

April 11, 2000

**REPORT OF THE SECTION OF ANTITRUST LAW
ON PROPOSED HART-SCOTT-RODINO ANTITRUST
IMPROVEMENTS ACT AMENDMENTS**

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. In particular, this report does not represent the views of the Section of Business Law.

INTRODUCTION

The Section of Antitrust Law of the American Bar Association (the “Section”) submits these comments on S. 1854, the “Hart-Scott-Rodino Antitrust Improvements Act of 1999” (“S. 1854”) sponsored by Senators Hatch, DeWine and Kohl, and H.R. 4194, a bill introduced by Congressmen Rogan, Hyde, and Delahunt (the “House Bill”) (collectively “the Bills”). The Section applauds the sponsors of these Bills for identifying the need to review the Hart-Scott-Rodino Act, which has not been revisited by Congress since its enactment in 1976. As discussed in detail below, the Section supports certain elements of S. 1854 and the House Bill, but believes that other parts are either unnecessary or can be accomplished more effectively in other ways.

The Section of Antitrust Law is the largest association of competition lawyers in the world. The Section plays an active role in public policy discussions of antitrust law and enforcement. The Section has previously engaged in discussions with the federal antitrust agencies, the Federal Trade Commission (“FTC”) and Department of Justice Antitrust Division (“Antitrust Division”) (collectively the “Agencies”) about issues in the merger review process. For example, in 1995, the Section and the Agencies jointly developed a “Model Second Request,” which has been used by both Agencies for the past five years.

In mid-1999, the Section became concerned that serious problems had emerged in the merger review process, both on the part of the private bar/merging parties and on the part of both Agencies. As a result, the Section established an informal Task Force on HSR Reform (“Working Group”) and began meetings with both the FTC and Antitrust Division to identify merger review processes that could be improved from the perspective of both the private bar and the Agencies. As a result of extensive discussions, a number of improvements have already been announced by both Agencies, 1/ and other improvements are in process, including the following:

- Both Agencies have announced that when a Request for Additional Information and Documentary Materials (“Second Request”) is issued, FTC staff will identify the issues of concern to the Agency. Bureau of Competition Director Richard Parker has advised that he intends to implement a “Rule 16” type conference to be

1/ FTC Press Release (April 5, 2000); Antitrust Division Press Release (April 6, 2000).

held within five business days of issuance of a Second Request at which the staff will describe their competitive concerns, describe the reasons for issuance of the Second Request, and develop a plan for investigating those issues in a targeted way. Counsel for the parties will be asked to provide organization charts, information about the nature and location of the companies' files, and to work with the staff to develop the plan for the investigation. The ANTITRUST DIVISION MANUAL already requires that staff identify the issues at the start of a preliminary investigation.

- The FTC has announced plans to revise its internal appeals process so that appeals are no longer lodged with Bureau of Competition personnel with responsibility to review the merger. Instead, appeals will be made to the FTC's General Counsel. At the Antitrust Division, appeals will be made to the Director of Policy rather than to officials involved in reviewing the merger.
- The Agencies will respond promptly to requests for modifications to a Second Request.
- Senior staff in both Agencies will review all Second Requests prior to issuance.
- The Agencies are committed to providing better training on merger review processes for their junior staff, and better supervision.

The Working Group and the Agencies are working on additional reforms, including:

- The Working Group and the Agencies are working on a set of "best practices" for both the private bar and the Agencies, which will be published and which will provide an expectation for how merger reviews should be handled for both sides.
- The Working Group and the Agencies are developing proposals for handling such issues as translations, privilege logs, and archived electronic files.
- The ANTITRUST DIVISION MANUAL already reflects the Antitrust Division's processes for merger reviews. The FTC is planning to update its OPERATIONS MANUAL to reflect its new policies and to make the MANUAL available on its web page for easier access by the private bar and business community.

The Section looks forward to continuing to work with the Agencies to ensure that visible and durable reforms are implemented.

