is located in Western Australia's Darling Range. Worsley is one of the world's lowest cost alumina refineries. The decree also required Reynolds to divest Reynolds' Corpus Christi, Texas, refinery, which produces SGA and CGA in the United States. Without the proposed divestitures, Alcoa would have owned or controlled approximately 38 percent of the world market for SGA. In CGA, Alcoa would have held approximately 59 percent of the North American market. In both markets, the merger would have increased concentration significantly. The European Commission also announced that it required the companies to make certain divestitures, including the sale of Reynolds' refining operation in Stade, Germany. The Division consulted extensively with competition authorities in the EC during the course of their review of the proposed merger. The consent decree is awaiting entry by the Court.

In *United States v. Allied Waste Industries, Inc. and Superior Services, Inc.*,[26] the Division challenged an $80 million exchange of waste collection and disposal assets between Allied Waste Industries, Inc. and Superior Services, Inc. The complaint alleged that the asset exchange, as originally structured, would have substantially lessened competition in the waste collection industry in Milwaukee, Wisconsin and Mansfield, Ohio, and in the waste disposal industry in Leeper, Pennsylvania, resulting in higher prices for waste collection and disposal in those areas. Waste collection and disposal firms, like Allied and Superior, contract to collect municipal solid waste (trash and garbage) from residential and commercial customers. They transport the waste to disposal facilities such as landfills, incinerators, and transfer stations, which process and legally dispose of waste for a fee. Allied and Superior are two of only three major competitors providing waste collection services in Milwaukee, and they are the only two significant waste collection firms in Mansfield. In addition, they are the only two operators of landfills in the Leeper area. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, Superior was required to divest commercial waste collection operations and transfer stations in Milwaukee and Mansfield. Superior also agreed to abandon its purchase of Allied's landfill in Leeper. The consent decree was entered by the Court on December 11, 2000.

In *United States v. AT&T Corp. and MediaOne Group, Inc.*,[27] the Division challenged

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[26] United States v. Allied Waste Industries, Inc. and Superior Services, Inc., C.V. No. 1:00CV01067 (D.D.C. May 12, 2000).

[27] United States v. AT&T Corp. and MediaOne Group, Inc., C.V. No. 1:00CV01176 (D.D.C. filed May 25, 2000).

the proposed acquisition by AT&T Corp. of MediaOne Group, Inc. The complaint charged that the combination of AT&T's interests in Excite@Home, the largest producer of broadband Internet access, and MediaOne's interests in Road Runner, the second largest such provider, would substantially lessen competition in the aggregation, promotion and distribution of broadband content. Broadband Internet access permits users to transmit and receive data at much greater speeds than are possible through "narrowband" access over ordinary telephone lines. According to the complaint, Excite@Home, in which AT&T owned a substantial equity interest and had voting control, and Road Runner, in which MediaOne held a significant equity and management interest, served a significant majority of the nation's residential broadband Internet users. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, AT&T agreed to divest its interest in Road Runner. Under the decree, AT&T must exit the Road Runner joint venture no later than December 31, 2001, and earlier if other relevant owners of Road Runner agree to an earlier departure. AT&T will be permitted to retain Road Runner assets used exclusively to provide cable modem service and broadband service to MediaOne customers. In addition, AT&T was required to obtain prior approval from the Department before entering into certain types of agreements with Time Warner or with America Online (AOL). The consent decree was entered by the Court on September 26, 2000.

In *United States v. Franklin Electric Co., Inc., United Dominion Industries Limited and United Dominion Industries, Inc.*,[28] the Division sued to block the proposed joint venture between Franklin Electric Co., Inc. and United Dominion Industries (UDI) the only two producers of submersible turbine pumps (STPs) for gasoline service stations in the United States. Located in the underground gasoline storage tanks at service stations, STPs pump the gasoline up through the piping system to the above-ground islands containing the dispensers that ultimately enable the delivery of gasoline to the vehicle. The complaint alleged that the Franklin Electric and United Dominion joint venture would eliminate competition and create a monopoly in the STP market, thus enabling the joint venture to raise prices and reduce quality and service. United Dominion, which has approximately a 60 percent market share, sells STPs under the brand name Red Jacket, through its subsidiary The Marley Company. Franklin Electric, which sells STPs under the brand name "FE Petro" through its subsidiary FE Petro, had approximately a 40 percent market share. The joint venture would have combined the assets of FE Petro and The Marley Company into a joint entity 75 percent owned by Franklin Electric and 25 percent owned by United Dominion. On August 30, 2000, after a trial, the Court granted the government's request for a permanent injunction prohibiting the acquisition. The Court subsequently awarded the Division $102,455.17 in costs.

In *United States v. Allied Waste Industries, Inc. and Republic Services, Inc.*,[29] the

[28] United States v. Franklin Electric Co., Inc., United Dominion Industries Limited and United Dominion Industries, Inc., C.V. No. 00C 034C (W.D. Wis. filed May 31, 2000).

[29] United States v. Allied Waste Industries, Inc. and Republic Services, Inc., C.V. No. 1:00CV1469 (D.D.C. filed June 21, 2000).

Division challenged a multi-million dollar exchange of assets between Allied Waste Industries, Inc. and Republic Services, Inc. The complaint alleged that the acquisition, as originally structured, would have substantially lessened competition in waste collection or disposal services in 15 markets in Florida, Georgia, Indiana, Kentucky, New Jersey, New York, Ohio, Tennessee and Virginia. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, Allied and Republic agreed to sell waste collection and disposal assets and agreed to contract modifications affecting those 15 metropolitan areas. In each of these markets, Allied and Republic are two of only a few significant firms, and in some areas the only two firms, providing commercial waste hauling, roll-off waste hauling, or municipal solid waste disposal services. Commercial waste hauling is the collection and transportation of trash and garbage stored in small metal containers or dumpsters, generally by specialized front-end load trucks, from establishments such as office and apartment buildings and retail businesses. Roll-off waste hauling is the collection and transportation of large disposal containers holding larger volumes or bulkier items of waste from sources such as construction sites and industrial plants. The consent decree is awaiting entry by the Court.

In *United States v. JDS Uniphase Corporation and E-TEK Dynamics, Inc.*,[30] the Division challenged the proposed $15 billion acquisition of E-TEK Dynamics, Inc. by JDS Uniphase. Corporation. The complaint alleged that the acquisition, as originally structured, would have likely resulted in a reduction of supply or increased prices for dense wavelength division multiplexers ("DWDMs"), used in fiber optic systems to transmit voice, data and multi-media over long distances. DWDMs enable the simultaneous transmission of multiple channels on a single strand of fiber, increasing a network's total transmission capacity. The parties competed to sell DWDMs to telecommunication equipment manufacturers that incorporate the DWDMs into fiber optic systems and then sell those systems to telecommunications carriers. The proposed transaction would have resulted in the combined company accounting for approximately 70 percent of the world market for DWDMs with 16 or fewer channels. In addition, alternative sources to JDS and E-TEK for DWDMs have been producing at or near their capacity, in significant part because of restrictions in their access to thin film filters, which are critical components of DWDMs. Thin film filters are made in a vacuum chamber by coating pieces of polished glass with thin alternating layers of material. The complaint alleged that E-TEK's in-house production and supply contracts with several thin film filter vendors, together with JDS's in-house production, would have resulted in the two companies controlling approximately 80% of the world's output of thin film filters. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree prohibits the merged firm from enforcing its rights of first refusal on thin film filters manufactured by merchant suppliers, prohibits the merged firm from enforcing its contractual rights of repayment for money E-TEK advanced to those merchant suppliers and prohibits the

[30] United States v. JDS Uniphase Corporation and E-TEK Dynamics, Inc., C.V. No. C 00 2227 (THE) (N.D.Cal. filed June 22, 2000).

merged firm from enforcing its security interests in coating chambers on the premises of those merchant suppliers. The consent decree was entered by the Court on October 5, 2000.

In *United States v. Worldcom, Inc. and Sprint Corporation,*[31] the Division sued on June 27, 2000 to block the merger of Worldcom, Inc. and Sprint Corporation, alleging that the deal would have reduced competition in many of the nation's most important telecommunications services and would have resulted in higher prices for millions of consumers and businesses. The proposed merger, between two of the three largest U.S. telecommunications companies, was the largest merger challenged by the Justice Department. In the residential long distance telephone markets and several other telecommunications markets, WorldCom and Sprint are the only substantial competitors to AT&T and to each other. Each has constructed national and international fiber optic networks and developed sophisticated systems for handling millions of customer accounts, hired and trained large workforces capable of providing a variety of high-quality telecommunications services to customers throughout the nation, and invested billions of dollars over many years to establish widely known and trusted brands. According to the complaint, the proposed merger would have violated the antitrust laws by reducing competition in many of the nation's most important telecommunications markets: long distance services sold to residential customers in the U.S.; Internet backbone services providing top-level connectivity throughout the U.S.; international long distance services between the U.S. and more than 50 foreign countries; international private line services between the U.S. and more than 60 foreign countries; data network services to large business customers in the U.S.; and custom network services for very large businesses in the U.S. On July 13, 2000, the parties abandoned the merger.

In *United States v. Ingersoll-Dresser Pump Company, Ingersoll-Rand Company and Flowserve Corporation,*[32] the Division challenged the $775 million acquisition of Ingersoll-Dresser Pump Company ("IDP") by Flowserve Corporation and simultaneously filed a proposed consent decree settling the suit. According to the complaint, the acquisition, as originally proposed, would have likely resulted in higher prices for API 610 pumps and power plant pumps used in the United States. API 610 pumps are specialized, highly engineered pumps that perform critical functions in an oil refinery, including the movement of erosive, hot and flammable petroleum-based liquids under high pressure. Power plant pumps are also specialized and highly engineered, and are used in the steam cycle of a power plant. The pumps, which cost between $20,000 and $500,000, are sold through a bidding process. For most bids, there are only three or four credible competitors, and Flowserve and IDP are two of them. The decree required Flowserve, one of the world's largest manufacturers of pumps and related products and services, and IDP to license eight lines of pumps to a firm that will

[31] United States v. WorldCom, Inc. and Sprint Corporation, C.V. No. 1:00CV01526 (D.D.C. filed June 27, 2000).

[32] United States v. Ingersoll-Dresser Pump Company, Ingersoll-Rand Company and Flowserve Corporation, C.V. No. 1:00CV01818 (D.D.C. filed July 28, 2000).

manufacture the pumps and compete with Flowserve for sales to oil refineries and power plants in the United States. In addition, Flowserve must divest its manufacturing plant in Tulsa, Oklahoma, as well as IDP's service centers in Batavia, Illinois and La Mirada, California. The consent decree was entered by the Court on January 24, 2001.

