Presentation by Lauren S. Albert
at the FTC's General Session on
Best Practices for Merger Investigations

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Thank you for inviting me to speak at today's Merger Best Practices Workshop. My name is Lauren Albert, and I am a partner at Axinn, Veltrop and Harkrider here in New York. I am honored to provide the opportunity to share our views as to how the Second Request process can be improved to ease the burden on the parties, while ensuring the goal underlying the statute is achieved: giving the agencies an opportunity to determine whether an acquisition poses competitive problems before the deal is consummated.

I will give a number of specific suggestions today for modifications to the Second Request process, particularly those related to electronic discovery, but will begin by commenting on something almost more significant than specific modifications to the process. It relates to the FTC's posture during the Second Request process. According to Senator Rodino, the HSR Act was designed to require the parties to share with the government data they had assembled and analyzed in connection with planning the transaction. Once the agencies determined that the merger did pose anticompetitive concerns and commenced preliminary injunction proceedings, full-fledged discovery would begin under the aegis of a federal district court.

It appears we have strayed from Congress' original intent and the Second Request period is now being used by some government lawyers as an opportunity to prepare for trial. As a result, the Second Request period is far more adversarial than intended by Congress, provides a disincentive for the FTC to ease the burden of complying with a Second Request, and prohibits

the process from being a productive and cooperative one. At times, the FTC appears to be using the Second Request process as a fishing expedition and as a means of delaying the parties from certifying compliance. Given the extraordinary power Congress has given the agencies to issue Second Requests without any judicial intervention, they have a public duty to use the power judiciously, and not strategically as a means of furthering their litigation goals. For example, in one case, when we asked for a modification relating to the scope of the search of emails, we were told that it couldn't be modified, because "emails made the Microsoft case." Staff clearly was not interested in easing the burden imposed on the company by the Second Request, and only wanted unfettered pre-litigation discovery.

I understand from the FTC's perspective that the adversarial nature is due in part to some members of the private bar treating it as such, so it may be a chicken and an egg problem. But now is the time to call a truce. The FTC ought to return its focus to be consistent with the Congressional intent, and not begin with the presumption that a merger is anticompetitive, putting the parties on the defensive at the outset. The current Commission Rule of Practice requiring a meeting within 5 days has not been productive in setting the stage for a productive exchange of information. There are two reasons. First, the staff already is in litigation mode, and therefore are not forthcoming at the meeting. Second, one meeting, so early in the case is inadequate. Instead, I suggest that the FTC establish a policy emphasizing that the Second Request process is not to be used as pre-litigation discovery, and that there should be a continuous, open dialogue with the parties. The rule requiring a meeting within 5 days of issuance of a Second Request should remain, but that should not be the only obligation to communicate with the parties. There should be several meetings throughout the Second Request

period where there is an open dialogue of the issues. This will allow the process to be a more cooperative, streamlined one, leading to a more efficient resolution of the matter.

I will now discuss specific changes to the Second Request process.

- First, the FTC should set a deadline for responding to modifications promptly-we suggest within 48 hours. We have found that it often takes the staff over a week to respond to our modification requests, and then only to ask additional questions. As a result we often decided that it would be quicker, although more expensive, to not seek the modification and produce the material as requested.
- Second, we suggest that the FTC identify one person with whom the parties should discuss modifications, and that one person should have full authority to either grant or deny the request. We found that often the delay in responding to our request was caused by staff's need to run the request by a number of people, each of whom had a number of questions. This became all the more complicated when dealing with a regional office because not only did the request have to be run by various others in that regional office, but also people in D.C. Thus, there should be one person to whom the parties direct modification requests, and that one person should have full authority to respond.
- Third, the FTC should set up a mechanism to provide for uniformity in modifications—some sort of central databank of modifications previously granted. When we asked for one modification, we were told that it was FTC policy not to grant the type of modification we sought. When we explained that we had received that modification in the past, we were asked to prove it. That required us to get our files from off-site storage and retrieve the modification letter, only to be told that we still would not receive the modification.

- Fourth, the FTC needs to adopt new procedures and guidelines relating to electronic productions. We have a number of suggestions as to how the burden imposed by the voluminous amount of electronic material can be eased.
    - First, the FTC should designate a group of people to become the electronic production experts who will develop an expertise in issues relating to electronic documents. Those people should have a meeting with the parties' technology people within a week of issuance of the Second request. At that meeting, they should discuss: (i) the types of electronic records maintained by the company, (ii) the software used, (iii) the volume of electronic records, and (iv) the burdens imposed on the company in searching the electronic records. The parties should tell the FTC's electronic experts how they plan on reviewing and producing the electronic materials, and the FTC's experts should raise any concerns they have at that time.
    - Second, the FTC should approve the use of search terms as a means of reviewing electronic documents and provide guidelines for crafting acceptable lists. Again, search term lists should be approved promptly, and again we suggest within 48 hours of submission. In evaluating search terms, the Commission should not require the inclusion of common words that will inevitably retrieve tens of thousands of non-responsive documents, such as "agreement," "contract," "corporate," "sale," "sell," and dollar sign, all of which have been suggested to us in the past. The FTC should be receptive to further modifications of the search term list if sample runs of the search terms demonstrate that using the list results in a large percentage of non-responsive documents due to the inclusion of one or more terms that prove to be commonly used.

