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Via Overnight Courier

Joseph Simons, Esq.
Bureau Director
Bureau of Competition
Federal Trade Commission
6th and Pennsylvania Aves, N.W.
Washington, D.C. 20580

Re: Merger Review Process

Dear Mr. Simons:

On behalf of the Section of Antitrust Law of the American Bar Association (the "Section"), we would like to express our support for the Federal Trade Commission's ("FTC") decision to seek public comments and to consider possible steps to improve the merger review process, including the remedies sought to resolve competitive issues identified during the merger review process. These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association ("ABA") and should not be construed as representing the position of the ABA.[1]

The objective to increase the efficiency and reduce the burden and duration of merger review investigations, particularly in transactions in which the agency issues Requests for Additional Information and Other Documentary Material ("Second Requests"), is shared by both the agencies and the private sector, and is consistent with the legislative intent of the Hart-Scott Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Only a very small percentage of transactions raise antitrust concerns, and the agencies and parties can address most of these concerns through restructuring the transaction after agency review. As the Section's Report of the Task Force on Federal Antitrust Agencies issued in 2001 recognized, "Obtaining 'substantial compliance' with . . . a second request can take months and require the expenditure of hundreds of thousands – or millions – of dollars. While these burdens are visited on only a relatively small number of transactions each year. . . the burdens imposed on the unfortunate parties are quite significant."[1] Reducing the time, costs and burdens of merger investigations is important so that competitively neutral and procompetitive acquisitions can be consummated quickly and with as little cost to the government and private parties as possible. The impact of protracted merger investigations can be particularly acute and potentially damaging to competition in transactions involving high tech firms and financially distressed companies.[1]

As you are aware, the Section has a long-standing history of working with the agencies in their periodic review of the merger process, including in the drafting of the Model Second Request in 1995. Also, in December 2000, the Section, after consultation with staffs at both the FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ") issued guidelines on the merger review process,[1] which sought to provide helpful suggestions to the bar and agencies on managing the merger review process. We provide a copy of the Section Guidelines at Tab 1 to this letter for your general reference, and we will cite to relevant portions of the Section Guidelines where appropriate. The Section would like to express its appreciation to both the FTC and the DOJ for their cooperation with the Section during the creation of the Section Guidelines and for their arranging to place a link to the Section Guidelines on their respective web pages.[2]

As a general matter, the Second Request process works well. There are many dedicated attorneys at both the FTC and DOJ who work hard to ensure that investigations are conducted fairly, efficiently, and without unnecessarily imposing costs and burdens upon the merger parties, while at the same time effectively enforcing the competition laws. Nevertheless, improvements in the process are always desirable, and the Section hopes that these comments will contribute to improving and streamlining the merger review process.[3]

Some of the comments and suggestions expressed in this letter reflect the "best practices" that are already being employed by some staff members. The Section hopes that the management at both agencies will encourage the staff to follow these practices more widely and consistently. In addition, the Section has noted specific areas and circumstances in which the agencies could improve the process. We note below some of the practices that raised issues. The Section recognizes that some of the problems encountered may be exceptions rather than the rule, but are worthy of comment and suggestions on how to avoid such issues in the future. Moreover, the Section's comments and suggestions are consistent with the original intent of the HSR Act, as noted by Representative Peter Rodino:

> [P]lainly, Government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. . . . [L]engthy delays and extended searches should consequently be rare. It was, after all, the prospect of protracted delays of many months – which might effectively "kill" most mergers – which led to the deletion . . . of the "automatic stop" provisions originally contained in both bills.

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[1] ABA's Guidance for Federal Merger Investigations and Complying with "Second Requests" (Dec. 2000) ("Section Guidelines" available at http://www.abanet.org/antitrust/mergerguidelines.html.).

[2] The Guidelines are also available at www.ftc.gov/bc/bestpractices/mergerguidelines.pdf.

[3] The Section encourages the adoption by the FTC and DOJ of consistent practices in the review of transactions wherever possible. Accordingly, the suggestions and objectives expressed in this letter apply equally to both agencies and we have endeavored to recognize the broader applicability throughout this letter by referencing the agencies rather than simply the FTC.

> In sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable.[4]

Before the Section provides specific comments to the questions raised by the staff in connection with its examination of the merger review process, the Section would like to discuss briefly some general themes and objectives regarding how the Section believes the merger review process should work. It appears that both the FTC and DOJ already embrace many of these themes and objectives:

1. Both the parties and the agencies should work cooperatively to focus the review of a particular matter and to explore means by which to make the process less adversarial, less document-intensive, shorter and less expensive. The process works best if both sides are cooperative and engage in a dialogue rather than if they adopt a confrontational position designed to preserve rights in litigation.

2. The agencies should not view the process as full discovery for litigation; there is always the ability for the agencies to supplement any document gaps (and "top off") in actual litigation.

3. The agency staff should be authorized and encouraged to cut back and tailor the Model Second Request to fit the particular transaction and to reflect the information provided by the parties before the issuance of the Second Request.

4. The staff should not view the process as turning over every stone (or backup tape) in a never-ending quest for the quintessential "hot" document.

5. Staff should be encouraged to articulate the theory of the case early enough in the investigation to promote focused production, presentations and joinder of issues.

6. Management should encourage staff to balance burden and thoroughness; management should reward staff for efficient investigations.

7. The agencies should issue commentary to the Model Second Request to articulate those factors that might weigh for and against the need for the particular request or data.

8. The agencies should work towards procedural and substantive convergence.

9. The agencies should seek from the merger parties a remedy that adequately preserves competition to the pre-merger state in the affected relevant markets.

10. In remedies, flexibility is key. The agencies should not impose presumptions prohibiting: (i) non-structural remedies; and (ii) mix and match of assets.

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[4] 122 Cong. Rec. 30,876-77 (daily ed. Sept. 16, 1976) (Statement of Rep. Rodino).

11. The agencies should use monitor trustees in appropriate matters so long as they have guidance on what their role is and how they should achieve that role.

Below, we respond in turn to each of the issues that the FTC raised in its press release announcing the workshops to review its practices. In addition, in the attached appendix, the Section provides a summary of some specific changes it recommends the agencies adopt.

the initial waiting period

The Section supports implementation of an efficient clearance process to minimize any delay by the agency in commencing and completing its investigation as expeditiously as possible.

The Section Transition Report points to the issues raised by the current clearance process and the delays that have consumed a significant part of the initial waiting period in a number of transactions. Delays in the clearance process lead to the agencies issuing some Second Requests solely because of a lack of time to review preliminarily proposed transactions and the parties refiling HSR notifications to avoid such Second Requests.[5] As further noted by the Section Transition Report, it is in everyone's interest that decisions as to whether to issue Second Requests are as fully informed as possible and that the agencies use the initial waiting period fully to resolve potential anticompetitive concerns without resorting to the Second Request process. The Section encourages the agencies to monitor carefully the clearance process and fully supports all efforts to streamline the clearance process, including setting an absolute number of days (e.g., 10 days) for all clearance decisions or enactment of a new clearance arrangement that would seek to achieve the objectives stated in the rescinded clearance agreement.

In addition, as indicated in the Section Guidelines, the Section supports, wherever possible, a review process in which the parties and the agency staff work cooperatively and exchange the necessary information to allow the investigation to be focused and completed efficiently.[6] Consistent with that objective, the Section encourages the agency to utilize the initial waiting period to eliminate the need for a Second Request in those transactions where the antitrust issues can be answered fully without the issuance of a Second Request and to focus the Second Request only to those transactions clearly warranting the issuance of a Second Request. At the same time, the Section recognizes the obligation of the parties to work towards achieving the same goals.

The Section encourages the use of voluntary information requests or access letters during the initial Hart-Scott-Rodino Act waiting period before issuance of any request for additional information or Second Request.

It is in the interests of both the agencies and the parties to use as effectively as possible the period before the issuance of any Second Request. The agencies should consider encouraging parties in particularly complex transactions to meet with the staff, where possible, even before the filing of the official Hart-Scott-Rodino ("HSR") Notification and Report Form (and, in some cases, even before the public announcement of the transaction) to discuss the likely antitrust issues raised by the transaction and the timing of the filing and review. For the process to work,

[5] Section Transition Report at 28.

[6] Section Guidelines §IV.A.

such discussion, and any written materials provided, should be subject to the same confidentiality protections afforded under the HSR Act for information provided pursuant to the HSR Act. The Section understands that pre-filing discussions with the antitrust authorities occur routinely in the European Union and have been an extremely effective way to focus the discussion early in the process.[7]

The Section believes the agency's use of voluntary information requests, if the staff properly tailors and focuses the request, can streamline and focus the agency's entire investigation of a merger. Such requests are more likely to be focused if their issuance follows a meeting or discussion with counsel and if they relate to documents or data that the company actually maintains, as opposed to data or documents that must be created. To be effective in narrowing the scope or need for a Second Request, it is important that the parties receive the request as early as possible during the waiting period. Publication of an annotated form "access letter" (as the agencies have done with the Second Request) may be helpful in allowing the parties to better prepare and understand the agency's expectations generally, to discuss with the business people what information will be available for production, and to begin gathering some of the information likely to be requested even before it is requested. It is important, however, that the agency not by default issue a form access letter, but rather tailor the request to the particular transaction. Moreover, the access letter should not be a Second Request in disguise.

The staff should be guided to use the access letter process for two purposes: (1) to allow staff to determine whether certain issues can be resolved short of a Second Request investigation; and (2) to obtain the information necessary to narrow the scope of the Second Request by identifying fewer relevant markets for investigation.[8] Broad access letters issued simply to obtain a head start on the Second Request process tend not to be productive, place substantial burden on the parties, and potentially set the wrong tone in dealings with the parties, which could have long-term counterproductive effects during the merger review process. It is important that the agency and the parties develop a cooperative and working relationship wherever possible in order to facilitate an efficient and effective resolution. While it is critical that the parties deal with the agency in good faith, the same good faith requirement extends to the staff, and the management should continue to encourage the staff to deal with the parties openly and candidly.

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[7] Without commenting on the specific allocation, the Section supports the efforts of the FTC and DOJ to implement a new clearance process that designated to each of the agencies certain industries, believing that the elimination of delay and uncertainty from the certification process constituted good government practices. *See* Letter to Chairman Timothy J. Muris and Assistant Attorney General for Antitrust Charles A. James from Roxane C. Busey dated January 23, 2002. As of the date of these comments, the agencies have abrogated the clearance agreement and reinstated the clearance protocol announced on March 23, 1995. If the agencies are able to achieve any future preclearance arrangements that would provide guidance at the outset regarding which agency will be reviewing a merger, then the potential for early communications and provision of pertinent information would be enhanced further, thereby potentially saving both the agencies and the parties both time and expense in the merger investigation process.

[8] Section Guidelines, § V.E.

A dialogue between the parties and the staff is needed during the drafting of the access letter to ensure that the requests are realistic and do not merely seek the same level of detail and the same sort of information as a Second Request. Access letters should request information that the parties will generally have readily available and that the parties can promptly produce to the staff. The keys to successful deployment of the voluntary request process are to assure that voluntary requests are truly voluntary and that the staff and parties both recognize that narrow responses are often adequate to resolve or focus agency concerns.