In *United States v. L'Oreal USA, Inc., L'Oreal S.A. and Carson, Inc.,*[33] the Division challenged the $79 million acquisition of Carson, Inc. by L'Oreal. The complaint alleged that, as originally structured, the transaction would have resulted in L'Oreal controlling about 50 percent of retail sales for women's hair relaxer kits in the United States, and three of the top five selling brands, thus significantly decreasing competition in this market. Hair relaxer kits are beauty products used to straighten naturally curly hair. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree required L'Oreal and Carson to divest Carson's Gentle Treatment and Ultra Sheen brands and certain related assets. The consent decree is awaiting entry by the Court.

In *United States v. Clear Channel Communications, Inc. and AMFM Inc.,*[34] the Division challenged the proposed $23.8 billion merger between Clear Channel Communications, Inc. and AMFM, Inc. on August 29, 2000. The complaint alleged that the transaction, as originally proposed, would have resulted in higher prices and lower quality for radio and billboard advertisers. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the decree and an agreement that the Division had announced on July 20, 2000, the parties were required to sell 99 radio stations in 27 markets -- the largest radio divestiture ever and the largest radio transaction ever to be reviewed by the Antitrust Division. The value of the divestitures required was approximately $3.4 billion. In addition, the parties were required to sell AMFM's partial ownership interest in Lamar Advertising Company, and relinquish two seats on Lamar's board of directors to alleviate concerns of higher prices and lower quality services for billboard advertisers. The consent decree is awaiting entry by the Court.

In *United States v. SBC Communications Inc. and BellSouth Corporation,*[35] the Division challenged the proposed wireless business joint venture between BellSouth Corporation and SBC Communications Inc. The complaint alleged that the SBC/BellSouth joint venture, as originally structured, would have significantly increased concentration in 16 markets for wireless mobile telephone services and would have created higher prices, reduced

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[33] United States v. L'Oreal USA, Inc., L'Oreal S.A. and Carson, Inc., C.V. No. 1:00CV01848 (D.D.C. filed July 31, 2000).

[34] United States v. Clear Channel Communications, Inc. and AMFM Inc., C.V. No. 1:00CV02063 (D.D.C. filed August 29, 2000).

[35] United States v. SBC Communications Inc. and BellSouth Corporation, C.V. No. 1:00CV02073 (D.D.C. filed August 30, 2000).

quality and quantity of service and led to fewer network improvements. A proposed consent decree settling the suit was filed simultaneously with the complaint. Under the terms of the decree, SBC and BellSouth are required to divest their interest in one of the two overlapping wireless businesses that they own either in whole or in part in the 16 affected markets, including the major metropolitan areas of Los Angeles, Indianapolis, New Orleans and Baton Rouge, which have populations of more than 20 million. The divestitures involve both metropolitan statistical areas ("MSAs") and rural service areas ("RSAs"). MSAs are the 306 areas in the U.S. defined by the Federal Government that are used by the Federal Communications Commission ("FCC") to license cellular systems in urban areas. RSAs are the 428 areas defined by the FCC that are used for licensing cellular systems in the rural regions of the U.S. outside the MSAs. The consent decree was entered by the Court on December 29, 2000.

In *United States v. Republic Services, Inc. and Allied Waste Industries, Inc.*,[36] the Division challenged a $55 million acquisition of Allied Waste Industries, Inc. assets by Republic Services, Inc. The complaint alleged that the acquisition would have substantially lessened competition in the waste collection industry in Akron/Canton, Ohio resulting in higher prices for consumers. Republic and Allied were two of four major competitors providing waste collection services in Akron/Canton. A proposed consent decree settling the suit was filed simultaneously with the complaint. The decree requires Republic to sell its Akron/Canton, Ohio small container commercial waste collection assets. The consent decree was entered by the Court on January 18, 2001.

During fiscal year 2000, the Division investigated 10 bank merger transactions for which divestiture was required prior to or concurrently with the acquisition. A "not significantly adverse" letter conditioned upon a letter agreement between the parties and the Division was sent to the appropriate bank regulatory agency in all 10 instances. In addition, four "not significantly adverse" letters conditioned upon a letter agreement between the parties and the Division regarding non-divestiture commitments were sent to the appropriate bank regulatory agency.[37] In one other bank merger transaction involving only the sale of deposits,

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[36] United States v. Republic Services, Inc. and Allied Waste Industries, Inc., C.V. No. 1:00CV02311 (D.D.C. filed September 27, 2000).

[37] The 14 letters were: November 22, 1999 letter to the Board of Governors regarding the application by Wells Fargo Corporation, San Francisco, CA, to acquire Texas Bancshares, Inc., San Antonio, TX; December 1, 1999 letter to the Board of Governors regarding the application by South Branch Valley Bancorp, Moorefield, WV, to acquire Potomac Valley Bank, Petersburg, WV; December 8, 1999 letter to the Board of Governors regarding the application by First Security Corporation, Salt Lake City, UT, to acquire Zions Bancorporation, Salt Lake City, UT; December 16, 1999 letter to the Board of Governors regarding the application by Wells Fargo & Company, San Francisco, CA, to acquire First Place Financial Corporation, Farmington, NM; January 24, 2000 letter to Board of Governors regarding the application by Centura Bank, Inc., Rocky Mount, NC, to acquire Triangle Bancorp, Raleigh, NC; February 14, 2000 letter to the Federal Deposit Insurance Corporation regarding the application by Virgin Islands Community Bank (VICB) to acquire the seven U.S. Virgin Islands branches of Chase Manhattan Bank; May 8, 2000 letter to the Board of Governors regarding the application by

an agreement was reached with the parties obviating the need for a conditional letter.[38]

2. Federal Trade Commission

The Commission challenged 32 transactions that it concluded would lessen competition if allowed to proceed as proposed during FY 2000, leading to 18 consent agreements for public comment, and nine filings withdrawn. In five matters the Commission authorized staff to seek injunctive relief, all of which were filed in district court. In three of these filed cases, the parties abandoned the transactions, in one case the parties negotiated a consent agreement with the Commission, and one case is pending in the Court of Appeals.

In *BP Amoco p.l.c/Atlantic Richfield Company*,[39] the Commission filed for a preliminary injunction alleging that the proposed $27 billion merger of BP Amoco and Atlantic Richfield Company ("ARCO") would lessen competition in the exploration and production of Alaska North Slope ("ANS") crude oil and its sale to West Coast refineries, and in the market for pipeline and storage facilities in Cushing, Oklahoma, thereby raising prices for crude oil used to produce gasoline and other petroleum products throughout North America. According to the complaint, the merger would create the third-largest private petroleum company in the world and the largest US oil producer and refiner. The merger would combine companies that are by far the two largest producers of crude oil on the North Slope of Alaska, the two largest suppliers of ANS crude oil to refineries in California and Washington that depend on Alaskan crude oil for a substantial portion of their supply, and the two most successful competitors in bidding for exploration leases on the North Slope. Combined, BP Amoco and ARCO also would have a dominant interest in the oil pipeline and storage facilities that serve the crude oil marketing center in Cushing, Oklahoma. Subsequently, the parties agreed to seek adjournment of the federal court proceedings and

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BB&T Corporation, Winston-Salem, NC, to acquire One Valley Bancorp, Charleston, WV; May 22, 2000 letter to the Board of Governors regarding the application by Wells Fargo & Company, San Francisco, CA, to acquire First Commerce Bancshares, Inc., Lincoln, NE; June 20, 2000 letter to the Comptroller of the Currency regarding the application by Old National Bank, Lawrenceville, IL, to acquire Permanent Bank, Evansville, IN; July 28, 2000 letter to the Board of Governors regarding the application by Westamerica Bancorporation, San Rafael, CA, to acquire First Counties Bank, Clearlake, CA; August 15, 2000 letter to the Comptroller of the Currency regarding the application by NBT Bank, Norwich, NY, to acquire BSB Bank, Binghamton, NY; August 15, 2000 letter to the Comptroller of the Currency regarding the application by First Citizens Bank, Mansfield, PA, to acquire six branches from Sovereign Bank, Wyomissing, PA; August 1, 2000 letter to the Board of Governors regarding the Application by Fleet Boston Corporation, Boston, MA, to acquire North Fork Bancorporation, Melville, NY; September 14, 2000 letter to the Board of Governors regarding the application by Wells Fargo & Company, San Francisco, CA, to acquire First Security Corporation, Salt Lake, UT.

[38] Bank of Lancaster to acquire two branches of First Virginia Bank Falls Church in Northumberland County, VA and one branch of First Virginia Bank Hampton Roads in Lancaster County, VA.

[39] Federal Trade Commission v. BP Amoco p.l.c. and Atlantic Richfield Company, Civ. No. C00416 (SI) (USDC ND Cal., filed February 4, 2000). Docket No. C-3938 (issued August 29, 2000).

negotiated a consent agreement with the Commission. Under the order, BP Amoco was required to divest all of ARCO's assets relating to oil production on Alaska's North Slope to Phillips Petroleum Company or another Commission-approved purchaser.

In *Kroger Company/Winn-Dixie,*[40] the Commission filed for a preliminary injunction alleging that the proposed acquisition by Kroger of 74 Winn-Dixie supermarkets in Texas and Oklahoma would lessen supermarket competition in several markets in Texas. According to the complaint, about half of the stores are in metropolitan Fort Worth, where Winn-Dixie and Kroger are the second and third largest supermarket chains, respectively. The combined Kroger/Winn-Dixie presence in Fort Worth would account for 33 percent of all supermarket sales within the market, leading to the likelihood of competitive harm to consumers. The smaller markets outside Fort Worth are even more highly concentrated, where the merged companies would be poised to become the largest and second largest chains in several markets. By eliminating the direct competition between Kroger and Winn-Dixie, the proposed acquisition would have also eliminated the need for future competition between the two chains, both of which appeared to have aggressive growth strategies in the Forth Worth area. New stores operated by competing firms were not expected to open in sufficient numbers to defeat Kroger's ability to exercise market power after the proposed transaction was completed. The parties subsequently abandoned the transaction.

In *Swedish Match AB/National Tobacco Company, L.P.*,[41] the Commission filed for a preliminary injunction alleging that the proposed acquisition of the assets of National Tobacco by Swedish Match would lessen competition in the loose leaf chewing tobacco market in the United States. According to the complaint, Swedish Match, which sells under the "Red Man" and other brands, and National Tobacco, which sells under the "Beech Nut" and other brands, are the first and third largest sellers of loose leaf chewing tobacco in the United States. The proposed transaction would reduce the number of major competitors in the loose leaf chewing tobacco market from three to two and increase Swedish Match's market share to about 60 percent of sales. The acquisition would allow Swedish Match to increase prices unilaterally, and would increase the likelihood of coordination among the firms remaining in the market. The Court granted the Commission's request for a preliminary injunction, followed by the Commission's issuance of an administrative complaint. The parties subsequently abandoned the transaction.