S. 1854 would change the Hart-Scott-Rodino statute in many ways, several of which will be discussed below. S. 1854 addresses four major HSR areas:

- (1) It would raise the size-of-transaction threshold from \$15 to \$35 million, decreasing the number of transactions requiring notification by approximately one-third.
- (2) It would create a two-tier filing fee, establishing a new \$100,000 filing fee for larger transactions.

- (3) It would set standards for Second Requests that would preclude the Agencies from making cumulative or burdensome information requests and would define when a party has substantially complied with a Second Request.
- (4) It would establish a process for judicial review to ensure compliance with the standards.

The House Bill would increase the size-of-transaction threshold to \$50 million, eliminate the size-of-person test, and impose multi-tier filing fees ranging from \$45,000 to \$225,000. It would not change the Second Request process.

The Section of Antitrust Law supports an increase in the size-of-transaction threshold. The Section would support the increase to \$35 million contained in S. 1854, but favors the increase to \$50 million proposed by the House Bill. An increase in the size-of-transaction threshold is necessary if for no other reason than to adjust the numbers to reflect inflation that has occurred since 1976 when the HSR Act was enacted. A change is long overdue.

The Antitrust Section has long recognized the critical role the Agencies play in maintaining competition, and the need for adequate funding for both Agencies. ^{2/} The Section believes that there should be no filing fees for HSR filings and that the Agencies' important law enforcement missions should be funded from general appropriations rather than making the Agencies dependent on filing fees.

However, if HSR filing fees are going to be continued, the Section supports a simple, two-tier filing fee system. A two-tier filing fee introduces certain administrative complexities, but so long as the system provides the same overall funding for the Agencies, ^{3/} and so long as HSR rules are modified to be consistent with the statute, the Section favors a two-tier fee system.

The Section has not had sufficient time to review the implications of some of the provisions of the House Bill. For example, the Section is concerned about the consequences of eliminating the "size-of-person" threshold. The Section does believe, however, that the proposal merits further study, and the Section is willing to work with the Agencies and Congressional staff to analyze the issues raised by the House Bill.

The Section supports requiring the Agencies to identify their competitive concerns when the Second Request is issued. The Section also believes there is some merit in creating standards and deadlines relating to Second Requests, but believes that the standards proposed

^{2/} See ABA Antitrust Section, *Report on Adequate Funding for the Enforcement Agencies* (May 1999), reprinted at <<http://www.abanet.org/antitrust/funding.html>>.

^{3/} The Section fully supports sufficient funding for the Agencies. However, it believes that Agency funding should be decided without reference to filing fees. As a result, it opposes setting filing fees at levels that provide budget increases for the Agencies and it believes the revenue-neutrality calculations should be based on the FY 2000 budget.

in S. 1854 are impractical as currently drafted. However, the Section would like to work with the Agencies and Congressional staff to develop meaningful and practical standards.

Finally, the Section opposes the judicial review provisions in S. 1854. The Agencies and the parties normally work cooperatively to resolve disagreements relating to a Second Request. The Section fears that the institution of a judicial review procedure will impose an adversarial aspect to the discussions at the very beginning of the Agencies' investigation, which could make the entire investigation more difficult for both sides. As noted above, the Agencies have revised their internal appeals processes, and we believe those changes should be given a chance to work.

The Section believes that most reform of the Second Request process should come from within the Agencies rather than through legislation. The Section believes that the Agencies should undertake visible, durable, and effective reforms to ensure that the merger review process works in all cases, and that the recent reforms are a good start. Because the recent reforms are not reflected in regulations, however, they are subject to change with a change in Agency leadership. The mere issuance of press releases announcing new "policies" does not ensure that these policies will endure. Indeed, the new policies could be repealed or changed without notice. The ABA Section of Antitrust Law strongly encourages the Agencies to institutionalize their new policies through binding regulations, or, at a minimum, through revisions to the ANTITRUST DIVISION MANUAL and FTC OPERATIONS MANUAL. The Section looks forward to working with the Agencies to ensure that effective, lasting reforms are developed and implemented.