The DOJ issued a revised merger review procedure in 2001, under which, depending on the specifics of the transaction, parties are asked to produce: a list and description of overlapping and other potentially relevant products; product brochures; business and strategic planning documents, market studies, and information on market shares and competitor positioning; listings of competitors, suppliers, and customers; readily available data regarding sales and output; and analyses and studies related to the transaction.[9] The procedures also call for parties to "describe the scope and nature" of the search for documents that are responsive to DOJ requests for information. Though such a response is voluntary, staff attorneys may request that parties certify their description of their search in order to "ensure good faith compliance." The agency procedures also encourage parties to consult at an early stage with DOJ staff regarding a proposed transaction. The DOJ, in turn, commits to discuss its substantive concerns with the parties as soon as possible during the course of an investigation. In addition, agency staff may request interviews with company personnel early in the process, and may also request meetings and teleconferences with the parties on a regular basis after a Second Request has been issued in order to facilitate ongoing negotiation with the parties. Early reports from private parties indicate that the DOJ's new process is working well and has eliminated the need to issue Second Requests in at least some cases and streamlined the Second Request process in others by focusing on dispositive issues. The Section believes that consistent practices between the agencies is useful and, therefore, encourages the FTC to discuss the nuances of this new procedure with DOJ representatives.

The Section recognizes that there are transactions in which the staff has inadequate time during the initial waiting period in which to confirm the information provided to it by the parties.[10] Such instances typically arise in cash tender offer transactions (in which there is an abbreviated 15 day waiting period), in transactions involving bankrupt firms (also involving an abbreviated waiting period), where clearance to one of the agencies was delayed, or where the parties were unable to provide the voluntary information until late in the initial waiting period. In those instances in which the agency believes that the need to issue a Second Request and engage in a protracted investigation is very likely to be obviated if the agency has a short (i.e., up to a couple of weeks) extension in the initial waiting period, it may be appropriate to suggest to the parties that they consider "withdrawing and refiling" their Notification and Report Forms. The agencies should facilitate the exercise of this option by eliminating the current requirement that the parties

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[9] *See* DOJ Merger Review Process Initiative (2001), available at http://www.usdoj.gov/atr/public/9300.htm.

[10] Section Guidelines, § VII.E.1.

update their Item 4(c) searches before refiling, since such searches can be expensive and burdensome and are unlikely to result in additional probative information in light of the voluntary information produced by the parties and the confirmatory purpose to be served by the extension.

THE CONTENT AND SCOPE OF THE SECOND REQUEST

The agencies should use a more focused and less burdensome Second Request and seek additional discovery from the parties in the event that the transaction is actually challenged.

The Model Second Request issued in 1995 provides a good starting point generally; however, the staff should not view the model as an unalterable template to which the staff can only add.[11] Rather, as recommended in the Section Transition Report, the staff should be encouraged to modify or limit the Model Second Request to fit the particular transaction,[12] especially in light of the information that the agency may already have obtained from the reporting parties and third-parties, as well as general industry information that the agency may have obtained during the course of prior investigations. The size of major document productions has grown by a factor of ten over the course of the last decade. A decade ago, the largest document productions typically numbered in the hundreds of boxes of documents. Today, the largest document productions involve thousands or tens of thousands of boxes of documents.[13] While some of this is explained by the growth in the size of transactions and, at times, counsel's unwillingness to work with the staff cooperatively to focus the investigation, at other times it may reflect an unwillingness or inability on the part of the particular staff to focus on the key, outcome determinative issues and information needed at the Second Request stage. The failure to take into account the existing information in the hands of the staff or the known peculiarities of the industry results in overbroad Second Requests and can diminish the willingness of the parties to work cooperatively with the agency. The unnecessary production of thousands or tens of thousands of boxes of documents is not in the interest of either the agencies or the parties.

Moreover, the issuance of an overbroad Second Request, which endeavors to identify all actual and potential issues, will impose delays and costs on the parties in negotiating the actual Second Request terms after it issues. Nor should the staff seek to obtain from the parties in every matter every fact and every document necessary to justify an injunction to block the transaction in court. The Second Request process should not involve turning over "every stone" in the search for information or documents responsive to a Second Request.[14] Instead, the Second Request process should involve the discovery of reasonably necessary information and documents to allow the agency to assess the competitive effects of a transaction. Only a very small percentage (i.e., less than 1%) of all transactions are subject to litigation. Even in those transactions in

[11] Certain members of the bar have indicated that in some of the Second Requests they have received, the Model Second Request has been modified to add specifications that are essentially duplicates of what is in the model, but with variations sufficient to require substantial effort to respond but are of marginal – if any – incremental value.

[12] *See* Section Transition Report, n.. 11.

[13] *See also* Section Transition Report, p. 30.

[14] *See, e.g.*, Section Guidelines, § VI.B.1.

which Second Request issues, the number of litigated matters remains low. Indeed, the agencies have indicated that based on fiscal years 1998 and 1999 statistics, 60% of all merger investigations in which Second Requests issued were resolved without the parties even complying with the Second Request, albeit in most of these investigations a limited production occurred.[15] The amicable resolution (either with a no action decision or a consent) of a merger investigation can be expedited and the costs of the process decreased if the Second Request that is issued is narrowly tailored from the outset. Moreover, for those cases in which the agency commences litigation, it is not necessary for the staff to develop a complete trial record as part of the Second Request process in order to ensure that the agencies are able to challenge the problematic transactions.

A discovery approach by the agency that balances burden against need will not prejudice the agency. If the agency later determines that there are issues for which it needs additional discovery or that the matter is likely to be litigated. At that juncture, the agency could either obtain the additional information voluntarily from the parties or issue a civil investigative demand ("CID"). Moreover, the agency should be permitted to engage in additional discovery if the parties raise arguments that would have been the subject of deferred or eliminated responses. Even under the current scheme, it is not unprecedented for the agency to issue a CID to the merger parties for an investigational hearing or to obtain additional information or documents on an issue it failed to identify prior to the issuance of the Second Request. The effective use of CIDs is an option available to the agency if its initial Second Request proves to be inadequate and needs to be supplemented.

In some situations, and subject to the general concerns expressed *infra*, the agency could alternatively consider entering into a timing agreement with the parties. The timing agreement would trade-off an abbreviated Second Request that provides for an accelerated review process, with the agreement that if the agency decides to challenge the merger, the parties will agree to additional discovery during the litigation process. Such an arrangement permits both sides to weigh the likelihood of such litigation against the potential timesaving in the Second Request process. It is critical that in these situations that the parties are provided a meaningful benefit for agreeing to the possibility of a protracted litigation resolution (e.g., a Second Request that is truly limited and focused in scope such that compliance can be done expeditiously and cost-effectively) and that the decision whether to agree to such terms are truly voluntary. To ensure that the parties realize a tangible benefit from this approach, it may be appropriate to provide the parties with a copy of the "abbreviated" Second Request before they agree to enter into the agreement. Also, careful supervision and monitoring of such arrangements by management may be appropriate to ensure that they are not abused by the staff in matters in which there is a high risk of litigation as a means by which to extract protracted and repeated discovery demands.

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[15] *See also* U.S. Department of Justice, Antitrust Division, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General For Antitrust, Final Report (2000), n.. 121 ("[D]uring 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, 70 percent involved document productions of fewer than 50 boxes.")

A third alternative would be for the agency to agree to defer certain categories of documents or issues included in the Second Request on the condition that the parties agree to provide any of the deferred aspects within a reasonable timeframe if the agency should decide it needed the deferred information. The parties' ability to certify compliance with the Second Request, however, should not be dependent upon first providing the deferred material to the agency. Such an arrangement permits the parties to balance the likelihood of such deferred information being requested and the costs of then searching for and providing that information outside the initial Second Request production against the cost and time savings incident with obtaining the agency's agreement to defer the information. Members of the bar report that the DOJ's policy of allowing staff to defer the production of certain data and documents both reduces the burden on the parties while providing the staff with a measure of comfort that it can always request the deferred information.

The Agencies should revise and update the Model Second Request to address shortcomings.

The Section believes that the agencies should update the Model Second Request to reflect agency experience during the past seven years. As indicated in the Section Transition Report, "[c]omplaints that second requests routinely ask for far more material than the staff will ever review or need are still widespread."[16]

For example, searching and producing documents from foreign offices can be extremely costly and time consuming.[17] These costs escalate to the extent that the documents are not written in English both from a review standpoint as well as in terms of the need for responsive documents to be translated (see discussion *infra*, Section 3.3 for discussion of foreign translation requirement). Unless the merger parties have decision-makers for the company or the businesses or product lines that are the subject matter of the investigation in these foreign offices, the Section recommends that the agencies eliminate the requirement that custodians in foreign offices be included within the search.

There are also limits to using one model for all transactions. It would be useful to have the model provide specifically pertinent definitions and instructions for industries in which there are many investigations or different models based on types of industries (e.g., petroleum, supermarkets, defense), as well as the break-out of detailed specifications for types of issues that frequently arise in transactions (e.g., entry, network effects, vertical foreclosure, market definition). The definitions of "company" and "person" in the model are overly broad and parties are frequently incapable of comply with the definitions.. These definitions should be limited to require the production of documents only from those entities included within the person for "HSR" purposes, i.e., that are "controlled" by the company. References to "affiliates," a term not used in the HSR regulations, and entities in which the Ultimate Parent Entity has a 25 percent (or even less) stake impose upon the parties a requirement that they obtain information that they cannot legally compel, and this often becomes but one more point that needs to be negotiated or contested by the parties. Similarly, the requirement that the merger parties produce documents in

[16] Section Transition Report, n.. 11.

[17] Section Guidelines, § V.E.7.f.6.

the possession of representatives is also inappropriate since the parties are not entitled to those documents. The agencies can issue subpoenas to entities not controlled by the entity receiving a Second Request where such information is required to conduct the investigation.[18]

There are specific instructions and definitions in the current model that merger parties have found to be particularly time-consuming, expensive or burdensome and for which there may not be sufficient countervailing benefit to the agency to justify imposing the requirements uniformly. Most of these are discussed in the attached Appendix. One worthy of particular note, however, is the current "topping off" or "cut-off" date requirement, which mandates that the parties must submit documents within 30 calendar days in general, within 14 days for select Specifications, and within 45 days for translated documents. This requirement is problematic for several reasons.

First, parties do not typically delay the production of documents so long that the information and documents provided are stale. On the contrary, parties typically have a tremendous incentive to comply with a Second Request as promptly as possible, which helps to ensure the "freshness" of the record in the vast majority of Second Requests. On the other hand, in a large document production with numerous custodians, requiring a re-search of all custodians is extremely time-consuming and burdensome, and the processing of these documents can require greater time than the specified cut-off period, resulting in an untenable cycle under which parties would never be able to certify substantial compliance. The burden and difficulties are greatest with respect to e-mail and electronic documents.

Second, the rolling cut-off dates also have become extremely burdensome because the proliferation of e-mail systems at large corporations has caused a dramatic increase in the volume of documents that need to be reviewed, although the vast majority of e-mails generated are typically not responsive to the Second Request. The agency should adopt a specific cut-off date for document searches as of the date the Second Request issues, the date that the parties begin their document search, or the date the party searches a specific custodian. Parties should be required to search each custodian only once, absent compelling circumstances. If in a particular transaction the agency is concerned that it will not receive merger or integration planning documents that are important to its analysis, one solution would be to identify a smaller group of individuals who are likely to be engaged in those activities and perform an updated search for those custodians.