In *H.J. Heinz Company/Milnot Holding Corporation,*[42] the Commission filed for a preliminary injunction alleging that the proposed acquisition by Heinz of Milnot, owner of

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[40] Federal Trade Commission v. Kroger Company and Winn-Dixie Stores, Inc., Civ. No. 3-00CV1196-R (USDC ND Tex., filed June 2, 2000).

[41] Federal Trade Commission v. Swedish Match North America, Inc. and National Tobacco Company, L.P., Civil No. 1:00CV01501 (TFH) (USDC DofC, filed June 23, 2000).

[42] Federal Trade Commission v. H.J. Heinz Company and Milnot Holding Corporation, Civ. No. 00-

Beech-Nut Nutrition Corporation, would lessen competition in the manufacture and sale of prepared baby food within the United States. According to the complaint, Heinz and Beech-Nut are the nation's second and third largest producers of prepared baby food. This acquisition would reduce the number of competitors in the baby food market from three to two, thereby creating a duopoly and increasing the likelihood of coordinated anticompetitive interaction and actual or tacit collusion between the two remaining firms. It would also eliminate substantial head-to-head competition between Heinz and Beech-Nut, and would eliminate Beech-Nut as a substantial, independent and competitive force in the market. The Commission's request for a preliminary injunction was denied. The Commission subsequently sought an emergency stay from the Court of Appeals, which enjoined the transaction, pending its ruling on the Commission's appeal.

In *Conso International Corporation/McCall Pattern Company*,[43] the Commission filed for a preliminary injunction alleging that the proposed acquisition of McCall by Conso would reduce competition in the market for home sewing patterns. According to the complaint, Conso, owner of the Simplicity brand, is the largest sewing pattern company in the United States and McCall is one of the three leading domestic manufacturers of home sewing patterns. The proposed transaction would reduce the number of significant U.S. sewing pattern designers and producers from three to two, and the merged companies would control more than three-quarters of U.S. sales of domestic home sewing patterns. The proposed acquisition would allow the combined firm to exercise unilateral market power in an already highly concentrated industry. The parties subsequently abandoned the transaction.

Of the 18 consent agreements, a complaint, decision and order were issued in 13 of those matters in fiscal year 2000, with four of the consent agreements becoming final in fiscal year 2001. A final order is pending in one of the cases.

In *El Paso Energy Corporation/Sonat Inc.*,[44] the complaint alleged that the proposed $6 billion merger of El Paso and Sonat would lessen competition in the transportation of natural gas by eliminating actual and potential competition between El Paso and Sonat. According to the complaint, El Paso and Sonat are both involved in the transportation of natural gas in the east-central Gulf of Mexico, the west-central Gulf of Mexico, eastern Tennessee and northern Georgia, and the post-merger market in these areas would be highly concentrated. In addition, due to the cost of developing and placing natural gas pipelines, entry into the marketplace by additional competitors would not be timely or sufficient to prevent the anticipated anticompetitive effects of the merger. Under the terms of the order, El

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1688 (JR) (USDC DofC, filed July 14, 2000).

[43] Federal Trade Commission v. Conso International Corporation, MP Holdings, Inc., and McCall Pattern Co., File No. 001-0154 (USDC SD NY, filed August 4, 2000).

[44] El Paso Energy Corporation/Sonat Inc., Docket No. C-3915 (issued January 11, 2000).

Paso was required to divest Sea Robin Pipeline Company, a wholly-owned subsidiary of Sonat, and Sonat's one-third ownership interest in Destin Pipeline Company, LLC. Sea Robin and Destin are large natural gas pipelines operating in the Gulf of Mexico off the coast of Louisiana. El Paso was also required to sell its East Tennessee Natural Gas Company, which owns a natural gas pipeline system serving customers in Tennessee and northern Georgia.

In *VNU N.V./Nielsen Media Research, Inc.*,[45] the complaint alleged that VNU's proposed acquisition of Nielsen would restrict competition in the market for advertising expenditure measurement services in the United States. According to the complaint, Nielsen, through its Monitor Plus division, and VNU, through its Competitive Media Reporting ("CMR") division, the nation's largest supplier of advertising expenditure measurement services, are the only companies in the United States that provide advertising expenditure measurement services. Both companies track when and where advertisements run in national and local media, such as television and radio. This information is then integrated with other data, such as advertising cost and television ratings, to create reports on overall advertising expenditures. Customers, including advertising agencies, television stations, and national and local businesses, buy these reports to monitor competitive advertising and develop strategies for the purchase and placement of future advertisements. The proposed acquisition would not only decrease competition, but would increase the likelihood that the customers of these services would be forced to pay higher prices. In addition, innovation within the industry would decrease and entrants into the marketplace would face significant barriers to entry, making it unlikely that a new competitor would deter or counteract the anticompetitive effects resulting from the proposed acquisition. Under the order, VNU was required to divest its CMR division.

In *Dominion Resources, Inc./Consolidated Natural Gas Company ("CNG")*,[46] the complaint alleged that the proposed $5.3 billion acquisition by Dominion of CNG would lessen competition in the electric power generation market in southeastern Virginia. According to the complaint, the proposed merger would combine the dominant provider of electric power in Virginia with the primary distributor of natural gas in southeastern Virginia. Dominion, through its subsidiary Virginia Power, accounts for more than 70 percent of all electric power generation capacity in the Commonwealth of Virginia, and CNG, through its ownership of Virginia Natural Gas, Inc. ("VNG"), is the primary distributor of natural gas in southeastern Virginia. Entry into the electric power generation market in southeastern Virginia by companies unaffiliated with Dominion may be deterred because of Dominion's control over VNG. Such control would likely deter or disadvantage new entry into the marketplace, as Dominion could exercise market power to raise the cost of entry and production or otherwise gain a competitive advantage, ultimately resulting in the likelihood

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[45] NVU N.V/Nielsen Media Research, Inc., Docket No. C-3900 (issued December 7, 1999).

[46] Dominion Resources, Inc./Consolidated Natural Gas Company, Docket No. C-3901 (issued December 14, 1999).

that consumers would be forced to pay higher prices for electric energy. It would be both costly and time consuming for other natural gas transportation companies to extend pipelines from their network to southeastern Virginia. In addition, other pipelines near the area lack sufficient excess capacity to support a new pipeline in southeastern Virginia, while VNG has substantial excess capacity. Under the order, Dominion was required to divest VNG.

In *Precision Castparts Corp./Wyman-Gordon Company*,[47] the complaint alleged that the proposed acquisition by Precision of Wyman-Gordon would lessen competition in the market for structural castings for aerospace components. According to the complaint, Precision is a worldwide manufacturer of complex metal components and the world leader in the production of large structural castings for the aerospace industry. Wyman-Gordon manufactures advanced components used in the aerospace industry, including cast components for jet engine and airframe applications. The companies are two of the world's leading suppliers of titanium, stainless steel and nickel-based superalloy aerospace investment cast components. In addition, they are two of only four viable suppliers of titanium aerospace cast components and large nickel-based superalloy aerospace cast components and two of only six suppliers of large stainless steel components. By eliminating competition in these highly concentrated markets, the proposed acquisition would have allowed Precision to exercise market power and increase prices. Under the order, Precision was required to divest Wyman-Gordon's titanium foundry in Albany, Oregon, and Wyman-Gordon's Large Cast Parts foundry in Groton, Connecticut, a leading international manufacturer of aerospace investment cast components, and to provide technical and other assistance to the buyers of the divested facilities to assure that they can effectively compete in the markets for cast aerospace components.

In *Reckitt & Colman plc/Benckiser N.V*,[48] the complaint alleged that the proposed $2.7 billion acquisition by Reckitt & Colman of Benckiser would lessen competition in two highly concentrated household cleaning product markets. According to the complaint, Reckitt & Colman and Benckiser are two of the nation's leading companies involved in the research, development, formulation, manufacture, marketing and sale of hard surface bathroom cleaners and are the leading producers of the nation's fine fabric wash products. Hard surface bathroom cleaners are products specifically formulated, sold and used by customers to remove built-up soil and stains from bathroom surfaces. In this market, Reckitt & Colman produces Lysol®, and Benckiser produces Scrub Free®. Fine fabric wash products are specifically developed, sold and used by customers to launder fine fabrics such as silks, woolens or other delicate fabrics. Reckitt & Colman sells Woolite®, the dominant product in this market, and Benckiser sells Delicare®, the leading competitive alternative. Under the order, Benckiser was required to divest its Scrub Free® and Delicare® business to Church & Dwight, Inc., a

[47] Precision Castparts Corp./Wyman-Gordon Company, Docket No. C-3904 (issued December 21, 1999)

[48] Reckitt & Colman plc/Benckiser N.V., Docket No. C-3918 (issued January 28, 2000).

producer of household cleaning products, selling items under the Arm & Hammer® brand name.

In *Exxon Corporation/Mobil Corporation*,[49] the complaint alleged that the proposed acquisition by Exxon of Mobil would significantly injure competition in the markets for the refining and marketing of gasoline in the United States and would raise gasoline prices for consumers. Specifically, the acquisition would lessen competition in each of the following markets: the marketing of gasoline in the northeastern and mid-Atlantic United States where the merging companies are direct and significant competitors in at least 40 metropolitan areas; the marketing of gasoline in five metropolitan areas in Texas; the marketing of gasoline in Arizona; the refining and marketing of CARB gasoline, specially formulated gasoline required in California; the bidding for and the refining of jet fuel for the U.S. Navy on the West Coast; the terminaling of light petroleum products in the Boston, Massachusetts and Washington, D.C. metropolitan areas; the terminaling of light petroleum products in the Norfolk, Virginia metropolitan area; the transportation of refined light petroleum products to the inland portions of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia and Tennessee; the transportation of crude oil from the north slope of Alaska via the Trans Alaska Pipeline System; the importation, terminaling and marketing of gasoline and diesel fuel in the Territory of Guam; the refining and marketing of paraffinic lubricant base oils in the United States and Canada, which is already dominated by Exxon; and the worldwide manufacture and sale of jet turbine lubricants. The settlement prevents the merger of most of the companies' overlapping U.S. marketing business. It requires the largest retail divestiture in Commission history – the sale or assignment of approximately 2,431 Exxon and Mobil gas stations in the Northeast, Mid-Atlantic, California, Texas and Guam. In addition, an Exxon refinery in California, terminals, a pipeline and other assets are to be sold.

In *Hoechst AG/Rhone-Poulenc S.A.*,[50] the complaint alleged that the proposed $16 billion merger of Hoechst and Rhone-Poulenc would lessen competition in the market for the research, development, manufacture and sale of cellulose acetate and direct thrombin inhibitors in the United States. Cellulose acetate is a thermoplastic used to produce, among other things, cigarette filters, tool handles, tapes and film. Direct thrombin inhibitors are used in the treatment of many blood clotting diseases. According to the complaint, the market for cellulose acetate is highly concentrated. Rhone-Poulenc, through Rhodia, a specialty chemicals subsidiary, is one of only three producers of cellulose acetate in the United States. Hoechst and Rhone-Poulenc are the two leading companies developing direct thrombin inhibitor products. Hoechst sells Refludan, the only direct thrombin inhibitor on the U.S.