DISCUSSION

1. Proposed Increase in the Size-of-Transaction Dollar Threshold

S. 1854 proposes an amendment to Section 7A(a)(3)(B) of the Clayton Act that would increase the size-of-transaction dollar threshold from \$15 million to \$35 million. Section 6 of S. 1854 would require that certain conforming changes be made to the thresholds established by rule and promulgated as 16 C.F.R. § 802.20 beginning on January 1, 2005. ^{4/} The House Bill would increase the size-of-transactions threshold to \$50 million.

S. 1854 would amend Section 7A(a)(3)(b) of the Clayton Act by striking \$15,000,000 and replacing it with \$35,000,000, while the House Bill would strike \$15,000,000 and replace it with \$50,000,000. These amendments would raise the size-of-transaction dollar reporting threshold to require notification if, as a result of the acquisition, the acquiring person will hold more than \$35 million (or \$50 million) of assets and/or voting securities of the acquired person. The size-of-transaction threshold has not been increased since the HSR Act was enacted in 1976 and is long overdue. This transaction value was set in 1976 and has not been amended or updated since that time, despite the fact that inflation has significantly affected

^{4/} The Administration's budget proposal for Fiscal Year 2001 assumes that the size of transaction threshold will be increased to \$35 million and that filing fees will be increased to provide additional funding to the Agencies.

the value of this threshold -- if only accounting for inflation, this \$15 million is the equivalent of approximately \$42 million in today's dollars. ^{5/}

Because the filing thresholds have not been increased to reflect inflation, today many small transactions that raise no competitive issues must still be reported under the HSR Act. Indeed, in FY98, nearly 27% of all transactions reported (approximately 1,235) were valued at less than \$25 million while nearly 52% of all transactions reported (approximately 2,398) were valued at less than \$50 million. ^{6/} The HSR reporting obligation creates a significant burden and expense to the business community, especially in light of the fact that so few of these transactions (approximately 1%) are seriously investigated by either Agency. It also poses a burden on the Agencies which must review these transactions.

Furthermore, in FY98, over 70% of all transactions reported were granted early termination, indicating that these transactions did not raise any competitive issues. ^{7/} Serious investigations, where clearance is obtained by one of the Agencies to conduct a preliminary inquiry, were conducted in only about 10% of all filings, and less than 3% of all filings resulted in the issuance of Second Requests. Therefore, most transactions that are being reported under the HSR Act do not raise significant enough competitive issues even to warrant an investigation. Nonetheless, parties to these transactions have been subjected to burdensome and unnecessary filings and forced to pay fees of \$45,000 per transaction. The Section, therefore agrees that the dollar reporting threshold should be increased.

Indeed, the Section believes that the thresholds should be raised even higher than contemplated by S. 1854 -- to the \$50 million level in the House Bill -- and that raising this threshold would not interfere with the Agencies' antitrust mission. Indeed, large transactions are more the norm today and these transactions present complex and difficult issues that must be examined closely by the Antitrust Agencies. The Agencies are correctly devoting substantial portions of their limited resources to examining these large, complex transactions and should not be required to divert those precious resources to review small transactions that have little likelihood of raising anticompetitive issues.

The threshold in S. 1854 is based on a several different indices including the Producer Price Index, the Consumer Price Index and the Gross Domestic Product and budget considerations. Because the antitrust Agencies are funded primarily through filing fees collected under the HSR program, budget considerations are an important factor in setting the dollar reporting threshold. ^{8/} Based on transactions reported in FY99, the proposed increase in S. 1854 would decrease the number of transactions requiring notification by approximately

^{5/} The INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE REPORT TO THE ATTORNEY GENERAL (Feb. 28, 2000) ("ICPAC REPORT") proposes raising the threshold to \$43 million. *Id.* at 14, 124-129.