Absent compelling circumstances (such as a substantial delay by the parties in responding to the Second Request), more realistic options include: (1) a generally applicable 60 day cut-off period; (2) the cut-off date is the date the Second Request is issued; (3) the cut-off date is the date a custodian's files are searched; or (4) one of the above options, with an obligation to re-

[18] Subpoenas to third-parties should also be tailored to minimize the burden on the parties; the agencies should be cognizant that these subpoenas often impose great costs on companies and should be negotiated by the staff withthe due recognition that, particularly for unrelated third-parties, those costs have no concomitant benefit.

search the files of a very select group of custodians if there is a specific reason to believe that they will have new, probative information that is responsive to the Second Request.

As mentioned in the Section Transition Report, interrogatories that "require the parties to produce information beyond that kept in the normal course of business (e.g., econometric analysis of scanner data and preparation of detailed maps) have added substantially to the expense and time for compliance,[19]" without a clear corresponding benefit to the agency. Nor, as discussed above, are such requests consistent with legislative intent.[20] In addition, some of the interrogatories, e.g., requiring detailed recitations of bidding histories, impose unrealistic demands on the parties for which the parties may have no comparative advantage over the agency in "mining documents" for the relevant data. It should be clear in those instances that it is acceptable to produce all relevant documents from which the information can be compiled in lieu of answering the interrogatory if in the ordinary course of business the party does not assemble such data. Alternatively, it should be acceptable to produce competitive information or bid databases assembled in the ordinary course instead of the "raw" documents that may support those databases. Specifications that call for pricing or customer data (e.g., Specification 3 of the Model Second Request, which requests sales by SKU, import and export information, sales by product "feature") should be limited to obtaining the relevant variables in a format that the Bureau of Economics can use rather than requiring the merger parties to provide all such data and to perform a number of burdensome permutations of data (e.g., customers by quartile and decile, etc., by different attributes, volumes and dollars, by day, week, and month). Because compliance with econometric requests is so expensive, it should not be routinely included in Second Requests, but instead should require the approval of agency management, and management should be included in any subsequent discussions with the parties regarding the scope of such requests.

Finally, as indicated in the Section Transition Report, "complaints also are made that the model second request interrogatories and boilerplate requests are used in particular industries when they are either irrelevant or unanswerable.[21]" More generally, some of the interrogatories are not very probing or useful as a fact-gathering tool, but elicit self-serving statements from the parties. The only apparent purpose of such requests is to understand what the parties might assert in litigation, but even for that purpose, such interrogatories appear to be of marginal utility. If the parties wish to develop these statements and arguments and share them with the staff during the Second Request process, the parties should do so on a voluntary basis. In addition, the Model Second Request requires the parties to produce information concerning the nature of their facilities, including the manufacturing capacity, whether the facilities are leased or purchased, whether built or acquired, when opened and cost to replace if closed. In many industries (e.g., service and high technology), such concepts are meaningless. Similarly, requests for information about

[19] Section Transition Report, n. 11.

[20] *See* 122 Cong. Rec. 30,876 (daily ed. Sept. 16, 1976) (Statement of Rep. Rodino).

[21] Section Transition Report, n. 11.

foreign sales offices is likely to be irrelevant unless the staff believes that the geographic market is not worldwide or believes that the sales process or competitive environment is materially different outside the United States. In other transactions, entry is not a relevant consideration or the parties will draft narratives that are self-serving placeholders but that do not facilitate the agencies' review. To the extent that entry information is required for protracted periods (e.g., 5 years or more), such information may be of little probative value for determining current entry conditions. Nevertheless, preparation of such responses takes client and expert time and attention, imposes costs upon the parties, and consumes staff and party resources that could be better dedicated to outcome determinative issues. The Section questions whether these interrogatory responses are truly useful to the staff when conducting their investigation and, if not, suggests the agency eliminate these specifications from the Second Request.[22]

Specifically, the Section requests that the agencies consider eliminating or modifying the following specifications from the Model Second Request, depending upon the industry and transaction: (1) Specification 1 (beyond the request for current organizational charts for the top level of the company and the business or product lines that are the subject matter of the investigation); (2) Specifications 4 and 11, except where there are specific concerns regarding the facility's capacity; (3) Specification 5(a), requesting a "sample of the relevant product," should be eliminated since it is rarely useful; (4) Specifications 9 and 11 regarding entry should be voluntary and limited to a more prescribed time period; (5) Specification 12, concerning imports and exports, should be eliminated unless geographic market definition is critical to the investigation's outcome and is contested; and (6) Specification 15(d), concerning all opinions and statements regarding the transaction should be eliminated, given its marginal value and probativeness after the staff has directly spoken to customers, competitors and suppliers, and the privilege issues the request raises.

The Second Request instructions on sorting and organizing responsive information are often burdensome to the parties.

Sorting documents to provide them by specification, as is currently required, is time-consuming, error-prone, and highly subjective. The judgment as to which specification a document is responsive is necessarily subjective and likely to be inconsistent from transaction to transaction and from document reviewer to document reviewer in a particular transaction. This is particularly true when the parties are required to designate for which specification the document is more responsive or primarily responsive. A single document is often responsive to multiple document categories.[23] Therefore, the Section recommends that merger parties be able to

[22] Courts limit the scope of interrogatories under the Federal Rules of Civil Procedure based on burden and reasonableness. *See, e.g.*, Trevino v. Celanese Copr., 701 F.2d 397, 406 (5th Cir. 1983)(finding, upon considering FRCP 33, that burden to the producing party and reasonableness of the information sought constitute limits on interrogatory-based discovery). Rule 33 is governed by the Federal Rule of Civil Procedure 26, which limits all civil discovery to information "reasonably calculated to lead to the discovery of admissible evidence." F. R. Civ. P. 26(b)(1). Moreover, Congressman Rodino stated that failure to comply with "a government request of dubious or marginal relevance" does not constitute a failure to substantially comply. 122 Cong. Rec. 30,877 (daily ed. Sept. 16, 1976). This statement suggests a strong restriction on the extent to which the drafters intended second request interrogatories to incorporate vague, overbroad language and initiate fishing expeditions during the second request phase.

[23] We note that the DOJ does not require the production of documents by specification.

produce documents as the parties keep the documents in the ordinary course of business, which the Section believes is currently the practice of the DOJ.

The Section also understands from members of the private bar that the FTC's current indexing requirements of the Second Request can be extremely costly and time-consuming. A conservative estimate regarding the costs of indexing (even utilizing paralegals) is in the $850 per box range. The Section recommends, therefore, that the parties should only be required to provide the FTC with an index that shows the Bates number range for each custodian's documents in total. Alternatively, more detailed indexing might be required if the party intends to create more detailed indices for its own use. However, the agency should recognize claims of work product may exist for this information.[24]

The preparation of privilege logs is often burdensome to the parties and should not be required.

From the outset, Congress made clear that "a company would not fail to 'substantially comply' if it withheld information… that was the subject to a legitimate privilege."[25] Production of a log of documents withheld under a claim of privilege that follows the Model Second Request format is extremely burdensome and may be of dubious value to the agencies in the context of the typical Second Request.[26] It appears that staff seldom challenges or questions a privilege log during an investigation (as opposed to during litigation). Given that the staff typically does not appear to use the logs extensively, some possible alternatives include: (1) eliminating the requirement to produce a log of privileged documents, and require instead a "beefed up" certification of compliance or a separate certification that all documents withheld under a claim of privilege were done so in good faith; (2) allowing staff discretion on whether to require a privilege log on a case-by-case basis, with agency management guidelines on when a log should be required ; and (3) deferring the production of a log of privileged documents, unless and until a complaint is filed by the agency. If the agency files a complaint, the agency could require the parties to produce a log of privileged documents within 30 days.

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[24] When opposing parties have sought discovery of documents arranged by counsel in a manner that "could not help but reveal important aspects of [counsel's] understanding of the case," courts have held that the discovery of the organization structure itself (but not the documents) is barred by the work-product doctrine. *See, e.g.*, James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982); *see also* United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1288-89, 1296-1301 (D.C. Cir. 1980) (holding that a document database was not discoverable since it revealed the order in which counsel organized documents, and the opposing party could use that information to determine which documents the other party's counsel considered most important). Indeed, when extensive document discovery is involved, such as in responses to second requests, "the process of selection and distillation is often more critical than pure legal research." *Raytheon Co.*, 93 F.R.D. at 144.

[25] 122 Cong. Rec. 30,876 (daily ed. Sept. 16, 1976) (Statement of Rep. Rodino). The Section notes that although the recent D.C. Circuit decision in FTC v. GlaxoSmithKline, No. 01-5391 (July 2, 2002), involved an investigation outside of the merger context, it still provides some useful indications regarding the extent to which the parties must provide information regarding the distribution of attorney-client privileged communications and the conditions under which such privilege is waived.

[26] Section Guidelines, § V.E.f.9.

At an absolute minimum, the instructions should not require more information in a privilege log than is required under the Federal Rules of Civil Procedure.[27] The agency should consider eliminating the requirement: (1) to identify the number of pages of each privileged document withheld; (2) to identify the specification to which the privileged document is responsive; and (3) that attachments to privileged documents be separately identified and listed. In addition, if the agency believes that a privilege log is essential, it should consider extending the current exclusion for certain law firm memoranda to exclude from the privilege log: (a) documents authored by in-house lawyers and not directly or indirectly furnished to business officials or to third parties; (b) communications among outside counsel and in-house lawyers that are not directly or indirectly furnished to company business officials or third parties; and (c) communications among outside counsel, in-house lawyers and economists retained by counsel for the purpose of analyzing the transaction. After all, if the agency files a complaint, it has the right, under FRCP 26(b)(5), to demand a privilege log. So it loses very little, if anything, by refraining from seeking such a log as part of the Second Request, while at the same time eliminates the imposition of delay and costs on the merging parties in the overwhelming majority of transactions that never proceed to litigation.

The agency's objectives are best served when the parties and the agency can focus on the substantive issues raised by the transaction rather than being distracted by protracted delays due to the process. In this regard, it would be useful to the process if the agency were to adopt a policy regarding inadvertent disclosure of privileged materials that would recognize that the size and scope of production makes inadvertent disclosure more likely and seek not to punish the parties for such inadvertent disclosures of privileged materials. Such a policy would expedite the production of documents to the agencies and would limit the potential that such disclosure would result in the loss of privilege in another subsequent and unrelated litigation[28].

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[27] FRCP 26(b)(5) requires only that the withholding party "describe the nature of the documents . . . not be produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." For reasons discussed above and under the requirements of FRCP 34(b), neither the Federal Rules nor common law supports the second request requirement to list document specifications and page numbers on the privilege log; such information does nothing to help the FTC "assess the applicability of the privilege or protection." Unfortunately, however, courts interpreting the requirements of 26(b)(5) often emphasize the need to separately identify on a log and provide a basis for privilege of each attachment withheld as privileged.

[28] Such an approach to inadvertent disclosure of confidential information would also be consistent with Ethics Opinions. See ABA Formal Opinion 92-368 on "Inadvertent Disclosure of Confidential Materials," November 10, 1992, of the ABA Committee on Ethics and Professional Responsibility ("A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them."); ABA Formal Opinion 94-382 on "Unsolicited Receipt of Privileged or Confidential Materials," July 5, 1994, of the ABA Committee on Ethics and Professional Responsibility ("A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using

Certain side agreements with respect to divestitures may be privileged.