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[49] Exxon Corporation/Mobil Corporation, Docket No. C-3907 (accepted for comment November 30, 1999). On January 26, 2001, a modified consent order was issued. As modified, the order will allow Exxon Mobil to retain certain brand names and trademarks previously included in the Exxon jet turbine oil assets to be divested.

[50] Hoechst AG/Rhone-Poulenc S.A., Docket No. C-3919 (issued January 28, 2000).

market, and Rhone-Poulenc is in the process of developing its direct thrombin inhibitor, Revasc, which it licensed in 1998. The proposed transaction would reduce potential competition and innovation competition among researchers and developers of direct thrombin inhibitor products by eliminating a significant competitor and increasing the barriers to entry to others, by combining Hoechst's and Rhone-Poulenc's portfolios of patents and patent applications. The order required the companies to divest their interest in Rhodia to a level of five percent or less and to divest their assets relating to the direct thrombin inhibitor drug Revasc.

In *MacDermid, Inc./Polyfibron Technologies, Inc.*,[51] the complaint alleged that the proposed acquisition by MacDermid of Polyfibron would substantially lessen competition in the liquid photopolymers and sheet photopolymers market in North America. According to the complaint, both MacDermid and Polyfibron are involved in the manufacture, distribution and sale of liquid photopolymers, and either produce and sell, or have exclusive rights to sell, sheet photopolymers in North America. The sheet photopolymer market in North America is highly concentrated, with the pre-merger market dominated by two firms, E. I. duPont de Nemours & Co., Inc., and Polyfibron, which sells its own manufactured sheet photopolymer products and those of BASF Drucksysteme GmbH ("BASE") under a 1995 distribution agreement. While MacDermid does not produce sheet photopolymers, in 1998 it entered into an agreement with Asahi Chemical Industry Co., Ltd., that gives it the right to distribute and sell Ashahi's sheet photopolymer products in North America. The existence of the two distribution agreements means that the current duopoly in the sale of sheet photopolymers in North America would become further entrenched following the proposed acquisition, as the only two likely entrants to the market, BASF and Asahi, are bound by the agreements to sell only through Polyfibron and MacDermid, respectively. Under the order, MacDermid and Polyfibron were required to divest Polyfibron's liquid photopolymers business, terminate their respective agreements to distribute photopolymers manufactured by other companies, and agree not to invite or enter into agreements with other photopolymer manufacturers that would result in any allocation, division or illegal restriction of competition.

In *RHI AG/Global Industrial Technologies, Inc.*,[52] the complaint alleged that the proposed acquisition by RHI of Global would lessen competition in the manufacture and marketing of refractories in North America. Refractories are brick- and cement-like products made from certain natural minerals and materials that are used to line and protect furnaces in many industries – including the steel, aluminum, cement and glass industries – that involve the heating or containment of solids, liquids, or gases at high temperatures. After the proposed merger, RHI and Global would not only hold a monopoly in the market for magnesia-carbon bricks for basic oxygen furnaces ("BOFs"), but also would control:

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[51] MacDermid, Inc./Polyfibron Technologies, Inc., Docket No. C-3911 (issued February 8, 2000).

[52] RHI AG/Global Industrial Technologies, Inc., Docket No. C-4005 (accepted for comment December 30, 1999). A modified consent order was issued on March 23, 2001.

approximately 65 percent of the $58 million North American market for magnesia-carbon refractory bricks for electric arc furnaces ("EAFs"); 40 percent of the $100 million North American market for magnesia-carbon bricks for steel ladles used with BOFs; 70 percent of the $50 million North American market for high-alumina bricks for steel ladles used with BOFs; half of the $23.5 million North American market for high-alumina bricks for torpedo cars; and 46 percent of the $5 million North American market for magnesia-chrome bricks for steel degassers. Under the order, RHI was required to divest two refractory manufacturing plants in North America, along with certain assets related to refractory products currently being produced at a third North American plant. The order also required that the assets be divested to another refractories producer, Resco Products, Inc., which manufactures similar refractory products but does not compete in the same markets as RHI and Global.

In *Fidelity National, Inc./Chicago Title Corporation,*[53] the complaint alleged that the proposed $1.2 billion acquisition by Fidelity of Chicago Title would lessen competition in six local markets in California for title information services. According to the complaint, the market for title information services is highly concentrated and Fidelity and Chicago Title are direct competitors. This acquisition may increase the likelihood of collusion or coordinated interaction among competing providers of title information services in several counties in California: San Luis Obispo, Tehama, Napa, Merced, Yolo, and San Benito. In addition, in each of the local jurisdictions identified, there are no commercially reasonable substitutes for title information services, and due to the relatively large fixed costs associated with building and maintaining title plants, entry into the market for title information services in each of the local jurisdictions is difficult or unlikely to occur at a sufficient scale to deter or counteract the effects of the acquisition. Under the order, Fidelity was required to divest or sell copies of the pre-acquisition title plant interests of either Financial or Chicago Title in five of the identified local jurisdictions to a buyer approved by the Commission. The order also required that Financial divest the pre-acquisition interests of Financial or Chicago Title in a jointly owned title plant in San Luis Obispo County, California, or to relinquish any additional voting rights in the joint plant.

In *Rhodia, Donau Chemie AG/Albright & Wilson PLC*,[54] the complaint alleged that the proposed acquisition by Rhodia of Albright & Wilson would lessen competition in the U.S. market for pure phosphoric acid, a chemical used to produce a wide variety of consumer and industrial products, ranging from cola beverages to cleaning materials and metal treatments. According to the complaint, the market for pure phosphoric acid in the U.S. is highly concentrated, and the proposed acquisition would increase the market concentration significantly. Rhodia and Albright & Wilson are the only two major domestic producers of pure phosphoric acid that currently use the low-cost solvent extraction process. Under the

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[53] Fidelity National Financial, Inc./Chicago Title Corporation, Docket No. C-3929 (issued February 25, 2000).

[54] Rhodia, Donau Chemie AG/Albright & Wilson PLC, Docket No. C-3930 (issued April 21, 2000).

order, Rhodia was required to divest Albright & Wilson's pure phosphoric acid business in the U.S. to Potash Corporation of Saskatchewan, the world's third largest producer of agricultural grade phosphoric acid used as fertilizer.

In *Duke Energy Corporation/Phillips Petroleum Company/Duke Energy Field Services, LLC*,[55] the complaint alleged that the proposed merger of Duke's and Phillips' natural gas gathering and processing business into a new company called Duke Energy Field Services, LLC, and Duke's proposed acquisition of gas gathering and processing assets in central Oklahoma jointly owned by Conoco Inc. and Mitchell Energy & Development Corporation would likely lead to anticompetitive increases in gathering rates and an overall reduction in drilling operations and production in several counties in Kansas, Oklahoma and Texas. According to the complaint, Duke is one of the largest natural gas gatherers and marketers in the United States and Phillips is an integrated oil and gas company. In seven markets in Kansas, Oklahoma and Texas, gas producers were limited in their choice of gas gathering services, and were only able to turn to Duke or Phillips, or at most, one other gatherer. The proposed acquisitions would likely lead to anticompetitive increases in the gathering rates and an overall reduction in drilling operations and production. It is unlikely that such anticompetitive effects could be remediated by new entry into the gas gathering market in the relevant areas. To remedy these concerns, under the terms of the order, Duke was required to divest approximately 2,780 miles of gas gathering pipeline in these markets.

In *FMC Corp./Solutia Inc.*,[56] the complaint alleged that the proposed joint venture between FMC and Solutia would substantially lessen competition in the U.S. market for pure phosphoric acid and phosphorus pentasulfide. According to the complaint, both FMC and Solutia produce pure phosphoric acid and sell it directly to end customers. They also use this product internally to manufacture different types of phosphate salts. The U.S. market for these products is highly concentrated and the proposed joint venture would lead to significant increases in market concentration. Furthermore, the market for pure phosphoric acid is conducive to coordination, producers already price independently of industry operating rates, producers target competitors' customers in retaliation against aggressive bidding as a means of deterring future competition, and prices for pure phosphoric acid in the U.S. are already among the highest in the world. Phosphorus pentasulfide is a chemical mainly used to make chemical additives for engine lubricating oils, and, to a smaller extent, in manufacturing different types of insecticides. The only three companies making and selling this chemical in the U.S. are FMC, Solutia, and Rhodia – a company that will be exiting the market. The joint venture, as proposed, would create a monopoly in the production of this chemical, with new entry by competing companies unlikely in the future. Under the order, FMC and Solutia were required to divest the portion of Solutia's phosphates business in Augusta, Georgia to Societe

[55] Duke Energy Corporation/Phillips Petroleum Company/Duke Energy Field Services LLC, Docket No. C-3932 (issued May 9, 2000).

[56] FMC Corp./Solutia Inc., Docket No. C-3935 (issued May 19, 2000).

Chimique Prayon-Rupel, and FMC's phosphorus pentasulfide business in Lawrence, Kansas to Peak Investments, LLC.

In *Service Corporation International/LaGrone Funeral Home*,[57] the complaint alleged that SCI's 1994 acquisition of LaGrone may have lessened competition for funeral services in Roswell, New Mexico. According to the complaint, SCI is the nation's largest chain of funeral homes and cemeteries. SCI owned the Ballard Funeral Home, a full-service funeral home in Roswell, and subsequently acquired LaGrone, the only remaining full-service funeral home in Roswell giving SCI a monopoly in the provision of funeral services in the area. At the time of the acquisition LaGrone operated two funeral homes in New Mexico. Since SCI's acquisition of LaGrone, there had been no new entry into the provision of funeral services in Roswell, and after the acquisition, prices for funeral services increased. Prompted by the Commission's investigation of the LaGrone acquisition, SCI sold the Ballard Funeral Home to Sentry Group Services, Inc., a privately-held company that owns and operates 37 funeral homes and one cemetery in Oklahoma, Texas, New Mexico, Kansas and Colorado. SCI's financing subsidiary, Provident Services, Inc., provided the financing for Sentry's acquisition. Provident also finances many other funeral homes, including SCI's competitors. Under the order, SCI was required to divest the Ballard Funeral Home to a Commission-approved buyer if SCI acquired Ballard due to default on Sentry's loan. The order also prohibited Provident from sharing any information it obtained from Sentry with SCI.