^{6/} See FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE ANNUAL REPORT TO CONGRESS, Fiscal Year 1998, Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Appendix A, Table 1 ("HSR FY98 Annual Report").

^{7/} *Id.*

^{8/} As a technical matter, Agency funding is not "tied" to filing fees. But, as a practical matter, Congress is unlikely to provide funding to the Agencies beyond the funds raised by HSR filing fees.

33.3%. Of the 4,654 transactions reported in FY99, 1551 fell below the \$35 million threshold. Raising the threshold to \$50 million would eliminate about 1/2 of all filings.

The proposed increases in the dollar reporting threshold would decrease the burden on the business community since fewer transactions would be subject to the notification and waiting period requirements of the HSR Act. The proposed increase would also decrease the burden on the FTC's Premerger Notification Office because the number of transactions they are required to review would decline. Of course, since the FTC and DOJ would no longer receive notification of transactions valued at \$35 million or less (or perhaps \$50 million or less), they are less likely to learn about transactions valued below the new threshold that pose serious antitrust problems. Although the Agencies can and do investigate unreported transactions, they would have to rely on third-party complaints and the trade press to identify small transactions that pose serious antitrust concerns. Another more minor problem with the change is that it eliminates the ability of parties with transactions below the new reporting threshold to get a formal review by the Agencies of their transactions through the HSR process. There is no provision for voluntary filings in the Act.

Despite these drawbacks, the Section believes that the advantages of the threshold increase to at least \$35 million and preferably \$50 million outweigh the negatives and should be approved.

2. Conforming Changes to the HSR Rules

Section 6(a) of S. 1854 provides that thresholds established by rule and promulgated as 16 C.F.R. § 802.20 shall be adjusted by the FTC on January 1, 2005, and each year thereafter. The adjustments are to be made in the same manner as set forth in Section 8(a)(5) of the Clayton Act, the provision that provides for annual adjustments to the thresholds for interlocking directorates. The House Bill does not contemplate inflation adjustments.

Waiting until 2005 to change the Section 802.20 threshold presents unnecessary complications between now and 2005. Rule 802.20 and several others, will have to be changed as soon as the law goes into effect. As currently drafted, S. 1854 changes the minimum dollar reporting threshold but it does not affect the size of transaction percentage threshold set forth in Section 7A(a)(3)(b) of the HSR Act. This threshold is met if the acquiring person will hold 15% or more of the assets or voting securities of the acquired person as a result of the acquisition. The FTC effectively eliminated this percentage threshold for both asset and voting security acquisitions when it adopted Section 802.20 of the HSR Rules. In the case of assets, it eliminated any percentage threshold, leaving only a \$15 million threshold. With respect to voting security transactions, section 802.20 increased the percentage threshold for acquisitions of voting securities valued at \$15 million or less from 15% to 50%, and then only in certain circumstances. As a result, notification is required for voting securities acquisitions valued at \$15 million or less only when the acquisition results in the acquiring person holding 50% or more of the voting securities of an issuer that has annual net sales or total assets of \$25 million or more.

If S. 1854 becomes law and conforming changes are not made to Section 802.20 prior to January 1, 2005, acquisitions resulting in the holding of 15% of an acquired person's assets valued at more than \$15 million but not exceeding \$35 million in value will continue

to require notification. Also, acquisitions of voting securities valued at \$35 million or less resulting in the holding of 50% or more of the voting securities of an issuer that has total assets or annual net sales of \$25 million or more will require notification. Requiring filings in these cases would be inconsistent with the statutory intent. (Although filings would be required for such transactions, a filing fee would not appear to be required.)

The House Bill would eliminate the size-of-person threshold while increasing the size-of-transaction threshold to \$50 million. These changes would require substantial HSR rules changes that would have to be implemented at the same time the statutory changes went into effect to avoid similar problems. The Section would be pleased to work on these changes with the Premerger Office.