As to the FTC's request for views regarding the use of side agreements concerning future divestitures, the Section believes that the question calls for a legal judgment that is likely to be very fact specific and for which there is no case law expressly on point. We would note, however, that depending on the circumstances, such side agreements may be privileged and confidential and, if so, should not be required to be produced. For instance, a *bona fide* joint defense agreement in which counsel map out their common strategy may be privileged. Divestitures will sometimes be part of that strategy. An otherwise privileged joint defense agreement does not lose that privilege simply because possible divestitures are addressed.

Moreover, we question whether, as a matter of policy, an agency should seek to discover these agreements because they relate less to the antitrust merits and more to how the parties are allocating antitrust risk. Such information may also have bearing when the parties' legal advisors have opined that there is some antitrust risk, but such information would likely be privileged. Finally, some staff appear to take statements allocating the antitrust risk and requiring certain divestitures as party admissions that a transaction is anticompetitive and a shortcut to the staff undertaking an independent, substantive antitrust analysis of the transaction. Staff reportedly has in some transactions taken, in our view, the improper position that the terms of these agreements are the starting point for negotiations with the staff. The desire for the acquired party in a transaction to achieve a high degree of comfort regarding the certainty of consummation should not be relevant to the staff's deliberations regarding the transaction and should never be substituted for the independent investigation and judgment of the agency. Thus, the Section believes that as a general proposition the agencies should not require merging parties to produce such side agreements.

NEGOTIATING MODIFICATIONS TO THE SECOND REQUEST

The Section encourages more consistency, efficiency, transparency, and guidance from Agency management during the Second Request period.

The experience during the modification process varies widely by staff lawyer and investigative section. It would be helpful to the private bar if there were more consistency and uniformity across the divisions of the Bureau of Competition and among the staff attorneys. The Section believes that closer guidance from agency management will be required to achieve these goals. Without such objectives, the agencies and private parties gain very little from precedent. Trial attorneys who are confident and who know how to conduct focused investigations tend to agree to reasonable modifications, without compromising the integrity of their investigations. The FTC

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the materials until a definitive resolution of the proper disposition of the materials is obtained from a court."). See also Opinion No. 256 of the Legal Ethics Committee of the District of Columbia Bar (particularly Part 2 thereof), adopted May 16, 1995 (:…{W]here the receiving lawyer has not examined the misdirected material before gaining knowledge of the inadvertence of the disclosure, it is our opinion that the lawyer should, at a minimum, seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material, unread, the receiving lawyer should do so. In our view, a failure to do so would be a dishonest act, in violation of Rule 8.4 (c). A document received by a lawyer under these circumstances comes to the lawyer with 'notice' that it does not belong to him. In that sense, it is little different than a wallet found on the street: the finder knows it does not belong to him, and should he appropriate to himself the wallet's contents, the finder engages in the tort of conversion. (footnotes omitted)."

should adopt a uniform approach across investigative sections and within the sections to the extent possible. Creation of an annotated Second Request specifying the objectives and reasons for modification would be a useful resource tool for both the private bar and staff to reference and could expedite the modification process.

Moreover, the terms that the staff will modify and the criteria employed by the staff to assess which modifications of the second request are reasonable should be more transparent, perhaps through the issuance of guidance to the bar. Currently, members of the bar negotiate over the same issues with different staff members on different transactions and, for no apparent reason, receive different results. Certain modifications should be routinely granted by staff absent a specific compelling need in that particular transaction, and perhaps should be memorialized internally at the FTC to prevent the needless re-negotiation of the previously granted modifications in subsequent transactions.

One example of a specification that can be eliminated in many situations is the economists' "widget" data request, which often is not applicable in a service business where the output is not one more widget. This specification requests total cost, total variable cost, total fixed cost, total revenue and total number of units manufactured, typically by product, by geographic area and by a time unit (sometimes by month). Most companies do not keep their data in this format and it is extremely difficult, and often impossible, to provide the data as requested. Nevertheless, the private bar has noted examples in which it was difficult to get staff to modify or defer a response to this specification.

Similarly, the agencies could improve the process by developing better benchmarks regarding the limitation of the categories or level of employees whose files the parties must search for responsive documents. The need to prepare more detailed organizational charts than the companies have in the ordinary course or to engage in protracted discussions with the staff regarding the right to exclude lower level employees or employees in areas that are unlikely to be probative (e.g., lawyers, human resources, information services) imposes significant delay and costs on companies, particularly multinational public companies, without necessarily producing documents and material that are significant or relevant to the investigation. Moreover, parties currently spend excessive time and money searching the files of lower level employees because they "might" have responsive documents.

The agencies must have extensive institutional knowledge about the level of employees from which the most useful documents typically emanate. The Section believes the files of senior and midlevel management produce the most probative documents. Lower level employees without decision-making authority seldom, if ever, have unique, critical documents or information that the agency will not already receive in the documents produced in the files of their superiors. Searches should be limited to those individuals who have decision-making authority for the company and the business or product line that is the subject of the inquiry, those individuals who likely are the custodians of the most significant strategic documents, and those employees with price-setting authority and first-hand knowledge of competitors' actions. In addition, the instructions and definitions should conform to the most recent practices. Accordingly, the staff should be encouraged by the front office very quickly after the Second Request issues to agree to

modifications that include the key company decision makers and exclude lower level employees who lack decision-making authority. The number of custodians a party must search is one of the major factors in determining the volume of documents a party produces to the agency.

The speed with which the agency grants modifications is critical to the parties. The FTC's internal Rules of Practice require the staff to meet with Second Request recipients within five business days of issuance of the Second Request unless the parties agree otherwise. The staff also must respond to requests for modification of second requests within five days after the merging parties make such requests. The Section believes such firm deadlines for staff responses to requests for modifications are important. Recent transactions suggest that staff is taking longer than the specified periods to respond. The failure to meet deadlines should have consequences; otherwise, the process is meaningless.

The perception of some members of the bar is that some of the delay in granting modifications is due to the multiple levels of review. It is important that the front office be cognizant of what the staff is seeking from the parties. With this general guidance, the agency should provide the lead staff attorneys, or their designees, with greater authority to grant modifications to the Second Request. Moreover, the staff should not put parties in the position of either stipulating to points or producing documents on points that will only arise in litigation since, in the unlikely event there is litigation, the agency, if necessary, can conduct discovery on these points.

The agencies should be aware that if modifications cannot be quickly resolved, it may be less expensive and faster for counsel simply to comply than to continue negotiation of modifications. Such broad compliance is often suboptimal for both the parties and the agency. The end result is the production of an excessive volume of data and documents to the agency, which increases unnecessarily the burden and the costs on the parties and makes it more difficult for the agency to review meaningfully and expeditiously the information produced.

As potentially costly as burdensome requests are to the parties, the uncertainty regarding what must be produced can be even worse. Parties must know the scope of the search to begin collecting the information. The agency could expedite the process if in modification discussions the staff would explain the rationale for the document and data requests. Sometimes alternative data are readily available and will provide the answer faster and with less burden on the parties.

As mentioned above with respect to narrowing the second requests to only that information that is the most probative to the investigation, the FTC should consider adopting DOJ's practice of allowing the deferral of the production of certain responsive data or documents, pending the maturation of the investigation. The deferral option in Second Request modification negotiations both protects the agency and relieves the burden on the parties to produce unnecessary data and documents. It appears that the DOJ staff often ultimately determines that such deferred specifications or classes of data or documents are not necessary to their investigation.

Finally, in order to expedite the negotiation of modifications to the Second Request, the agencies should permit Second Request recipients to produce a first draft of a modification letter and provide the letter to staff in electronic form. Similarly, there is no reason why the recipient and

the staff should not be able to send drafts of a modification back and forth without any suggestion that the merging party is attempting to obtain improperly a modification in a manner inconsistent with the instructions.

The agencies should avoid conditioning modifications of the Second Request or substantive discussions on timing agreements.

The statute and regulations mandate that the parties substantially comply with the Second Request and wait certain prescribed waiting periods, which Congress recently increased, before proceeding with their transaction. The law does not require that the parties conduct rolling productions of documents and information or extend such waiting periods. Accordingly, staff demands for timing agreements that require the parties to conduct rolling productions, delay certifying substantial compliance, or extending the waiting period beyond the Congressional prescribed time periods in exchange for modifications, are inappropriate. In addition, the staff should not condition substantive discussions with parties or obtaining any modifications to the Second Request upon rolling document productions or extensions of the waiting period. Staff should be discouraged from ever linking implications of harshness or leniency in the modification process to acquiescence to a timing agreement.

Some review of the internal time schedules imposed on the staff by the FTC would seem appropriate. We understand that the FTC management currently requires the staff to forward its recommendation and, where applicable, litigation materials, 25 days before the waiting period expires. To require staff to produce its final recommendation and all litigation materials this early into the second waiting period has resulted in the staff not having time to discuss and resolve issues with the parties or looking for ways to bounce the parties' document productions. If the goal is to know what is going on earlier, there are other, less formal ways for the front office to be involved without causing the staff's efforts to be diverted from discussions with the parties. Accordingly, the Section would urge the Commission not to shorten so drastically the effective time during which the parties can engage the staff on the issues during the statutory waiting period by requiring that the staff recommendation be submitted so early during the statutory waiting period.

The requirement of translating foreign language documents is often extremely burdensome and expensive to the merger parties.

Translation of foreign language documents can be very burdensome and extremely expensive.[29] The current translation obligations can potentially cripple a transaction in terms of time and expense. Indeed, in smaller transactions or transactions involving distressed firms, the costs of such translation requirements can outweigh the expected synergies of the transaction and result in the parties abandoning the transaction or being less able to compete effectively once the transaction was permitted to proceed. As merger control proliferates, the potential costs arising from translation burdens have become a major source of concern to the business community. Moreover, some members of the bar believe that there have been instances in which the requirement to translate appeared to be used by the staff as a procedural weapon to gain concessions, such as more time.

[29] Section Guidelines, § V.D.7.h.

Nevertheless, with the increasingly global scope of competition, the agency must at times have access to certain non-English documents. The Section recommends balancing the costs against the benefits of such translation as follows. First, the staff should require translations only when plainly necessary for the investigation. Translations should only be required if there is no other reasonable way to obtain the information requested, or if foreign competition is particularly important to the issues in the case. Second, there should be a rebuttable presumption that documents below the senior corporate or product management level need not be translated, although they could still be produced. Third, the agency should allow the parties to produce summaries. Fourth, the staff should be open to alternative procedures. For example, the parties could pay for a translator to work with the agency, first providing a precis of a document, and then, if it proves of interest to staff, providing a more complete translation. Staff could identify particular individuals whose documents the parties need to translate in the first instance and the parties could agree then to translate additional documents upon request without prejudice to substantial compliance. Finally, in a transaction in which the merger party's management maintains its principal documents in English, the agency should waive or sharply curtail requiring the translation of foreign-language documents e.g., summaries of a subset of documents drawn from a limited number of foreign sources should suffice. Where the company maintains its essential documents in foreign languages and where relatively few probative English-language documents are available, a fuller foreign-language production might be appropriate. In all instances, however, staff should recognize the extraordinary cost associated with translation and should negotiate with the parties in good faith accordingly to reach a reasonable agreement. Some members of the bar reported very favorable success with staff with foreign language skills quickly reviewing documents and designating certain documents for translation, or reviewing foreign language documents with translators hired by the parties. These two solutions are examples of the type of creative thinking and flexibility on the part on the staff that management should encourage and reward.