In *Pfizer Inc./Warner-Lambert Company*,[58] the complaint alleged that the proposed $90 billion acquisition by Pfizer of Warner-Lambert would lessen competition in the markets for the research, development, manufacture and sale of: over the counter ("OTC") pediculicides sold for the treatment of lice infestation, one of the most prevalent communicable diseases among school age children; selective serotonin reuptake inhibitor/selective norepinephrine reuptake inhibitors ("SSRI/SNRI"), the leading class of antidepressants in one of the largest pharmaceutical markets in the U.S.; drugs for the treatment of Alzheimer's disease; and EGFr-tk inhibitors being developed for the treatment of cancer. According to the complaint, the markets in each area are highly concentrated. Pfizer and Warner-Lambert are the two leading suppliers of OTC pediculicides in the U.S., each with about 30 percent of the market. The companies also market the only two drugs in the U.S. for the treatment of Alzheimer's disease. Pfizer's Aricept dominates the industry with a 98 percent share, while Warner-Lambert's Cognex makes up the remaining two percent. Pfizer and Warner-Lambert directly compete against each other in the SSRI/SNRI market. In 1999, Pfizer's Zoloft was the second-leading SSRI, and Celexa, co-promoted by Warner-Lambert and Forest Laboratories, Inc., was the fastest growing SSRI in the U.S. Additionally, Pfizer and Warner-Lambert are two of four companies having EGFr-tk inhibitors in human clinical

[57] Service Corporation International/LaGrone Funeral Home, Docket Number C-3959 (issued June 30, 2000).

[58] Pfizer Inc./Warner-Lambert Co., Docket No. C-3957 (issued July 28, 2000).

testing. Under the order, the companies were required to end Warner-Lambert's agreement with Forest Laboratories, Inc. to co-promote the antidepressant drug Celexa, divest Pfizer's RID head lice treatment business, divest all of Warner-Lambert's assets related to the Alzheimer's drug Cognex, and transfer and give up all of Pfizer's assets related to the EGFr-tk inhibitor under development to treat solid tumor cancers.

In *Establissements Delhaize Freres et Cie "Le Lion" S.A./Hannaford Bros. Co.*,[59] the complaint alleged that the proposed $3.5 billion acquisition by Delhaize of Hannaford would substantially lessen supermarket competition in the southeastern United States. According to the complaint, Delhaize and Hannaford are direct competitors in a number of markets in North Carolina and Virginia, where Delhaize's Food Lion supermarkets compete with Hannaford's supermarkets. The relevant geographic markets include the Richmond Metropolitan Statistical Area ("MSA") and portions of the Norfolk-Virginia Beach Newport News MSA in Virginia, and the Greater Raleigh, the Wilmington MSA, Columbus County, Duplin County, and Pender County markets in North Carolina. Reduced competition would likely occur through the elimination of direct competition between the supermarkets owned or controlled by Delhaize and those owned by Hannaford, as well as by increasing the likelihood that Delhaize would exercise market power and raise prices for consumers. Under the order, Delhaize was required to divest 37 supermarkets in Virginia and North Carolina to three Commission-approved buyers.

In *Agrium, Inc./Union Oil Company of California/Unocal Corporation*,[60] the complaint alleged that the proposed acquisition by Agrium of assets of Unocal Corporation would lessen competition for the sale of nitrogen fertilizer products in the northwestern United States. According to the complaint, Agrium and Unocal are the leading sellers in the Northwest of the most popular nitrogen fertilizers: anhydrous ammonia, urea and UAN 32% solution. Purchasers of these fertilizers are not easily able to substitute fertilizers due to agricultural considerations and commercial factors. Only nitrogen fertilizers contain the nitrogen required for plant growth. There is also no substitute for urea in the manufacture of urea formaldehyde resin, an important commercial resin. The transaction, as proposed, would lead to a significant increase in market concentration, and a likely increase in the prices of these nitrogen fertilizers within the Northwest. In addition, entry by another competitor to alleviate the anticompetitive effects is unlikely. Under the order, Agrium was required to divest Unocal's deepwater terminal and other assets that serve customers in Oregon, Idaho, and Washington.

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[59] Establissements Delhaize Freres et Cie "Le Lion" S.A./Hannaford Bros. Co., Docket No. C-3962 (accepted for comment July 25, 2000) (final order pending).

[64] Agrium, Inc./Union Oil Company of California/Unocal Corporation, Docket No. C-3981 (issued November 17, 2000).

In *The Boeing Company/Hughes Space Communication,*[61] the complaint alleged that the proposed $3.75 billion acquisition by Boeing of Hughes would lessen competition in the highly specialized markets for satellites and launch vehicles. According to the complaint, the acquisition would enable Boeing/Hughes to potentially disadvantage or raise the costs of other competitors for a certain classified program for which Boeing is the sole supplier of, systems engineering and technical assistance ("SETA") services, and Hughes is one of the two competing contractors. Boeing/Hughes may gain access to competitively sensitive nonpublic information concerning satellite and launch vehicle suppliers which would reduce competition, as well as innovation and quality, for satellites and launch vehicles. And, as a supplier of satellites and launch vehicles, Boeing/Hughes may be able to disadvantage or raise the costs of competing launch vehicle suppliers by withholding satellite information necessary to make a satellite compatible with a launch vehicle. Under the terms of the order, Boeing was prohibited from performing SETA services for a certain classified program and was required to provide technical assistance to enable the Department of Defense to take over SETA services responsibilities for that program. In addition, Boeing was required to erect firewalls between its satellite and launch vehicle divisions to ensure that proprietary and competitively sensitive information of satellite and launch vehicle competitors is protected. Boeing was also required to provide satellite interface information to all launch vehicle suppliers to ensure that all launch vehicle suppliers will be able to integrate their launch vehicles with Boeing/Hughes satellites.

ONGOING REASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

The Commission continually reviews the impact of the premerger notification program on the business community and antitrust enforcement. Although a complete assessment is not possible in this limited report, a few observations can be made.

As indicated in past annual reports, the HSR program ensures that virtually all significant mergers or acquisitions that affect American consumers in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief. As a result, the HSR Act is doing what Congress intended, giving the government the opportunity to investigate and challenge mergers that are likely to harm consumers *before* injury can arise. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions that raised significant antitrust concerns before the antitrust agencies had the opportunity to adequately consider their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation, during the course of which harm from the

[61] The Boeing Company/Hughes Space and Communications, Docket No. C-3992 (issued January 5, 2001).

consummated transaction continued (and afterwards as well, where achievement of effective post-acquisition relief was not practicable). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

Although highly effective, the HSR program historically prompted expressions of concern from the business and legal communities that the program maybe overreaching, that the reporting thresholds (which had not been adjusted since enactment of the HSR Act in 1976) may be too low, and that the process may cause delay. This past year, the agencies actively assisted committees of Congress in the development of proposed legislation to significantly lessen the burden on business by increasing the reporting thresholds substantially.[62]

In addition, the enforcement agencies continue to seek ways to speed up the review process and reduce burdens for companies. This year, the agencies implemented new procedures and initiatives to improve the handling of second requests. The agencies are continuing their ongoing review of the HSR program in order to make it as minimally burdensome as possible without compromising the prompt and effective relief intended to result from the HSR program. Fiscal year 2000 marked the first full year of the PNO's brown bag sessions with outside counsel (see notice on website). Implemented in FY 1999, these ongoing brown bag lunch sessions with HSR practitioners have provided both counsel and the PNO with a forum to exchange ideas toward the goal of improving the HSR process.

[62] *See infra* note 1. The HSR Reform legislation included increasing the size-of-transaction threshold from $15MM to $50MM and eliminating the alternative 15% percentage test, thereby making $50MM an absolute floor – no transaction resulting in an acquiring person holding less that $50MM of assets or voting stock is now reportable. The Commission, with the concurrence of the Assistant Attorney General, has also promulgated interim rules to implement these statutory changes. 66 Fed. Reg. 8679 (February 1, 2001).

List of Appendices

List of Exhibits

Appendix A

Summary of Transactions

Fiscal Years 1991 - 2000

Appendix A

Summary of Transaction by Fiscal Year

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Transactions Reported	**1,529**	**1,589**	**1,846**	**2,305**	**2,816**	**3,087**	**3,702**	**4,728**	**4,642**	**4,926**
Filings Received[1]	**2,914**	**3,030**	**3,559**	**4,403**	**5,439**	**6,001**	**7,199**	**9,264**	**9,151**	**9,941**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,376	1,451	1,745	2,128	2,612	2,864	3,438	4,575	4,340	4,749
Investigations in Which Second Requests Were Issued	**64**	**44**	**71**	**73**	**101**	**99**	**122**	**125**	**111**	**98**
FTC[3]	33	26	40	46	58	36	45	46	45	43
Percent[4]	2.4%	1.8%	2.3%	2.2%	2.2%	1.3%	1.3%	1.0%	1.0%	0.9%
DOJ[3]	31	18	31	27	43	63	77	79	68	55
Percent[4]	2.3%	1.2%	1.8%	1.3%	1.6%	2.2%	2.2%	1.7%	1.6%	1.2%
Transactions Involving a Request For Early Termination[5]	**1,321**	**1,403**	**1,689**	**2,081**	**2,471**	**2,861**	**3,363**	**4,323**	**4,110**	**4,324**
Granted[5]	907	1,020	1,201	1,508	1,869	2,044	2,513	3,234	3,103	3,515
Not Granted[5]	414	383	448	573	602	817	850	1,089	1,007	809

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[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported, unless the notification is for a joint venture where more than one acquiring person is required to submit a filing. Only one application is received when an acquiring party files for an exemption under sections 7A(c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act; and (3) transactions which were found to be non-reportable. In addition, where a party filed more than one notification in the same year to acquire voting stock of the same corporation, e.g., filing for the 15% threshold and later filing for the 25% threshold, only a single transaction has been counted because, as a practical matter, the agencies do not issue more than one second request in such a case. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to 801.4 of the premerger notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the second request was issued and not the date the investigation was opened.

[4] Second requests investigations are a percentage of the total number of adjusted transactions.

[5] These statistics are based on the date of the H-S-R filing and not the date action was taken on request.