3. Creation of a multi-tiered filing fee

S. 1854 would amend Section 7A by adding a new subsection (k) that would establish a two-tiered filing fee structure based on the dollar value of the transaction. Transactions valued at more than \$35 million but not exceeding \$100 million would require a filing fee of \$45,000, while transactions valued at more than \$100 million would require a filing fee of \$100,000. The House Bill would create a three-tiered-filing fee, establishing a fee of \$45,000 for transactions valued at \$50 million but less than \$100 million, a fee of \$100,000 for transactions valued at \$100 million but less than \$200 million, and a fee of \$225,000 for transactions valued at \$200 million and above.

The increase in the dollar reporting threshold and the multi-tiered filing fee structure is designed to be revenue neutral. The intent is that the funding for the antitrust Agencies will not be adversely affected. Indeed, the filing fees in the House Bill are intended to increase Agency funding while S. 1854 is intended to maintain current funding.

The Section believes the budgets of the FTC and the Antitrust Division should not be funded from filing fees. The Antitrust Section has long supported adequate funding for the FTC and Antitrust Division. For example, in 1999, the Section issued a report that described the importance of the mission of the antitrust Agencies in the following terms, and adopted the following resolution:

For more than a century, it has been recognized that vigorous enforcement of the federal antitrust laws is important because long-term economic growth, consumer well being, and the international competitiveness of American enterprises are fostered by effective competition. Maintaining and enhancing competition, and removing unreasonable restraints thereon, are critical elements of the national economic policy. The Antitrust Division and FTC are the federal law enforcement agencies responsible for enforcement of federal antitrust laws. In order to enforce the antitrust laws effectively, the FTC and Antitrust Division require funding and resources adequate to meet the workload they face.

* * *

RESOLVED, That the Section of Antitrust Law of the American Bar Association, recognizing the critical law enforcement responsibilities and the important role the Justice Department Antitrust Division and Federal Trade Commission play in the economic welfare of the nation

(a) reaffirms its support for adequate funding for the Justice Department's Antitrust Division and the Federal Trade Commission at levels that will assure the enforcement of our nation's antitrust laws, and

(b) supports the increased level of funding proposed for them in the Administration's Fiscal year 2000 budget requests based on the sharply increased workload of the antitrust agencies.

Congress should recognize the important law enforcement responsibilities of the Agencies and fund them from general revenues – as it does other law enforcement functions, such as the FBI and other Divisions of the Department of Justice. Funding the Antitrust Agencies from filing fees is a bad policy for several reasons.

- First, it sets a bad example for other nations that have adopted or are about to adopt merger notification requirements. The U.S. competition laws are seen as a model for other competition agencies around the world and this filing fee structure could precipitate more filing fees in other countries, further increasing the burden and cost on U.S. businesses involved in transactions. Indeed, at least 16 countries have already emulated the U.S. and imposed filing fees. ICPAC Report, Annex 3-A. If the use of filing fees to fund antitrust enforcement agency budgets is adopted by other jurisdictions, transaction costs will increase for multinational transactions.
- Second, the HSR filing fee is not really a “user” fee because it requires persons involved in reportable transactions to fund the enforcement activities of the Agencies unrelated to the review of mergers and acquisitions. For instance, the filing fee funds the consumer protection function of the FTC and non-merger antitrust enforcement work of the FTC and the Antitrust Division.
- Finally, it creates a disincentive for the Agencies to eliminate unnecessary filings. ^{9/} Since the budgets of the Agencies are based on filing fees, the Agencies have no incentive to adopt new exemptions, as provided by the HSR Act, to exempt classes of transactions that are unlikely to violate the antitrust laws.

Thus, as a matter of public policy, there should be no connection between HSR filing fees and Agency funding.

^{9/} The recent ICPAC REPORT reaches the same conclusion. *Id.* at 129.