The FTC appeal procedure for resolving disputes involving modifications to the Second Request requires greater transparency and more involvement by the Front Office.

The Section applauds the policy recently adopted by the FTC whereby staff will meet with the merging parties to explain the staff's concerns and competitive theories. Similarly, the Section supports greater transparency in the appeals process to provide guidance and precedent to staff and counsel alike about Commission modification decisions. Because the FTC keeps the existence and outcome of appeals confidential, the private bar (and presumably staff) cannot learn from the process. Without access to this information, the private bar cannot advise their clients how best to proceed based on prior FTC precedent. The FTC needs to begin creating a record of the decisions on appeal and the basis for the decisions, both to establish a body of public precedent and to prevent usurpation of authority.[30] The FTC should also make clear, as a matter of procedure, whether this administrative appeal process is a formal process for purposes of determining, in a court challenge, if the parties exhausted administrative remedies.

[30] *See, e.g.*, Ehrlich & Posner, "An Economic Analysis of Legal Rulemaking," 3 J. Legal Stud. 257 (1974).

Parties report being reluctant to use the appeal process because of the delay involved and because of concern that doing so will adversely affect relations with staff. The delay associated with modification disputes and the appeals process, the risk (real or perceived) of staff retribution for utilizing the process and the question of the independence and fairness of the appeals process make its use less attractive than possible. Parties usually are concerned about "picking their battles" and Second Request appeals go to burden rather than the merits, so it is usually a lower priority "battle" than those on the merits. Routine and active involvement by the front office/General Counsel's office during the negotiation of the request may be a more effective way to avoid disputes in the first place. Involvement by the Front Office in the Second Request negotiations as a matter of course may reduce the need for appeals, and therefore lower the need to appeal and the associated stigma of doing so. Front Office involvement as a matter of course will result in better decisions and more uniformity within and across shops. It is also important that the arbiter of the appeals process have experience both from the private practice and agency perspective in handling Second Requests.

SPECIAL ISSUES CONCERNING ELECTRONIC RECORDS AND ACCOUNTING OR FINANCIAL DATA

The agencies should reduce the requirements relating to email production.

In today's working environment, the review and production of e-mail are the primary source of delay and expense in responding to a Second Request. It is important to find a balance between providing the agency with the information it needs to conduct an investigation and not overwhelming the parties to a transaction with the costs associated with reviewing and producing enormous amounts of e-mail. Currently, it appears that the system is out of balance. Staff requests that the parties review and produce e-mails for the entire or most of the search group can easily result in the volume of the documents produced increasing exponentially. In large part, the agency can address this issue by reducing the number of custodians whose files must be searched through effective Second Request limitations or the time period for which these documents are responsive. While e-mail is undoubtedly an important source of information, it would be interesting to know at what level in a corporation the agencies are finding new, unique, probative information from e-mail. The Section believes this information is most likely limited to the e-mail of a select, senior group of managers. The Section suggests the agencies consider adopting the following principles and recommendations.

The goal of the agencies in this area should be to receive unique, probative e-mail from decision-makers, not to capture the entire universe of e-mail that addresses, discusses, or refers to a relevant product or market. Unlike in a conspiracy investigation, it is unlikely in a merger investigation that a single e-mail or a single e-mail string will be outcome determinative. The agencies should, therefore, require at most only the production of e-mail of limited essential employees.[31] This may be a subset of the custodians identified in the Second Request. As the agencies are aware, parties can deploy technology to conduct term searches and de-duplicating in order to reduce the burden on the parties, and the parties should be permitted to use such technologies wherever possible. Moreover, the agencies should defer production of e-mail from

[31] *See, e.g.*, Section Guidelines, § V.D.7.g.

back-up tapes. Parties should be required to maintain back-up tapes as of the day the Second Request issues for the pendency of the investigation. Although the Section appreciates the staff's concern that companies are allowing employees to retain email for a shorter period, companies are not limiting e-mail retention as a device for avoidance of production. Rather, such document retention policies are undertaken as part of a company's overall computer/IT/records management system to address the growing expenses incurred in retention of documents and e-mail. The back-up tapes are not the equivalent of off-site storage, but rather a means by which to restore an e-mail system in case of a catastrophe. Parties are not as able to retrieve, search, or produce as easily from such back-up tapes as from the company's actual computer network. In addition, it is often disruptive or requires the acquisition or leasing of additional equipment for a company to restore and search its back-up tapes.[32] Accordingly, the Section suggests that the Staff should be required to make some meaningful showing of need before companies are required to go through the time-consuming and expensive process of restoring and searching back-up tapes. See Section 4.2 below.

In addition, absent extraordinary circumstances (such as suspected document destruction), the agencies should not require parties to produce e-mail from legacy computer systems no longer used by the parties. It is typically more time-consuming, more expensive, and more error-prone to produce e-mail electronically than in hard-copy documents. Parties should be permitted the option to produce e-mail electronically or in hard copy. Requiring parties to provide all spreadsheets, e-mail attachments and databases that are available electronically in electronic form is burdensome because it may require a different production process than for hard copy documents. Electronic review slows the process, can result in less accurate reviews, and makes inadvertent production of privileged materials more likely. A less burdensome alternative approach would be initially to produce all electronic documents in hard copy. The staff could then identify any files it requires in electronic form, and the parties would commit to provide such documents within a relatively short time. Similarly, native formats should not be required for all attachments if the parties agree to provide native formats for designated attachments expeditiously on request.[33] Such production should not affect compliance timing.

The agencies should reduce the burden and costs on the merging parties of identifying the relevant back-up or storage information and for collecting and transmitting it to the reviewing agency for its analysis.

As discussed *supra* at Section 4.1, the process involved in searching back-up tapes and accessing archived e-mail and data is extremely costly, time-consuming and difficult.[34] Back-up tapes take snapshots of the information maintained on a company's servers. Unless the company erases such information from its servers, the company often also maintains the information on its

[32] Indeed, in a litigation context, a number of courts have refused, under the Federal Rules of Civil Procedure, to permit discovery of back-up electronic data. *See, e.g., In re* General Instrument Corporate Securities Litig., 1999 WL 1072507 (N.D.Ill. Nov. 18, 1999)(finding electronic back-up tapes to be discoverable, but noting that the cost to produce such documents outweighed their probative value in the matter).

[33] *See* Michael Byowitz, William Rooney, "Second Requests: Suggestions for Reform", 13 Antitrust 43, 44 (Summer 1999).

[34] Section Guidelines, § V.D.7.g.1.

server. Most companies design their e-mail back-up systems for use only in case of disaster recovery, with the tapes being maintained remotely. Consequently, the main considerations in designing a back-up system are ease of backing-up and compressing e-mail, not enhancing recovery or search procedures. It is extremely expensive for a company to retrieve such information, it takes a considerable amount of time, and the company must restore an entire tape to produce, for example, a single e-mail from the tape. The rationale for searching back-up tapes should be to produce unique, probative information that is not otherwise available to the agency. Absent compelling circumstances, the agencies should eliminate or defer requiring the parties to search and produce e-mail and data from back-up tapes.

The private bar reports instances in which they have spent disproportionate amounts of time researching a client's e-mail back-up system and explaining the system to the agencies in letters, phone calls and meetings to attempt to get a modification to exclude back-up tapes from the search. Sometime the staff then grants the modification; other times the staff will deny the modification, without any apparent difference in circumstances. It also appears that the staff may sometimes use this requirement as a means to gain more time to conduct its investigation.

Accordingly, the Section suggests the following approach. Parties should not be required to search back-up tapes unless the agencies believe that the company destroyed critical information that is not otherwise available. Instead, parties should preserve a copy of all back-up electronic files (whether stored on computer tapes or other media) that may contain documents responsive to a Second Request, pending completion of the investigation, and should agree to search or produce the back-up tapes if it subsequently appears that critical information may only be available on the tapes; provided, however, that any such subsequent requests for searching such tapes should not affect the ability of the parties to certify substantial compliance.

The agencies and the merging parties' information-technology personnel, such as network administrators, should discuss production of necessary information on the least burdensome terms.

As indicated in the Section Guidelines, the process works best when both sides cooperate and engage in a dialogue on all the issues, including the best way to obtain information that is important to the investigation.[35] Accordingly, discussions between agency staff and merger parties' IT personnel can be useful to determine the costs and benefits of producing certain documents and data and to discuss less burdensome alternatives. It is important to understand that even though company IT personnel may respond "can do" to a data request, gathering such data can be very expensive, time-consuming and fraught with unforeseen problems. In addition, it is often time-consuming to engage in protracted discussions to determine the types of documents that exist in electronic form. There should be a balancing of need versus expense and hardship and a determination of whether the parties can provide enough information without necessarily getting an exhaustive indication of all types of data that are available. The pertinent question, therefore, should not simply be whether it is possible to extract somehow the information, but also the relevance and probity of the data. The process works best when the staff is pragmatic and realistic about what data they really need, and does not insist on data

[35] Section Guidelines, § IV.A.1-10.

simply because the information is capable of being physically retrieved, even if unduly time consuming and expensive.

Moreover, with more transparency on the part of the agency regarding what information regarding the systems and data is useful in ascertaining burden, as well as what alternatives might be acceptable, these discussions could be streamlined and conducted more efficiently. Counsel should always be invited to participate in all communications between IT groups for the agency and the parties.

The agencies should focus and streamline the requirements for collecting and transmittingaccounting data for economic analysis to lower the burden and costs on the merging parties.

Producing accounting or financial data for economic analysis appears to be another burdensome and expensive component of complying with a Second Request, after the production of e-mail. Moreover, the data requested is often of dubious value. There should be an explicit requirement that the data requested be meaningful before the parties are required to produce it. The Section recommends that before including data specifications in a Second Request, the staff should have a very clear objective in mind. The economic model that staff is contemplating should be specified clearly, and the staff should draft the data request to contribute to that specific analysis. More transparency with the bar, perhaps through an annotated Model Second Request, would help the bar understand the need for such requests and, where appropriate, to indicate to the staff why in a particular matter such information will not be probative or different data would be preferable. In addition, such data requests should be limited to information the parties maintain in the ordinary course of business or that the parties have developed specifically for the merger analysis or investigation, subject to any appropriately asserted work product claims.

While not strictly accounting or financial data, scanner data is often available in transactions involving food or beverage industries. Often, the assumptions necessary to use and analyze the data are outcome determinative. Econometric analysis of this data is also extremely expensive and should not be required. Moreover, just because the scanner data exist does not mean the agency should insist upon their production; data needs to be meaningful. In some investigations, it may make sense to defer the production of the more expensive and difficult to produce data until the geographic and product issues have been limited and refined. Moreover, the agency should not require the parties to produce data that they do not maintain in the normal course of business. The FTC's data requests, particularly in the petroleum and food industry, are at times beyond the ability of even the largest companies to produce internally. The Section suggests that the management of the Bureaus of Economics and Competition reevaluate the need to include these requests given the burden they impose on the parties.

It is appropriate to require the production of data in an electronic format if the party typically maintains it in that format. However, parties should not be required to put data in an electronic format if the company does not normally maintain it in that format. Moreover, the agency should not require parties to manipulate data (or pay a third party to manipulate it) to put it into a specific format desired by the staff. Nor should the parties be required to provide data that they

must pay a third party to obtain or generate.[36] These requirements are particularly burdensome and expensive for the parties.

The Section encourages communications between the agency's staff and the merging parties' personnel knowledgeable about financial or accounting systems, such as controllers.