Appendix B

Number of Transactions Reported

And

Filings Received by Month

for

Fiscal Years 1991 - 2000

Appendix B

Table 1. Number of Transactions Reported by Month for the Fiscal Years 1991 - 2000

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
October	148	140	163	184	273	238	296	424	333	376
November	198	180	184	221	309	273	332	387	359	428
December	121	155	160	222	216	249	267	426	394	468
January	96	97	100	156	180	238	263	306	282	335
February	97	87	110	149	170	231	250	336	330	440
March	113	135	149	167	229	277	315	392	427	455
April	120	129	131	167	177	252	302	384	364	343
May	130	142	155	220	281	304	328	401	438	398
June	122	116	151	182	252	253	319	442	445	494
July	130	154	172	208	225	265	389	435	444	351
August	156	124	204	226	237	264	318	427	434	446
September	98	130	167	203	267	243	323	368	392	392
TOTAL	**1,529**	**1,589**	**1,846**	**2,305**	**2,816**	**3,087**	**3,702**	**4,728**	**4,642**	**4,926**

Appendix B

Table 2. Number of Filings Received[1] by Month for Fiscal Years 1991 - 2000

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
October	270	253	297	332	505	450	561	818	662	777
November	376	326	341	428	614	520	636	749	686	839
December	236	316	325	427	419	474	521	836	785	922
January	184	194	188	293	360	445	514	614	548	677
February	180	165	239	295	326	480	483	650	658	867
March	216	255	263	326	432	528	614	766	828	959
April	223	244	251	321	350	498	599	763	719	695
May	253	268	301	421	534	584	640	787	851	859
June	228	233	311	362	496	502	620	862	884	1,004
July	235	286	327	380	439	515	759	851	887	718
August	319	227	393	431	455	515	617	844	885	886
September	194	263	323	387	509	490	635	724	758	738
TOTAL	**2,914**	**3,030**	**3,559**	**4,403**	**5,439**	**6,001**	**7,199**	**9,264**	**9,151**	**9,941**

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when the transaction is reported, unless the notification is for a joint venture where more than one acquiring person is required to submit a filing.

Exhibit A

Statistical Tables

for

Fiscal Year 2000

Data Profiling Hart-Scott-Rodino Premerger

Notification Filings and Enforcement Interest

TABLE I

FISCAL YEAR 2000[1]

ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT[5]	NUMBER		PERCENT[6]			NUMBER		PERCENT[6]		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Less Than 15	168	3.5%	2	2	1.2%	1.2%	2.4%	0	0	0.0%	0.0%	0.0%
15 UP to 25	959	20.2%	17	16	1.8%	1.7%	3.4%	3	6	0.3%	0.6%	0.9%
25 UP to 50	1,120	23.6%	38	14	3.4%	1.3%	4.6%	8	5	0.7%	0.4%	1.2%
50 UP to 100	845	17.8%	32	21	3.8%	2.5%	6.3%	7	7	0.8%	0.8%	1.7%
100 UP to 150	407	8.6%	15	14	3.7%	3.4%	7.1%	2	5	0.5%	1.2%	1.7%
150 UP to 200	244	5.1%	9	13	3.7%	5.3%	9.0%	2	4	0.8%	1.6%	2.5%
200 UP to 300	244	5.1%	13	8	5.3%	3.3%	8.6%	3	2	1.2%	0.8%	2.0%
300 UP to 500	236	5.0%	19	12	8.1%	5.1%	13.1%	2	5	0.8%	2.1%	3.0%
500 UP to 1000	238	5.0%	17	13	7.1%	5.5%	12.6%	7	6	2.9%	2.5%	5.5%
1000 AND UP	288	6.1%	27	37	9.4%	12.8%	22.2%	9	15	3.1%	5.2%	8.3%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE II

FISCAL YEAR 2000[1]

ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT[5]	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES GRANTED			NUMBER		PERCENT		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	168	3.5%	2	2	0.6%	0.6%	1.2%	0	0	0.0%	0.0%	0.0%
LESS THAN 25	1,127	23.7%	19	18	5.6%	5.3%	10.9%	3	6	3.1%	6.1%	9.2%
LESS THAN 50	2,247	47.3%	57	32	16.8%	9.4%	26.3%	11	11	11.2%	11.2%	22.4%
LESS THAN 100	3,092	65.1%	89	53	26.3%	15.6%	41.9%	18	18	18.4%	18.4%	36.7%
LESS THAN 150	3,499	73.7%	104	67	30.7%	19.8%	50.4%	20	23	20.4%	23.5%	43.9%
LESS THAN 200	3,743	78.8%	113	80	33.3%	23.6%	56.9%	22	27	22.4%	27.6%	50.0%
LESS THAN 300	3,987	84.0%	126	88	37.2%	26.0%	63.1%	25	29	25.5%	29.6%	55.1%
LESS THAN 500	4,223	88.9%	145	100	42.8%	29.5%	72.3%	27	34	27.6%	34.7%	62.2%
LESS THAN 1000	4,461	93.9%	162	113	47.8%	33.3%	81.1%	34	40	34.7%	40.8%	75.5%
ALL TRANSACTIONS	4,749	100.0%	189	150	55.8%	44.2%	100.0%	43	55	43.9%	56.1%	100.0%

TABLE III
FISCAL YEAR 2000[1]
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($MILLIONS)	CLEARANCE GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF: TOTAL NUMBER OF TRANSACTIONS			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	2	2	4	0.1%	0.1%	0.2%	1.1%	1.3%	0.6%	0.6%	1.2%
15 UP to 25	17	16	33	0.4%	0.7%	1.1%	9.0%	10.7%	5.0%	4.7%	9.7%
25 UP to 50	38	14	52	0.8%	1.1%	1.9%	20.1%	9.3%	11.2%	4.1%	15.3%
50 UP to 100	32	21	53	0.7%	1.1%	1.8%	16.9%	14.0%	9.4%	6.2%	15.6%
100 UP to 150	15	14	29	0.3%	0.6%	0.9%	7.9%	9.3%	4.4%	4.1%	8.6%
150 UP to 200	9	13	22	0.2%	0.5%	0.7%	4.8%	8.7%	2.7%	3.8%	6.5%
200 UP to 300	13	8	21	0.3%	0.4%	0.7%	6.9%	5.3%	3.8%	2.4%	6.2%
300 UP to 500	19	12	31	0.4%	0.7%	1.1%	10.1%	8.0%	5.6%	3.5%	9.1%
500 UP to 1000	17	13	30	0.4%	0.6%	1.0%	9.0%	8.7%	5.0%	3.8%	8.8%
1000 AND UP	27	37	64	0.6%	1.3%	1.9%	14.3%	24.7%	8.0%	10.9%	18.9%
ALL CLEARANCES	189	150	339	4.0%	3.2%	7.2%	100.0%	100.0%	55.8%	44.2%	100.0%

TABLE IV
FISCAL YEAR 2000[1]
INVESTIGATIONS IN WHICH SECOND REQUESTS WERE ISSUED

							SECOND REQUESTS ISSUED AS A PERCENTAGE OF:					
TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH SECOND REQUEST WERE ISSUED[3]			TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP[7]			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
LESS THAN 15	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
15 UP to 25	3	6	9	0.1%	0.1%	0.2%	0.3%	0.6%	0.9%	3.1%	6.1%	9.2%
25 UP to 50	8	5	13	0.2%	0.1%	0.3%	0.7%	0.4%	1.2%	8.2%	5.1%	13.3%
50 UP to 100	7	7	14	0.1%	0.1%	0.3%	0.8%	0.8%	1.7%	7.1%	7.1%	14.3%
100 UP to 150	2	5	7	0.0%	0.1%	0.1%	0.5%	1.2%	1.7%	2.0%	5.1%	7.1%
150 UP to 200	2	4	6	0.0%	0.1%	0.1%	0.8%	1.6%	2.5%	2.0%	4.1%	6.1%
200 UP to 300	3	2	5	0.1%	0.0%	0.1%	1.2%	0.8%	2.0%	3.1%	2.0%	5.1%
300 UP to 500	2	5	7	0.0%	0.1%	0.1%	0.8%	2.1%	3.0%	2.0%	5.1%	7.1%
500 UP to 1000	7	6	13	0.1%	0.1%	0.3%	2.9%	2.5%	5.5%	7.1%	6.1%	13.3%
1000 AND UP	9	15	24	0.2%	0.3%	0.5%	3.1%	5.2%	8.3%	9.2%	15.3%	24.5%
ALL TRANSACTIONS	43	55	98	0.9%	1.2%	2.1%	0.9%	1.2%	2.1%	43.9%	56.1%	100.0%

TABLE V
FISCAL YEAR 2000[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF THRESHOLD GROUP			NUMBER		PERCENTAGE OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$15 MILLION	207	4.4%	1	2	0.5%	1.0%	1.4%	0	1	0.0%	0.5%	0.5%
15%	378	8.0%	6	7	1.6%	1.9%	3.4%	0	3	0.0%	0.8%	0.8%
25%	415	8.7%	10	10	2.4%	2.4%	4.8%	7	4	1.7%	1.0%	2.7%
50%	2,185	46.0%	100	88	4.6%	4.0%	8.6%	24	26	1.1%	1.2%	2.3%
ASSETS ONLY	1,564	32.9%	72	43	4.6%	2.7%	7.4%	12	21	0.8%	1.3%	2.1%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE VI
FISCAL YEAR 2000
TRANSACTIONS BY ASSETS OF ACQUIRING PERSON

	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
ASSET RANGE ($ MILLIONS)	NUMBER	PERCENT	NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	243	5.1%	3	1	1.2%	0.4%	1.6%	0	0	0.0%	0.0%	0.0%
15 UP to 25	56	1.2%	1	1	1.8%	1.8%	3.6%	0	0	0.0%	0.0%	0.0%
25 UP to 50	118	2.5%	5	1	4.2%	0.8%	5.1%	0	0	0.0%	0.0%	0.0%
50 UP to 100	198	4.2%	3	5	1.5%	2.5%	4.0%	0	0	0.0%	0.0%	0.0%
100 UP to 150	264	5.6%	6	4	2.3%	1.5%	3.8%	2	0	0.8%	0.0%	0.8%
150 UP to 200	200	4.2%	4	7	2.0%	3.5%	5.5%	3	3	1.5%	1.5%	3.0%
200 UP to 300	260	5.5%	7	5	2.7%	1.9%	4.6%	4	3	1.5%	1.2%	2.7%
300 UP to 500	326	6.9%	12	8	3.7%	2.5%	6.1%	1	1	0.3%	0.3%	0.6%
500 UP to 1000	508	10.7%	15	14	3.0%	2.8%	5.7%	5	4	1.0%	0.8%	1.8%
1000 AND UP	2,574	54.2%	133	104	5.2%	4.0%	9.2%	28	44	1.1%	1.7%	2.8%
ASSETS UNAVAILABLE[8]	2	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE VII
FISCAL YEAR 2000[1]
TRANSACTIONS BY SALES OF ACQUIRING PERSON