- Third, the FTC should eliminate the requirement that documents be produced by the specification to which they respond, particularly for electronic documents. Electronic documents can be searched using search terms and therefore there is no reason to organize the documents by specification. In other words, if the FTC wants to see all documents where the "market" is discussed, the search term "market" and various synonyms could be run through the production to find those documents.
- Fourth, the requirement that each page in the production bear a corporate identification number should be eliminated for electronic productions. Adding document control numbers is expensive because all files must be converted to a PDF or other electronic format. It also may be counterproductive because certain electronic formats, such as PDF, do not allow the FTC to search through the entire production using key words; instead, the FTC may be limited to searching only within each individual document.

To ensure the integrity of the documents and avoid any claims that a document was modified, the documents should be produced in read only format, which prevents them from being tampered with after they are burned to CD.

To provide a means of identifying documents produced on CDs for purposes of depositions, hearing or trial, the following protocol should be used: each custodian's responsive electronic documents are produced on CDs separate from documents of other custodians; and each CD is labeled with a distinct document control number, the custodian's name, and a description of the format of the documents on the CD, such

as emails, or Word documents. Within each CD, the title of the folder or .pst file[1] should contain the custodian's name and the CD's document control number.

One concern the FTC raised with us was how electronic documents could be identified at trial if they did not have document control numbers. We suggest the following: (1) e-mail can be identified by the document control number assigned to the CD on which it was produced, the custodian assigned to such CD, and the date, time and subject line of the particular e-mail; and (2) electronic documents (non-e-mail) can be identified by the document control number of the CD on which it was produced and by the full path and file name of such document (which would include the Specification subfolder in which the document was placed).

- Fifth, reduce how far back in time electronic records need be produced, especially for non-essential personnel. Second Requests usually require the production of documents going back 4 to 5 years, and unfortunately and probably more so after the Arthur Andersen debacle, clients tend to maintain electronic documents and emails spanning that entire period of time. We recently had to search through emails for 275 people sent or received during a 5 year period. As a result, we reviewed the equivalent of over 12 million pages of electronic records. To minimize this burden, the FTC should require only a limited number of key people's electronic documents be searched for the entire period, and either eliminate a review of other people's files altogether or require they be searched only for documents prepared during a one year period.

[1] E-mail can be saved in standard "Personal Folders File" format designated by the extension ".pst."

- We suggest two modifications relating to privilege issues that should become a standard part of every Second Request. As they are currently written, the Second Requests do not require the parties to log documents created by outside counsel that were not directly or indirectly shared with the client or third parties. We suggest the modification go a step further by eliminating that exception. All responsive documents created by outside counsel withheld on the grounds of privilege should not be logged if shown only to their client, other parties to the transaction or their counsel pursuant to a joint defense agreement, or consultants retained by counsel in connection with assisting them in advising their client with respect to the transaction.
- In addition, because electronic productions are so enormous, the chances for an inadvertent production are greatly increased. Moreover, in order to streamline their review process and provide materials to the Commission in a timely manner, parties may choose to search for privileged electronic records through the use of search terms, such as attorney names. Although this procedure is very efficient, it may result in an inadvertent production of otherwise privileged documents, which do not show up, for one reason or another, in the search. The FTC should agree with the parties that an inadvertent production of otherwise privileged electronic records will <u>not</u> be deemed a waiver of the applicable privilege.

- Finally, the continuing obligation requirements of the Second Request for both paper and electronic records should be limited to documents created within 30 days of issuance of the Second Request. Currently, the Commission requires that parties produce all documents created or retained by the responding company up to 30 calendar days prior to the date of the company's certification of substantial compliance and 14 calendar days prior to the date of

certification of compliance for documents relating to the transaction or to competition in the industry. In the process of complying with a Second Request, which can often take three to six months or longer, the Commission's continuing obligation requirement is incredibly burdensome and difficult to accomplish. For electronic records, the continuing obligation requirement is nearly impossible to comply with. It is not possible for a company to run another broad set of search terms through electronic records created or received only 14 days before production because the running of the search terms alone can take months to accomplish, not including any time to actually review the records. Moreover, any documents that would significantly impact the Commission's analysis surely will have been created prior to the Second Request being issued and, in all likelihood, prior to the HSR filing even being made.

That concludes my specific suggestions. I thank the FTC for giving me the opportunity to present my views and I would welcome the opportunity to be a part of any future efforts to streamline the Second Request process.