As with the discussion among IT experts, such communications may be appropriate, and productive, if conducted in good faith and with the goal of deciding what material information the parties can realistically produce. It should be up to the Second Request recipient to determine when and how to make such personnel available. Moreover, counsel should be present at all such discussions.

OTHER INFORMATION OR DATA-GATHERING METHODS

1.1. **The agencies should communicate with third parties, such as customers, through counsel and provide transaction parties with information regarding third-party discovery results as early in the process as possible to permit full engagement on the issues.**

The staff should initiate its communications with third-parties only through counsel, wherever possible.[37] The private bar reports that business executives in some industries have received calls from staff directly as customers in multiple investigations. Some in-house lawyers indicated that, despite their request to the FTC staff that the entire section that deals with that industry be notified that they are the contact point for that company, such information has either not been disseminated or not honored.

It is important for the agencies to be aware of the limitations of the affidavits staff obtains from third parties if counsel for the merging parties are not allowed access to them. Such affidavits (or the witnesses themselves) will become known to counsel if litigation is brought and the statements made in these affidavits simply may not withstand the rigors of litigation and cross examination or rebuttal evidence. It is in the interests of both the parties and the agencies to have a clear understanding of the merits of the arguments. Accordingly, if HSR Act or other laws prevent the staff from sharing the actual affidavits with counsel for the merging parties, the staff should be encouraged at a minimum to provide the merging parties with a comprehensive indication of what witnesses are stating and the types of witnesses involved. Such a dialogue should occur early enough in the process (and updated as appropriate) to permit the merging parties a reasonable opportunity to rebut the points raised by third-party statements.

Parties should have access to transcripts of hearings or depositions conducted during the merger investigation.

Consistency in practices between the agencies is useful. The Section understands that the DOJ currently provides parties' counsel with copies of hearing/deposition transcripts as soon as they are available and recommends that the FTC adopt the same policy.[38] As in civil litigation, [39] the agencies should provide the deponent the opportunity to review, correct and sign the transcript. The current FTC policy of denying parties access to transcripts is inefficient and increases

[36] *Accord* Alexander v. Federal Bureau of Investigation, 188 F.R.D. 111, 116-17 (D.D.C. 1998).

[37] *See, e.g.*, Section Guidelines, § IV.E.

[38] Section Guidelines, § V.F.1.

[39] *See* Fed. R. Civ. P. 30(e).

transaction costs, requiring the parties to generate their "own" transcript. Availability of transcripts could ensure accurate, cited references to testimony, thereby reducing transaction costs, preventing some misunderstandings between the parties and staff, and facilitating the review of recommendations by the front office and Commissioners. Moreover, the Commission's Rules would seem to require production in all but the most unusual circumstances.[40] FTC Rules of Practice § 2.9(a) (captioned "rights of witnesses in investigations") provides, in relevant part, "[a]ny person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony." Current policy appears to deviate from that rule.

THE PACKAGE OF ASSETS TO BE DIVESTED

The agencies can, and do, adequately assess the viability of the divestiture as a remedy for potential competitive harm created by an acquisition through its investigation of the industry and industry knowledge

The Section believes that the agencies have been very able and successful in negotiating divestiture packages that ensure that the transaction does not harm competition in the relevant markets. The agencies' success has been as a result of the knowledge and foresight the staff has gained through the course of its investigations of the conduct and structure of the industries affected by the transaction and their focus on the operations of the merging parties that are responsible for the relevant product or service. For industries in which the agencies' experience is dated or limited, outside consultants, customers, suppliers, and other third-parties are typically interviewed during the investigation, and part of the appropriate fact gathering includes information relating to the elements and requirements for competing in the relevant markets. Thus, by the time the staff begins evaluating the undertakings of the merging parties, it typically has a good foundation for discerning the requisite remedy components to ensure the maintenance of the competitive *status quo ante*.[41]

The economy does not operate without risk, however, and the agencies cannot expect to guarantee continued success and competition in the affected relevant markets. Factors entirely exogenous to the underlying transaction and the divestiture can adversely affect the ongoing viability and competitiveness of the divestiture buyer and the divested business. The agencies have every reason to be proud of their success record, which as reflected in the FTC's own divestiture study, showed a success rate to divestitures that was significantly higher than in the economy as a whole.

The agencies should view up-front buyers as a tool that merger parties can use where necessary to minimize risk.

The up-front buyer requirement imposes upon the merging parties the obligation to find an acceptable buyer for the package of assets they propose to divest and to execute an acceptable agreement with the buyer before the Commission accepts the proposed consent order for public

[40] *See* Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 2.8(c), 2.9(a), & 2.16(c) (2002).

[41] *See* FTC Bureau of Competition "Frequently Asked Questions About Merger Consent Provisions," ("FTC FAQ"), Q18, available at http://www.ftc.gov.

comment.[42] The up-front buyer requirement can significantly delay the consummation of the main transaction and thereby potentially cost the merging parties, and consumers, substantial lost synergies. Given the costs, the Section believes the agencies should require an up-front buyer as infrequently as possible. Up-front buyers should be required only in those instances in which the staff has serious concerns that there is an acceptable purchaser that can compete effectively with the proffered divestiture package. Up-front buyers should typically not be required when: (i) the assets to be divested have been previously operated as a stand-alone business or the asset package is clearly sufficient to maintain competition; and (ii) there is likely to be an acceptable buyer.

In addition to the potential for delay, the buyer up front requirement provides the divestiture asset buyer with tremendous leverage and the potential to use the merger review process to extract concessions beyond those necessary to restore competition. These problems are exacerbated in those situations in which preexisting rights of first refusal or other contractual provisions result in there being only one potential buyer of the assets to be divested. The agencies should recognize this potential for strategic behavior on the part of buyers and consider that possibility in its assessment of buyer demands. The staff should reach an independent conclusion as to what is required to restore competition effectively instead of permitting the buyer to misuse the process. The Section applauds the FTC staff's recent recognition that up-front buyers are not a requirement or presumption at the agency[43] and hopes that the agency will view the existence of an up-front buyer as a helpful but not necessary factor when evaluating divestiture packages in which there is some question regarding adequacy.

The Section suggests that the following four-step approach, initially developed at a Symposium at George Washington University Law School and published in its law review,[44] may be useful in determining when it is appropriate to seek a buyer up-front.

Step one: It is important to establish the baseline presumptions. The Section suggests that the agency begin with the presumption that "[d]ivestiture of an entire business will usually resolve" the government's concerns with respect to horizontal mergers. At this stage we would treat the "entire business" as the smallest operating unit of a corporation (whether a subsidiary or a division) that contains the manufacturing, sales and marketing, research and development, and general management functions pertinent to the area of competitive overlap, without need for support (e.g., in the form of supply of raw materials) from other units of the same parent.

Step two: The agency should determine whether the package comports with the elements of the baseline presumptions. If they do, then the merging firms should be presumptively entitled to a consent settlement providing for post-closing divestiture within a reasonable time. The scope

[42] FTC FAQ, Q7.

[43] FTC FAQ, Q8.

[44] *See* Symposium—Solving Competition Problems in Merger Control, 69 Geo. Wash. L.Rev. _ (forthcoming October/December 2001).

and freestanding nature of the business to be divested support an inference that the business will be no less viable in the hands of an acquirer than it was in the hands of the prior owner. The staff might still reasonably require a hold-separate agreement providing that the business to be divested be managed independently of the competing business to be retained during the period between consummation of the suspect transaction and divestiture. To justify more onerous relief, however, the staff should need to carry the burden of establishing that the viability or adequacy of the divestiture is in doubt. If the baseline presumptions are not satisfied, either because the competitive overlap is substantially narrower than an entire operating unit or because the parent, like most modern integrated corporations, has intracorporate transfers in which the operating unit is a buyer or seller, the merging firms will need to establish the adequacy of the divestiture in terms of scope (Step 3) and independence (Step 4).

Step three: The agency should determine the adequacy of the divestiture to sustain a viable competitor. As to the scope of the divestiture, it is important to note that partial divestitures and sales are commonplace in both private commercial transactions as well as consents. The staff is entitled to reasonable assurance, however, that the divestiture will be adequate to assure competition. Adequacy will typically depend on the particular circumstances of the acquirer of the divested assets – for example, what assets it holds beforehand and how the acquirer will integrate the divested assets with those previously held assets. The parties can provide reasonable assurance of adequacy through three alternative methods.

First, the parties can assure the package's adequacy through the identification of an acceptable up-front buyer. If the parties specifically identify the acquirer of the divested assets, staff is in a position to make the requisite assessment.

Second, the agencies can obtain a high level of assurance even without identification of a specific acquirer, so long as the staff knows that multiple interested acquirers are participating in an auction process. Staff needs to conduct sufficient diligence to obtain comfort that the auction will yield an acquirer and that potential acquirers can suitably integrate the divestiture package with their existing assets. Where those conditions are satisfied, the consent settlement should allow for post-closing divestiture subject to agency approval of the particulars.

Alternatively, a crown jewel provision could be included if requested by the parties to shift the risk of a failed divestiture process to the merged firm. The consent settlement should allow for post-closing divestiture of limited scope. If the respondent is unable to consummate a timely divestiture transaction with an adequate acquirer, the agency can broaden the divestiture package to include the crown jewel assets if requested by the merger parties.

Step four: Determine the likelihood of independence of the divested business. Ongoing relationships between the merged firm and the acquirer of the divested assets warrant review, but not an adverse presumption. Ongoing relationships "can be problematic," but "often . . . are successful" and sometimes "will be required." Bridging agreements, site services agreements, raw material supply agreements, and offtake agreements are frequently found in routine commercial divestitures involving no regulatory mandates. They generally enhance efficiency. The staff should seek assurance that "entanglements and encumbrances," when ancillary to a

remedial divestiture, will not subvert the divestiture's objectives. To the extent, however, that the ongoing relationship involves agreements of a type and form that are commonplace, their existence in a consent settlement context should not be disqualifying (and perhaps not even discomforting). Paradoxically, the context may tend to reduce the significance of the agreements' particular commercial terms since the terms will affect the anticipated profitability of the divestiture package as a whole and presumably will be fully discounted by the acquirer when negotiating the price of the divested assets.

The Section recognizes that a divestiture of less than an ongoing stand-alone business may raise concerns if the package, in the hands of the divestiture buyer, does not permit that buyer to compete effectively in the relevant market affected by the transaction.

As stated above, the principal objective to be served by any divestiture is that the divestiture buyer, either as a result of the divestiture package alone or in combination with the assets it already owns, has the ability to compete as effectively as the divesting party in the relevant market affected by the merger. The success of the package in achieving this objective must be evaluated on a case-by-case basis rather than with the imposition of any blanket rules or presumptions against partial divestitures that are limited to the specific product lines and related assets at issue.

The Section recognizes that there may be limited situations in which assets beyond those specifically used in the relevant market need to be divested in order to assure creation of a competitor that has all needed resources to compete effectively.