SALES RANGE ($ MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
			NUMBER		PERCENTAGE OF SALES RANGE GROUP			NUMBER		PERCENTAGE OF SALES RANGE GROUP		
	NUMBER	PERCENT	FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	364	7.7%	4	2	1.1%	0.5%	1.6%	0	0	0.0%	0.0%	0.0%
15 UP to 25	90	1.9%	1	2	1.1%	2.2%	3.3%	0	0	0.0%	0.0%	0.0%
25 to 50	126	2.7%	10	2	7.9%	1.6%	9.5%	2	1	1.6%	0.8%	2.4%
50 UP to 100	214	4.5%	3	7	1.4%	3.3%	4.7%	1	2	0.5%	0.9%	1.4%
100 UP to 150	205	4.3%	2	3	1.0%	1.5%	2.4%	0	2	0.0%	1.0%	1.0%
150 UP to 200	179	3.8%	4	5	2.2%	2.8%	5.0%	1	2	0.6%	1.1%	1.7%
200 UP to 300	262	5.5%	8	11	3.1%	4.2%	7.3%	0	4	0.0%	1.5%	1.5%
300 UP to 500	312	6.6%	10	12	3.2%	3.8%	7.1%	0	7	0.0%	2.2%	2.2%
500 UP to 1000	427	9.0%	19	8	4.4%	1.9%	6.3%	5	5	1.2%	1.2%	2.3%
1000 AND UP	2,546	53.6%	128	97	5.0%	3.8%	8.8%	34	32	1.3%	1.3%	2.6%
SALES NOT AVAILABLE[9]	24	0.5%	0	1	0.0%	4.2%	4.2%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE VIII
FISCAL YEAR 2000
TRANSACTIONS BY ASSETS OF ACQUIRED ENTITIES[10]

ASSET RANGE ($ MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	989	20.8%	25	18	2.5%	1.8%	4.3%	10	8	1.0%	0.8%	1.8%
15 UP to 25	645	13.6%	19	14	2.9%	2.2%	5.1%	1	5	0.2%	0.8%	0.9%
25 UP to 50	665	14.0%	37	11	5.6%	1.7%	7.2%	2	3	0.3%	0.5%	0.8%
50 UP to 100	648	13.6%	22	17	3.4%	2.6%	6.0%	2	5	0.3%	0.8%	1.1%
100 UP to 150	266	5.6%	21	15	7.9%	5.6%	13.5%	3	4	1.1%	1.5%	2.6%
150 UP to 200	203	4.3%	11	11	5.4%	5.4%	10.8%	1	3	0.5%	1.5%	2.0%
200 UP to 300	233	4.9%	11	12	4.7%	5.2%	9.9%	10	3	4.3%	1.3%	5.6%
300 UP to 500	219	4.6%	17	11	7.8%	5.0%	12.8%	3	7	1.4%	3.2%	4.6%
500 UP to 1000	265	5.6%	8	12	3.0%	4.5%	7.5%	3	6	1.1%	2.3%	3.4%
1000 AND UP	448	9.4%	10	25	2.2%	5.6%	7.8%	8	11	1.8%	2.5%	4.2%
ASSETS UNAVAILABLE[11]	168	3.5%	8	4	4.8%	2.4%	7.1%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE IX
FISCAL YEAR 2000[1]
TRANSACTIONS BY SALES OF ACQUIRED ENTITIES[12]

SALES RANGE ($ MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF SALES RANGE GROUP			NUMBER		PERCENTAGE OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 15	1,278	26.9%	54	22	4.2%	1.7%	5.9%	6	10	0.5%	0.8%	1.3%
15 UP to 25	422	8.9%	11	5	2.6%	1.2%	3.8%	0	1	0.0%	0.2%	0.2%
25 UP to 50	751	15.8%	28	13	3.7%	1.7%	5.5%	3	0	0.4%	0.0%	0.4%
50 UP to 100	682	14.4%	30	27	4.4%	4.0%	8.4%	5	9	0.7%	1.3%	2.1%
100 UP to 150	359	7.6%	15	13	4.2%	3.6%	7.8%	2	7	0.6%	1.9%	2.5%
150 UP to 200	200	4.2%	6	10	3.0%	5.0%	8.0%	0	1	0.0%	0.5%	0.5%
200 UP to 300	249	5.2%	11	14	4.4%	5.6%	10.0%	1	5	0.4%	2.0%	2.4%
300 UP to 500	239	5.0%	9	18	3.8%	7.5%	11.3%	4	9	1.7%	3.8%	5.4%
500 UP to 1000	219	4.6%	13	10	5.9%	4.6%	10.5%	3	3	1.4%	1.4%	2.7%
1000 AND UP	329	6.9%	12	18	3.6%	5.5%	9.1%	19	10	5.8%	3.0%	8.8%
SALES NOT AVAILABLE[13]	21	0.4%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	4,749	100.0%	189	150	4.0%	3.2%	7.2%	43	55	0.9%	1.2%	2.1%

TABLE X
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
1	Agricultural Production - Crops	3	0.1%	0.1%	0	0	0	0	0	0
2	Agricultural Production - Livestock and Animal Specialties	3	0.1%	0.2%	0	0	0	0	0	0
7	Agricultural Services	0	0.0%	NC	0	0	0	0	0	0
8	Forestry	3	0.1%	NC	0	0	0	0	0	0
9	Fishing, Hunting & Trapping	1	0.0%	0.2%	0	0	0	0	0	0
10	Metal Mining	3	0.1%	0.1%	0	0	0	0	0	0
12	Coal Mining	3	0.1%	-0.1%	0	0	0	0	0	0
13	Oil and Gas Extraction	39	0.8%	-0.1%	2	2	4	2	2	4
14	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	7	0.1%	-0.3%	0	0	0	0	0	0
15	Building Construction – General Contractors and Operative Builders	9	0.2%	0.1%	0	0	0	0	0	0
16	Heavy Construction Other Than Building Construction - Contractors	28	0.6%	-0.2%	0	0	0	0	0	0
17	Construction - Special Grade Contractors	27	0.6%	-0.2%	0	0	0	0	0	0
20	Food and Kindred Products	93	2.0%	-1.2%	3	9	12	2	4	6
21	Tobacco Products	5	0.1%	-0.4%	2	0	2	1	0	1
22	Textile Mill Products	19	0.4%	-0.1%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
23	Apparel and Other Finished Products Made From Fabrics and Similar Materials	5	0.1%	-0.3%	0	0	0	0	0	0
24	Lumber and Wood Products, Except Furniture	18	0.4%	-0.4%	0	0	0	0	0	0
25	Furniture and Fixtures	22	0.5%	-0.1%	1	0	1	0	0	0
26	Paper and Allied Products	52	1.1%	-0.1%	0	3	3	0	2	2
27	Printing, Publishing and Allied Industries	84	1.8%	-1.8%	2	8	10	1	2	3
28	Chemicals and Allied Products	169	3.6%	-0.2%	33	4	37	7	3	10
29	Petroleum Refining and Related Industries	26	0.5%	-0.2%	1	0	1	0	0	0
30	Rubber and Misc. Plastics Products	67	1.4%	-1.1%	4	0	4	0	0	0
31	Leather and Leather Products	1	0.0%	1.0%	0	0	0	0	0	0
32	Stone, Clay, Glass and Concrete Products	37	0.8%	NC	2	0	2	2	0	2
33	Primary Metal Industries	50	1.1%	0.4%	2	3	5	0	0	0
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	54	1.1%	-0.7%	8	0	8	1	0	1
35	Industrial and Commercial Machinery and Computer Equipment	132	2.8%	-1.3%	10	11	21	3	4	7
36	Electronic and Other Electrical Equipment and Components, Except Computer Equipment	202	4.3%	-0.1%	14	8	22	3	3	6
37	Transportation Equipment	67	1.4%	-1.5%	7	5	12	3	2	5

TABLE X
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks	76	1.6%	-0.9%	17	4	21	3	2	5
39	Miscellaneous Manufacturing Industries	22	0.5%	0.2%	1	3	4	1	0	1
40	Railroad Transportation	3	0.1%	0.1%	0	0	0	0	0	0
41	Local and Suburban Transit and Interurban Highway Passenger Transportation	3	0.1%	NC	0	0	0	0	0	0
42	Motor Freight Transportation and Warehousing	37	0.8%	NC	0	2	2	0	0	0
44	Water Transportation	22	0.5%	0.1%	2	2	4	0	1	1
45	Transportation by Air	19	0.4%	0.2%	0	0	0	0	0	0
46	Pipelines, Except Natural Gas	10	0.2%	0.2%	2	0	2	0	0	0
47	Transportation Services	36	0.8%	0.5%	0	0	0	0	0	0
48	Communications	446	9.4%	1.1%	2	29	31	0	17	17
49	Electric, Gas and Sanitary Services	155	3.3%	-0.4%	9	18	27	6	8	14
50	Wholesale Trade - Durable Goods	216	4.5%	-1.1%	10	0	10	1	0	1
51	Wholesale Trade - Nondurable Goods	157	3.3%	1.09%	6	1	7	1	0	1
52	Building Materials, Hardware, Garden Supply, and Mobile Home Dealers	7	0.1%	0.1%	0	0	0	0	0	0
53	General Merchandise Stores	8	0.2%	NC	0	0	0	0	0	0

TABLE X
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
54	Food Stores	23	0.5%	-0.3%	2	0	2	2	0	2
55	Automotive Dealers and Gasoline Service Stations	76	1.6%	-1.20%	0	0	0	0	0	0
56	Apparel and Accessory Stores	14	0.3%	NC	0	0	0	0	0	0
57	Home Furniture, Furnishings and Equipment Stores	15	0.3%	0.1%	1	0	1	0	0	0
58	Eating and Drinking Places	41	0.9%	-0.5%	1	0	1	0	0	0
59	Miscellaneous Retail	71	1.5%	-0.1%	1	0	1	0	0	0
60	Depository Institutions	91	1.9%	0.6%	0	1	1	0	0	0
61	Nondepository Credit Institutions	57	1.2%	-1.0%	0	0	0	0	0	0
62	Security and Commodity Brokers, Dealers, Exchanges and Services	117	2.5%	1.4%	0	0	0	0	0	0
63	Insurance Carriers	87	1.8%	-1.0%	0	7	7	0	2	2
64	Insurance Agents, Brokers and Service	33	0.7%	-0.1%	0	0	0	0	0	0
65	Real Estate	20	0.4%	-0.1%	0	0	0	0	0	0
67	Holding and Other Investment Offices	394	8.3%	3.1%	1	1	2	0	0	0
70	Hotels, Rooming Houses, Camps, and Other Lodging Places	18	0.4%	NC	1	0	1	0	0	0
72	Personal Services	5	0.1%	-0.6%	0	0	0	0	0	0
73	Business Services	635	13.4%	4.30%	24	24	48	4	3	7
75	Automotive Repair, Services and Parking	15	0.3%	NC	0	1	1	0	0	0