However, if filing fees are to be retained and used to fund the Agencies, a filing fee based on the dollar value of the transaction appears to be more equitable than a flat filing fee. A two-tiered filing fee based on the size of the transaction may not be the most equitable approach, but it is easier to administer than a fee system based on a percentage of the transaction value. A filing fee based on the size of the acquiring person or some variation of the size of person test would be the easiest system to administer since it is relatively easy to determine the total assets or annual net sales of the parties involved in a transaction. However, it seems to make more sense to tie the size of the fee to the size of the transaction than to the size of the parties involved in the transaction.

Basing the filing fee on the value of the transaction will, however, pose many valuation issues and require several changes to the HSR Rules. For example, rules will be required to address the following issues:

- How will parties determine the value of a transaction when notification is filed based on a letter of intent or an agreement in principle rather than an executed agreement?
- Will the affidavit requirement require modification to require parties to attest that a “good faith valuation” has been performed?
- How will parties determine the value of an exclusive license?
- What is the dollar value of a voting securities acquisition involving the purchase of shares for the 15%, 25% or 50% thresholds? Is the value of the transaction to be based on the value of the shares meeting the reporting threshold or the value of the highest number of shares that can be acquired if the threshold is met (15% versus 24.99%). If a person files for the 50% threshold, should the fee be based on the number of shares that can be acquired if the 50% threshold is met, the actual percentage of shares that the person intends or has contracted to acquire, or 100%?

Given the complexities of the HSR Rules and the body of interpretations that have developed over the life of the program, drafting modifications to the HSR Rules is a very arduous, and time consuming process. It is important that any modifications that are adopted be consistent with regulatory scheme that is in place and that the FTC be given sufficient resources to develop all necessary conforming rules. Of course, the Section stands ready to provide assistance to the FTC with respect to such necessary modifications.

The Section favors a two-tiered filing fee structure, such as that contemplated in S. 1854. Requiring a larger filing fee for bigger deals appears to be most equitable since review of larger transactions generally requires greater Agency resources (almost one-quarter of all Second Requests were issued in transactions valued at \$1 billion or more). The Section takes no position on the precise levels of filing fees. We recommend that the filing fees tiers be sufficiently differentiated that they not be subject to manipulation by the parties, that the system be as simple as possible, and that the fees be set to be revenue-neutral to the Agencies at FY2000 funding levels.

4. Elimination of “Size-of-Person” Threshold

The House Bill would eliminate the size-of-person threshold in the HSR Act. Currently, companies must meet certain size thresholds (\$10 million and \$100 million) before an HSR filing is required, irrespective of the size of transaction. The Section has not had sufficient time to analyze the implications of this provision in the House Bill, and neither Agency has explained the likely effect of this proposed amendment or offered a rationale for it. The Section believes that this change should not be enacted without further study of its likely impact. The Section looks forward to working with the Agencies in evaluating this proposal.

5. Second Request Reforms

S. 1854 sets forth several amendments to the HSR Act that would reform the second request process, while the House Bill does not propose any changes to the Second Request process. The reforms proposed by S. 1854 are:

1. Limits on the scope of a Second Request, requiring that it not be unreasonably cumulative or duplicative and that it be limited to information that does not impose a burden or expense on the parties that substantially outweighs the likely benefit of the information to the Agency in conducting its preliminary antitrust review of the acquisition.
2. Requiring the Agency issuing the Second Request to set forth a specific summary of the competitive concerns presented by the proposed acquisition and the relation between such concerns and the information and materials requested;
3. Establishing specific standards by which the Agency must judge substantial compliance with the Second Request;
4. Allowing parties to appeal to a United States Magistrate to challenge the scope and breadth of the Second Request or to challenge the Agencies’ finding that a party is not in substantial compliance with the Second Request; and
5. Extending the waiting periods applicable to certain transactions.

Each of these proposed amendments is discussed separately below.