As mentioned in the prior paragraph, the Section believes that the agency should limit the divestiture package to only those assets that are needed by the divestiture buyer to compete as effectively as the merging party in the affected relevant market. The Section recognizes that in some instances the asset package will need to include more than just the assets used solely in connection with the relevant product or service market. It is important, however, that the agencies not just enrich asset packages on the grounds that such assets would be "useful" to the divestiture buyer, but rather focus on what is "necessary" for the divestiture buyer to compete as effectively in the provision of the affected relevant product or service. Moreover, to the extent that the parties identify an up-front buyer, it is important that the agency not become an agent of the divestiture buyer in "gaming" the process to extract additional assets from the merging parties that are not necessary to compete. See discussion in Section 6.2 above. It should be undesirable from a public policy standpoint to take unrelated assets from the seller, which may have the unintended effect of weakening the seller in other areas or eliminating certain synergies that would ultimately inure to the benefit of consumers. Indeed, requiring the divestiture of additional assets or "clean sweeps" of one of the merging parties' presence in the affected market can eliminate some synergies from the transaction without necessarily making the divestiture buyer a more competitive entity. Accordingly, the agency should be careful not to over-enrich divestiture packages in an attempt to guarantee the success of the divestiture at the risk of losing synergies or harming to the merging parties' ability to compete post-merger.

The "manner" of a proposed divestiture

The Section recommends that the agencies be flexible as to the inclusion of a wide range of commercial provisions in the purchase agreement so long as the arrangement provides appropriate safeguards to preserve competition.

The FTC currently makes certain that the purchase agreement includes the typical commercial terms that ensure a prompt divestiture of all of the assets required to be divested and, in the case of an up-front buyer with divestiture occurring prior to the consent becoming final, provides for the "unwind" of the sale if the FTC subsequently rejects the consent. As to the particular terms

that may be appropriate in a specific transaction to ensure that the divestiture buyer obtains the components of the business that it needs to compete effectively, the Section believes that substantial deference should be given to the judgment of the buyer in the divestiture transaction, particularly where it is a significant company that is already a participant in the market or a closely related market and there has been a good faith arms-length negotiation. However, the agency needs to be aware that a buyer may attempt to use the agency and the divestiture process as a cudgel to acquire assets or concessions from the seller that are not necessary from a competitive standpoint. The staff should discourage such attempts to misuse the process by ensuring that the parties have engaged in good faith negotiations regarding the package and testing the completeness of the package from a competition standpoint in a manner that does not permit the buyer to make self-serving attempts to enrich its package.

The FTC should not be opposed to the divestiture buyer and the seller entering into supply arrangements and licensing arrangements, when the appropriate safeguards exist to ensure that these arrangements will not be used anticompetitively (i.e., to raise rivals costs, manipulate the price paid, facilitate collusion, etc.). Such arrangements can ensure that the seller maintains the efficiencies and scale economies of production, while at the same time ensuring that the divestiture buyer shares in those efficiencies and obtains the necessary inputs for competing in the affected relevant market. The agencies should be particularly receptive to such arrangements when comparable arrangements exist in the ordinary course in the industry and the arrangement uses commercial terms typically found in such ordinary course transactions.

The agencies should avoid requiring that a divestiture result in a "zero delta" in concentration. First, there is no empirical evidence that a minor increase in concentration has any competitive effects. Second, it is unclear why the agencies should prevent a party from divesting an asset to another party when it is unlikely that the agency would challenge, *ab initio*, such a transaction. Third, there is a very real tension between the agency wanting a buyer that is likely to succeed with the divested assets and a zero delta. A zero delta requires the buyer to be outside of the relevant market. However, some members of the bar report that the staff sometimes rejects financial buyers as not having the relevant experience or assets to succeed in the marketplace. The rejection of financial buyers and insistence on a zero delta limits the pool of potential buyers and depresses the sales price of the assets. The Section is pleased to note the recent staff indication that the Commission does not insist that merging parties divest sufficient assets to result in a zero concentration change. Rather, the Section agrees that the appropriate focus of the inquiry should be whether the proposed divestiture is sufficient to maintain or restore competition in the relevant market.[45]

The agencies should permit certain financing arrangements so long as the arrangement contains appropriate safeguards to address possible entanglement between the divesting party and the buyer.

The Section understands that the agencies are currently opposed to permitting any form of financial involvement between a divesting party and the divestiture buyer. The Section submits that an agency's existing bright-line rule against such financing arrangements is too rigid. Not all financing arrangements are structured such as to change the incentives of the parties in

[45] FTC FAQ, Q17.

competing against one another post-divestiture. As with supply, technical support, and licensing arrangements, the Section suggests that the agency focus on the substance to determine whether the arrangement alters the companies' financial incentives in a way that will likely reduce the vigor with which they compete. Absent such potential adverse effects (which can be determined by looking at the financing terms), the agency should not oppose buyer financing so long as the divestiture buyer and the package are otherwise acceptable to the agency.

1.2. Continuing obligations, such as supply agreements and technical assistance agreements should be required when they ensure that the divestiture buyer has the necessary inputs to compete effectively post-divestiture in the affected market.

Supply agreements can be an effective substitute or augmentation to divestiture. Supply agreements can substitute for the divestiture of manufacturing assets or they can bridge a gap between the acquisition of production assets and their actual commencement of operation under new ownership. As mentioned above, supply agreements can permit the merging parties to realize synergies and scale economies. They are particularly useful where the divested business' needs are a small fraction of a supplied product or where multiple businesses use the input. Indeed, bridging agreements, site services agreements, raw material supply agreements, and offtake agreements are frequently among the ancillary agreements found in routine commercial divestitures involving no regulatory mandates.

Similarly, intellectual property and know-how licenses, which are often part of an ordinary course divestiture of part of a company, should be required when multiple businesses are using the technology and the divestiture buyer needs access to the technology. The sharing of such intellectual property can be procompetitive and should be encouraged.

Technical assistance agreements can assure that the buyer does not have difficulties in producing the relevant product or service post-divestiture and are particularly useful in chemical and heavy industrial industries as well as high-technology industries, in which general processing knowledge may not be sufficient to ensure that there is a smooth ownership transition. An alternative to such arrangements would be, in the right circumstance, the hiring or secondment of appropriate personnel for some period.

As also mentioned above, in all ancillary arrangements the staff should seek assurances that "entanglements and encumbrances" will not subvert the divestiture's objectives by including the appropriate information exchange safeguards. To the extent that such arrangements exist among firms in the industry in the ordinary course of business, the staff should have even greater assurance as to the feasibility of such arrangements and, wherever possible, endeavor to adopt the terms and conditions that are commonly found in such commercially negotiated agreements.

The Section recognizes that issues can arise in divestitures that do not include all required assets or that are less than "absolute."

As discussed above, there are important societal goals realized by the agency tailoring a divestiture package such that only those assets needed to compete are transferred to the divestiture purchasers. Supply arrangements and licensing arrangements can be an effective way of ensuring that the divestiture buyer has the inputs it needs to compete while at the same time providing the merging parties with the opportunity to achieve manufacturing synergies and scale economies. Indeed, in some industries, as a matter of ordinary course, companies outsource the

manufacturing of their product (e.g., fabless high-technology companies) or contract with integrated competitors for an essential input for their product. The Section recognizes, however, that the substitution of a supply arrangement for the manufacturing facility producing the relevant product (or even an important input) can raise serious issues if the divestiture buyer is subsequently not able to obtain product on a timely and adequate basis and is thereby not perceived as a reliable supplier in the marketplace. To safeguard the divestiture buyer against such deficiencies in supply, the agency could require the merging party to maintain for the benefit of the divestiture buyer an adequate inventory of the supplied product to protect against shortfalls. In addition, the agency can appoint a monitor to ensure that the merging party is comporting with its contractual commitments and to scrutinize the conduct of the merging party to ensure that it is not misusing the supply arrangement to achieve an unfair competitive advantage.

Similarly, there have been certain divestitures to buyers who already had manufacturing facilities that were currently producing similar products and were capable of producing the relevant product if the divestiture buyer obtained the requisite intellectual property and know-how. Such limited divestitures can be even more effective to the extent they permit the divestiture buyers to achieve scale economies and synergies from their existing manufacturing facility. Issues can again arise, however, if the divestiture buyer is unable to transition smoothly into the manufacturing of the product. To some extent, the agency can protect against the potential difficulties in manufacturing start-up by providing for a buildup of inventory or a provisional transition supply agreement. In addition, the agency might again consider appointing a monitor to ensure that in the event the divestiture buyer is unable promptly to begin successful commercial production of the product, the monitor trustee can obtain such technical support and access to the merging party's technical personnel as might be needed to assist the divestiture buyer in being able to manufacture the product successfully.

When reviewing a proposed buyer, the Section recommends the agency assess whether the buyer is reasonably likely to maintain the competitive *status quo ex ante.*

The agency's approval of an acceptable buyer is a critical component to ensuring the success of the divestiture. Taking into account the buyer's pre-divestiture set of skills and other assets, the agency should assess whether the buyer is reasonably likely to operate the divested assets in a manner that will yield a level of competition in the marketplace that is not substantially less than the *status quo ex ante.* It is not unreasonable to require a business plan, particularly if the buyer has no experience in the industry or a closely related industry. The Section believes that the process could be improved by a more active dialogue earlier in the consent deliberations between staff and Commissioners regarding which buyers would be acceptable so as to minimize the potential that staff reject a possible buyer that the Commission might find acceptable.

The types of buyers that are likely to be successful are highly dependent on the particular transaction.

The agencies should not presumptively favor or disfavor particular types of buyers in the abstract, but rather should consider the range of preferred buyers given the particular facts of each matter. Each party should have the opportunity, within the time available, to make its case. Ultimately, the seller must choose which buyer it believes is likely to be approved in an

acceptable timeframe. We believe that, in practice, the interests of the seller and the agency create an effective set of incentives for the correct choice of a buyer.

THE "BUYER UP FRONT"

The Section suggests the agencies typically not require that the divesting party negotiate a firm divestiture contract with an identified buyer before the agency will accept a settlement.

As discussed, *supra*, Section 6.2, an agency should impose an up-front buyer requirement only in those instances in which it seriously questions the ability of the parties to find a suitable buyer. To impose weeks or months of delay on the parties to negotiate a divestiture contract can result in significant lost synergies. Moreover, this requirement gives putative buyers (and sometimes other third parties) inordinate negotiating leverage. Requiring a buyer up-front can cause odd and unintended distortions in the marketplace to which the agency should be sensitive. For example, in supermarket or retail transactions, the owner of a strip mall may not allow the assignment of the lease except for a substantial payment. This is more likely to occur when a buyer is required up-front and the owner is in a position to hold an entire transaction "hostage" until the ransom is paid. As discussed above, a crown jewel provision is a possible alternative if the parties request such provisions.

THE USE OF "FIX-IT-FIRST"

The Section recommends that the agencies encourage use of a "fix-it-first"[46] approach so long as the parties will not be able to renege on their commitments.

Consistency between the FTC and DOJ in remedies would also be useful. The DOJ often enters into "fix-it-first" transactions. The Section understands that approximately 25% of transactions in which the agency has concerns are resolved by "fix-it-first." The Section is unaware of any problems arising in those situations in which an agency accepted a "fix-it-first" undertaking instead of consent. Rather, it is the Section's understanding that the acceptance of a "fix-it-first" has been an effective and expedited means by which to resolve the issues raised by the Antitrust Division in the course of the investigation.