TABLE X
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
76	Miscellaneous Repair Services	7	0.1%	-0.6%	0	0	0	0	0	0
78	Motion Pictures	25	0.5%	-0.2%	0	2	2	0	0	0
79	Amusement and Recreation Services	37	0.8%	-0.2%	0	2	2	0	0	0
80	Health Services	114	2.4%	-0.8%	3	0	3	0	0	0
81	Legal Services	0	0.0%	-0.1%	0	0	0	0	0	0
82	Educational Services	6	0.1%	-0.1%	0	0	0	0	0	0
83	Social Services	0	0.0%	-0.2%	0	0	0	0	0	0
86	Membership Organizations	3	0.1%	0.1%	0	0	0	0	0	0
87	Engineering, Accounting, Research, Management and Related Services	110	2.3%	0.5%	11	0	11	0	0	0
89	Miscellaneous Services	2	0.0%	NC	0	0	0	0	0	0
94	Administration of Human Resource Programs	0	0.0%	NC	0	0	0	0	0	0
95	Administration of Environmental Quality and Housing Programs	0	0.0%	0.0%	0	0	0	0	0	0
99	Nonclassificable Establishments	1	0.0%	0.0%	0	0	0	0	0	0
00	Not Available[16]	251	5.3%	2.30%	2	0	2	0	0	0
DV	Diversified Ventures	35	0.7%	0.6%	1	0	1	0	0	0
	ALL TRANSACTIONS	4,749	100.00%	--	189	150	339	43	55	98

TABLE XI
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[17] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
1	Agricultural Production - Crops	4	0.1%	NC	0	0	0	0	0	0	2
2	Agricultural Production – Livestock and Animal Specialties	4	0.1%	0.1%	0	0	0	0	0	0	3
7	Agricultural Services	6	0.1%	NC	0	0	0	0	0	0	2
8	Forestry	1	0.0%	0.1%	0	0	0	0	0	0	0
9		1	0.0%	0.1%	0	0	0	0	0	0	1
10	Metal Mining	6	0.1%	-0.1%	0	0	0	0	0	0	2
12	Coal Mining	2	0.0%	-0.1%	0	0	0	0	0	0	2
13	Oil and Gas Extraction	36	0.8%	0.7%	3	2	5	3	2	5	26
14	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	9	0.2%	0.2%	0	2	2	0	0	0	6
15	Building Construction - General Contractors and Operative Builders	7	0.1%	NC	0	0	0	0	0	0	6
16	Heavy Construction other than Building Construction - Contractors	34	0.7%	0.2%	0	0	0	0	0	0	26
17	Construction - Special Grade Contractors	52	1.1%	0.3%	0	0	0	0	0	0	34
20	Food and Kindred Products	106	2.2%	1.8%	7	9	16	3	5	8	92
21	Tobacco Products	4	0.1%	NC	2	0	2	1	0	1	3
22	Textile Mill Products	16	0.3%	NC	1	0	1	0	0	0	10
23	Apparel and Other Finished Products Made from Fabrics and Similar Materials	9	0.2%	-0.2%	0	0	0	0	0	0	3
24	Lumber and Wood Products, Except Furniture	21	0.4%	0.3%	0	0	0	0	0	0	15

TABLE XI
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[17] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
25	Furniture and Fixtures	21	0.4%	0.2%	1	0	1	1	0	1	17
26	Paper and Allied Products	55	1.2%	0.3%	0	3	3	0	2	2	41
27	Printing, Publishing and Allied Industries	135	2.8%	NC	1	9	10	1	2	3	73
28	Chemicals and Allied Products	209	4.4%	1.0%	25	4	29	11	3	14	119
29	Petroleum Refining and Related Industries	29	0.6%	0.3%	1	0	1	0	0	0	20
30	Rubber and Misc. Plastics Products	88	1.9%	-0.6%	4	0	4	0	0	0	49
31	Leather and Leather Products	4	0.1%	0.1%	0	0	0	0	0	0	1
32	Stone, Clay, Glass and Concrete Products	46	1.0%	0.1%	2	2	4	0	0	0	36
33	Primary Metal Industries	44	0.9%	-0.5%	2	2	4	1	0	1	31
34	Fabricated Metal Products, Except Machinery and Transportation Equipment	91	1.9%	-0.3%	8	0	8	1	0	1	49
35	Industrial and Commercial Machinery and Computer Equipment	151	3.2%	-0.1%	11	9	20	3	3	6	104
36	Electronic and Other Electrical Equipment and Components, Except Computer Equipment	234	4.9%	0.8%	11	8	19	0	3	3	163
37	Transportation Equipment	74	1.6%	-0.4%	5	4	9	1	2	3	46

TABLE XI
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[17] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
38	Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks	83	1.7%	-0.9%	18	4	22	2	3	5	62
39	Miscellaneous Manufacturing Industries	26	0.5%	0.2%	1	3	4	0	0	0	15
40	Railroad Transportation	1	0.0%	-0.1%	0	0	0	0	0	0	0
41	Local and Suburban Transit and Interurban Highway Passenger Transportation	3	0.1%	-0.1%	0	0	0	0	0	0	3
42	Motor Freight Transportation and Warehousing	33	0.7%	-0.2%	0	2	2	0	0	0	19
44	Water Transportation	10	0.2%	-0.2%	2	0	2	0	0	0	8
45	Transportation by Air	11	0.2%	-0.2%	0	1	1	0	1	1	7
46	Pipelines, Except Natural Gas	7	0.1%	-0.2%	2	0	2	0	0	0	6
47	Transportation Services	32	0.7%	0.3%	0	0	0	0	0	0	22
48	Communications	489	10.3%	1.2%	2	26	28	0	12	12	268
49	Electric, Gas and Sanitary Goods	144	3.0%	-0.7%	9	16	25	7	8	15	110
50	Wholesale Trade-Durable Goods	220	4.6%	0.7%	7	0	7	1	0	1	148
51	Wholesale Trade-Nondurable Goods	137	2.9%	-0.3%	5	1	6	1	0	1	97
52	Building Materials, Hardware, Garden Supply, and Mobile Home Dealers	5	0.1%	-0.1%	0	0	0	0	0	0	5

TABLE XI
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[17] (the data series for this column was revised in April, 2008)
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
53	General Merchandise Stores	6	0.1%	-0.1%	0	0	0	0	0	0	4
54	Food Stores	26	0.5%	-0.4%	2	0	2	2	0	2	19
55	Automotive Dealers and Gasoline Service Stations	81	1.7%	-0.8%	0	0	0	0	0	0	69
56	Apparel and Accessory Stores	16	0.3%	-0.1%	0	0	0	0	0	0	7
57	Home Furniture, Furnishings and Equipment Stores	19	0.4%	0.1%	1	0	1	0	0	0	6
58	Eating and Drinking Places	31	0.7%	-0.2%	1	0	1	0	0	0	23
59	Miscellaneous Retail	90	1.9%	1.2%	1	1	2	1	1	2	44
60	Depository Institutions	29	0.6%	-0.1%	0	0	0	0	0	0	21
61	Nondepository Credit Institutions	57	1.2%	-0.4%	0	1	1	0	0	0	38
62	Security and Commondity Brokers, Dealers, Exchanges and Services	77	1.6%	0.6%	0	2	2	0	0	0	48
63	Insurance Carriers	87	1.8%	-1.2%	0	3	3	0	2	2	72
64	Insurance Agents, Brokers and Service	31	0.7%	-0.1%	1	1	2	0	0	0	16
65	Real Estate	16	0.3%	-0.2%	1	0	1	0	0	0	9
67	Holding and Other Investment Offices	30	0.6%	-0.4%	1	0	1	0	0	0	30
70	Hotels, Rooming Houses, Camps, and Other Lodging Places	12	0.3%	NC	0	0	0	0	0	0	9
72	Personal Services	6	0.1%	-0.2%	0	0	0	0	0	0	4
73	Business Services	754	15.9%	4.0%	21	24	45	2	6	8	436

TABLE XI
FISCAL YEAR 2000[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

2-DIGIT SIC CODE[14]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 99[15]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[17] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
75	Automotive Repair, Services and Parking	11	0.2%	-0.2%	0	1	1	0	0	0	8
76	Miscellaneous Repair Services	7	0.1%	NC	0	0	0	0	0	0	5
78	Motion Pictures	18	0.4%	-0.2%	0	2	2	0	0	0	10
79	Amusement and Recreation Services	43	0.9%	-0.4%	1	2	3	0	0	0	24
80	Health Services	97	2.0%	-1.5%	3	0	3	0	0	0	76
82	Educational Services	10	0.2%	NC	0	0	0	0	0	0	3
83	Social Services	0	0.0%	-0.1%	0	0	0	0	0	0	0
86	Membership Organizations	2	0.0%	-0.1%	0	0	0	0	0	0	1
87	Engineering, Accounting, Research, Management and Related Services	135	2.8%	0.4%	10	0	10	0	0	0	53
89	Miscellaneous Services	4	0.1%	NC	0	0	0	0	0	0	1
94	Administration of Human Resource Programs	0	0.0%	NC	0	0	0	0	0	0	0
99	Nonclassificable Establishments	2	0.0%	NC	0	0	0	0	0	0	0
00	Not Available	352	7.4%	4.3%	16	6	22	1	0	1	25
	ALL TRANSACTIONS	4,749	100.00%	--	189	150	339	43	55	98	2,813

[1] Fiscal Year 2000 figures include transactions reported between October 1, 1999, and September 30, 2000.

[2] The size of transaction is based on the aggregate total amount of voting securities and assets to be held by the acquiring person as a result of the transaction and is taken from the response to Item 3(c) of the notification and report form.

[3] Based on the date of the second request was issued.

[4] During fiscal year 2000, 4926 transactions were reported under the Hart-Scott-Rodino premerger notification program. The smaller number of 4749 reflects adjustments to eliminate the following types of transactions: (1) transactions reported under Section (c)(6) and Section (c)(8), (transactions involving certain regulated industries and financial businesses); (2) transactions found to be non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple-party transactions (transactions involving two or more acquiring persons).

[5] Percentage of total transactions.

[6] Percentage of transaction range group.

[7] Percentages also appear in **TABLE I**.

[8] This category includes transactions with newly formed acquiring persons and transactions withdrawn before staff could make a detailed analysis of the acquisition.

[9] This category is composed of newly formed acquiring persons, foreign acquiring persons with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

[10] The assets of the acquired entity were taken from responses to Item 2(b)(i) (Assets to be Acquired) or from Items 4(a) or (b) (SEC documents and annual reports) of the premerger notification form.

[11] The assets were not available primarily because the acquired entity's financial data was consolidated within its ultimate parent.

[12] The sales of the acquired entity were taken from Items 4(a) and (b) (SEC documents and annual reports) or responses to Item 5 (dollar revenues) of the premerger notification and report form.

[13] Transactions in this category include acquisitions of newly formed corporations or corporate joint ventures from which no sales were generated, and acquisitions of assets, which had produced no sales or revenues during the prior year to filing the notification and report form.

[14] The 2-digit SIC codes are part of the system of Standard Industrial Classification established by the United States Government Standard Classification Manual, 1987, Executive Office of the President – Office of Management and Budget. The SIC groupings used in this table were determined from responses submitted by filing parties to Item 5 of the premerger notification and report form.

[15] This number represents a deviation in percentage points from the Fiscal Year 1999 percentage.

[16] This category includes transactions by newly formed entities.

[17] The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired persons derived revenues in the same industry.