The fix-it-first approach can allow for rapid resolution of the antitrust issues. The agencies should particularly favor a "fix-it-first" in circumstances where a "clean" fix is readily identifiable and deliverable (e.g., in retail store acquisitions). Both agencies should encourage fix-it-firsts, since they avoid the administrative and transactional costs associated with consent orders. Orders can introduce rigidity to the parties' relationships, particularly where circumstances vary in a manner that warrants modification in the divestiture details. This is particularly the case for divestitures that include executory provisions, such as licensing, technology support, or supply of products or other inputs. The FTC typically incorporates these provisions into its orders by reference, such that modifications require negotiations with the staff and sometimes approval by the Commission. That takes time and introduces an additional layer of transaction cost. Accordingly, the Section believes that "fix-it-first" transactions have

[46] A "fix-it-first" for purposes of this letter is when the merging parties are able to resolve the competitive issues without resort to a consent agreement.

substantial benefits from both a public policy perspective and from the perspective of reducing transaction costs and encourages the FTC to consider such relief in the appropriate matters.[47]

the use of crown jewel provisions

The agencies should use crown jewels sparingly in those transactions in which the agency has substantial questions regarding the viability of the divestiture package and in which the parties have requested use of the crown jewel provisions.

The FTC staff has indicated:

> A "crown jewel" provision requires divestiture of a different package of assets from what a respondent was originally required to divest, and is typically to be divested by a trustee appointed by the Commission if the respondent fails to divest the original asset package on time or does so in a manner or condition that does not comply with the order…[48]

Crown jewel provisions can be a useful tool for the parties to offer when their divestiture package raises a significant risk that there will not be an acceptable purchaser proffered within the specified time period or when the acceptability of the proffered divestiture package is highly dependent on finding a specific type of purchaser (e.g., a buyer already with a powerful brand, manufacturing capability, or sales force). Crown jewel provisions can play two roles: (1) to give appropriate incentives to the parties to find an acceptable buyer within the prescribed period; and (2) to provide the agency with a guarantee of a successful divestiture package. But, the agencies should impose crown jewel provisions sparingly. The mere presence of a crown jewel provision in a consent can have an adverse effect, at least at the margin, by providing divestiture buyers with unfair leverage in negotiations with the merging parties and allowing the divestiture buyer to "game" the process, to the detriment of the merging parties, and consumers, to the extent that it results in the merging parties foregoing lost synergies in order to avoid the triggering of the crown jewel provision. Nor, as the staff recognizes, should the crown jewel provision be "included as a penalty clause or as punishment for failure to comply with the order."[49] More appropriate and expressly defined relief exists for noncompliance.

Crown jewel provisions can also create uncertainty that adversely affects ongoing or potential customer or supplier relationships as well as employee retention.

As mentioned in the preceding section, the Section believes that the agencies should use crown jewel provisions sparingly. The Section suggests that crown jewel provisions may be appropriate in only limited circumstances where the agency has substantial doubts about the parties' ability to accomplish a timely divestiture to an acceptable buyer and if the parties request such provisions. Otherwise, such provisions can seriously interfere with a competitive marketplace by creating uncertainty for customers, suppliers, and employees of the affected business. The Section believes that, in almost all circumstances, the divesting party has more

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[47] *See, e.g.,* Section Guidelines § p.3 n.7.

[48] FTC FAQ, Q24.

[49] FTC FAQ, Q24.

than enough incentive to accomplish the divestiture in a timely manner without the imposition of a crown jewel provision.

THIRD-PARTY RIGHTS

The agencies should avoid becoming entangled in resolving third-party rights under existing contracts.

In many industries, it is commonplace for competitors and vertically aligned firms to engage in a variety of joint ventures and joint development arrangements to share the risks that new product offerings raise. At times, these minority ownership and development arrangements become indirectly problematic due to a transaction between two parties that are involved in different, but competing, arrangements. The Section understands that in recent history in at least some transactions, these third-party arrangements have resulted in considerable delay in the ultimate resolution of the transaction, resulting in substantial delay and unrecouped lost synergies. Accordingly, the Section urges the Commission to avoid dealing with third-party rights wherever possible to minimize the likelihood that third-parties will used the merger process as leverage to extract inappropriate concessions. Rather, the agencies should allow the merging parties to deal with the third parties, and, wherever possible, to decouple approval of the provisional consent with the resolution of the third-party rights. In the interim until such third-party rights can be renegotiated to resolve the competitive issues, trust arrangements or information firewalls and restrictions on voting rights, with a monitor trustee supervising the conduct, should be adequate to ensure that no anticompetitive effects arise as a result of the continuing involvement with the third-party.

THE RISKS TO COMPETITION AND TO THE PARTIES

The agencies can avoid damage to the divestiture package in those instances in which the assets are susceptible to waste during the period before divestiture by using monitor trustees.

The Section believes that in the vast majority of consents there is little or no risk that the value of the assets will be diminished, due to: (1) the nature of the business; and (2), the terms of the consent decree, including the relatively short periods provided for divestiture. Nevertheless, there are certain measures that the agency could use in a particular situation if it believes that the assets are at risk during the interim period, including using, where possible, a short time period for divestiture; employing a monitor trustee;[50] and, if essential, specifying a crown jewel provision. Moreover, the agency should apply significant and aggressive remedies to address spoliation that is the result of affirmative acts or omissions of the parties to make it clear to the business community that it is unacceptable.

The agencies minimize the delay in accomplishing a divestiture by providing short divestiture periods with significant penalties upon the parties for failure to perform on a timely basis.

The Section is unaware of the agencies facing any systemic problem in ensuring that the divestitures occur on a very short time-frame. To the extent there have been any issues, the Section believes that it has been in very few and unique situations in which the parties either acted in bad faith or where due to market conditions outside of the control of the parties, the parties were unable to meet the short time periods specified. Generally speaking, the agencies

[50] A monitor trustee is an independent third party appointed to oversee certain aspects of the consent order. *See* FTC FAQ, Q36.

already minimize delay by the parties by setting a "short fuse" for post-closing divestiture with failure triggering a trustee sale as it sees fit and with no minimum price specified.

Rather, the Section believes that the greatest harm to the value and integrity of the divested business occurs before the entry of the provisional consent decree, i.e., during the agency's review of and negotiating of the divestiture package. The most effective means to minimize delay are by: (1) providing greater clarity more rapidly from staff (both litigating and compliance, with a unified voice) as to what management wants; and (2) streamlining and accelerating the review process thereafter. "One size" consents do not fit all. Consents are essentially contracts, and involving lawyers at the agency with corporate experience would be useful, since they would know what is realistic and what is not. This is true on the private bar side as well. The presence of corporate transaction lawyers could expedite the process.

The Section questions the desirability of requiring buyers of divested assets to report on their operations of the divested assets due to the costs such reporting would impose on the divestiture buyers.

As a general proposition, the Section questions the desirability of requiring buyers to report to the FTC on the operation of the divested assets. Such a reporting requirement would impose additional costs upon the parties and would be of marginal utility since: (1) as indicated in the divestiture study, most divestitures have been successful; (2) exogenous factors could impact the success of the divestiture buyer; and (3) as in a merger investigation, the true measures of the success are the extent to which the customers and competitors consider the company to be a competitive alternative, rather than whether the divestiture buyer views the purchase a success.

Buyers already face myriad burdens and challenges in integrating the assets, dealing with monitor trustees, and otherwise incurring the transaction costs associated with the unique characteristics of a divestiture transaction. The FTC should seek to reduce, not increase those transaction costs. If the divestiture is proving to be troublesome, the divestiture buyer can (and sometimes does) contact the FTC or customers contact the FTC to complain of higher prices.

Success of remedies is difficult to measure

The Section recognizes the difficulty in gauging the success of remedies given the complexities of market dynamics and the costs and burden of gathering comprehensive information from the myriad of sources that an accurate assessment entails. The abstract measurement seems straightforward – is the marketplace functioning as competitively with the merger-as-remedied as it would have been without the merger in the first place? The Section respectfully submits that the methodology deployed in the FTC's divestiture study might have been of some useto the FTC in obtaining relative and directional information, but that it was not designed to obtain the appropriate level of information needed to gauge accurately the success of remedies.[51] Rather, the Section believes that customers and competitors provide a good reference source for identifying consents in which problems arise post-consummation and encourages the agencies to deal with these problems on a case-by-case basis.

[51] The divestiture study was, by its nature, limited in scope and applicability. *See* Ilene Knable Gotts, "The FTC's New Divestiture Policy: One Size Fits Most?," Antitrust Report 29 (2000) for a critique of the divestiture study and its applicability.

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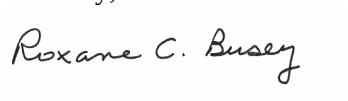
The Section hopes that these comments are helpful to the FTC as it engages in this worthwhile process of evaluating its merger review process. We welcome any other additional opportunity to be of assistance in this endeavor.

Sincerely,



Roxane C. Busey
Chair, Section of Antitrust Law
2001-02

cc: Chairman Timothy J. Muris
Commissioner Sheila F. Anthony
Commissioner Mozelle W. Thompson
Commissioner Orson Swindle
Commissioner Thomas B. Leary
David T. Scheffman
Assistant Attorney General Charles A. James

CH01/12237806.1

bcc: Ilene Knable Gotts
William J. Baer
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Thomas D. Smith
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George C. Cary
Robert S. Schlossberg
Robert T. Joseph
Joanne Travis
Patrick J. Kelleher

APPENDIX A

1. The definitions of "Company" and "Person" in the Second Request should be limited to those entities included within the "Person" for HSR purposes (16 C.F.R. § 801.1(b)); references to affiliates, a term not used in the HSR Regulations, and entities in which the ultimate parent entity has a 25% stake should be deleted.

2. The requirement to "top off" second request production should be deleted; a specific cut-off date, e.g., the date the second request is issued, should be adopted.

3. In those instances where the party does not have relevant information assembled in a form sufficient to answer the interrogatory, it should be made clear that it is acceptable to produce all relevant documents from which the information can be compiled in lieu of answering the interrogatory.

4. Parties should be able to produce documents as the parties maintain the documents in the ordinary course of business and not sorted by specification.

5. The parties should be required to provide the agencies with an index that shows only the bates number range for each custodian's documents in total; any more detailed indexing should only be required (subject to work product claims) if the party is voluntarily undertaking such indexing for itself.

6. The information required in a privilege log should be no greater than that required under the Federal Rules of Civil Procedure.

7. The agencies should adopt a policy that inadvertent disclosures of privileged documents do not act as a waiver of the privilege.

8. The FTC should provide a public record of each decision of a second request appeal.

9. Absent compelling circumstances, the agencies should eliminate or defer requiring the parties to search and produce e-mail and data from back-up tapes.

10. Parties should not be required to manipulate data or pay a third party to manipulate data to put it into a specific format; nor should the parties be required to provide data that they must obtain from a third party or specially generate.

11. The parties should have access to all hearing/deposition transcripts as they would under the Federal Rules of Civil Procedure.

12. Specification 1 of the Model Second Request should be modified to require only the current organizational charts for the top level of the company and the business or product lines that are the subject matter of the investigation and the sales force reporting to such management.

13. Specifications 4 (facility details) and 11 (plans for construction or expansion) of the Model Second Request should be eliminated except where there are specific concerns regarding the facility's capacity.

14. Specification 5(a) (requesting a sample of the product) should be eliminated.

15. Specifications 9 (identifying companies exiting and entering) and 11 regarding entry should be voluntary and limited to a more prescribed time period.

16. Specification 12 (imports and exports) should be eliminated unless geographic market definition is critical to the investigation's outcome and is contested.

17. Specification 15(d) (requiring a description of all opinions and statements regarding the transaction) should be eliminated.