As noted above, very few transactions each year result in the issuance of a Second Request -- less than 3% of all transactions filed in FY98 (only about 140). ^{10/} The issuance of a Second Request is a rare occurrence, but it is a significant step for both the Agencies and the parties. In the recent past, most Second Requests have been issued in extremely large and complex matters. For example, in FY98, almost one-quarter of all investigations in which a Second Request was issued involved transactions valued at \$1 billion, far more than any other category of transaction size. ^{11/}

Although Second Requests are few in number, the issuance of a Second Request in any transaction significantly increases the cost and burden on both the Antitrust Agencies and the parties. In many cases, the merger review process goes smoothly and does not impose unnecessary burdens. But sometimes the process breaks down, and this has major consequences for both the Agencies and the parties to the transaction, including delay, distraction, and increased costs. While these breakdowns occur infrequently, they are very serious, and the Agencies should take visible and durable steps to reform their processes to ensure that these breakdowns do not occur. The Section supports efforts of Senators Hatch, Kohl, and DeWine to reform the Second Request process and to ensure that such reforms are lasting and practical. However, the Section believes that the process would be better served at this time if most of these reforms emanated from internal steps taken by each Agency — such as those being implemented as a result of discussions with the Section — rather than through legislation as that proposed by S. 1854.

A. Standards for issuance of Second Request

Section 3(a) of S. 1854 would amend the HSR Act to require that Second Requests be limited to: (i) information or documentary material that is not unreasonably cumulative or duplicative; and (ii) information or documentary material that does not impose a burden or expense that substantially outweighs the likely benefit of the information to the Agency conducting the review. Current HSR regulations contain no limitation on the breadth of the Second Request.

The Section believes that Second Requests should not be unreasonably burdensome and should be written narrowly to provide the Agencies with only that information necessary to conduct a review of the proposed transaction. The limitations set forth in S. 1854 may impose discipline on the Agencies to narrow and limit the Second Request at the outset. Furthermore, requiring the Agencies to tie the benefits of the Second Requests to the burden and costs to the parties may produce more limited, less burdensome Second Requests.

However, the Section believes that the standards in S. 1854 are impractical as currently drafted. In some cases (e.g., when parties elect to provide no data during the first 30-day waiting period), the Agency will know little about the transaction, the parties, or the industry affected by the proposed merger and will have little information on which to base such a cost/benefit analysis. Many times this cost/benefit analysis can only be assessed after seeing the data from and about the parties. Therefore, this revision may prove to be of little

^{10/} See HSR FY98 Annual Report at Table 1.

^{11/} *Id.*

constraint on the Agencies because parties may ultimately have to provide data from which assessment is made. Consequently, the Section recommends that this portion of S. 1854 not be implemented at this time. However, there is merit to placing some legislative standards upon the issuance of the Second Request, and the Section would like to work with Congressional staff and the Agencies to develop meaningful and practical standards.

B. The Agencies must provide a statement summarizing the competitive concerns raised by the proposed acquisition.

Section 3(a) of S. 1854 would amend the HSR Act to require the Agencies to provide a specific, written summary of the competitive concerns presented by the proposed acquisition and the relationship between such concerns and the additional information or documentary material requested. The Section supports this amendment. ^{12/} This amendment will limit the Second Request to issues identified by the Agency that need to be investigated. Providing this statement in written form should not hamper the Agencies' abilities to fully investigate a matter so long as they are not precluded from investigating new issues that develop during the course of their investigation. Agency staff must currently provide their reasons to justify the issuance of the Second Request to their management, so there is little burden on the Agencies to provide this summary to the parties upon issuance of the Second Request. ^{13/}

Chairman Pitofsky advised the Senate Commerce Committee that he has instructed the Bureau of Competition to require staff to meet with parties early in the investigation to identify the issues of competitive concern that prompted the Second Request. ^{14/} Both Agencies have recently announced that they will require that staff promptly convene conferences with the parties to discuss competitive concerns. The ANTITRUST DIVISION MANUAL provides that after a preliminary inquiry commences, "the attorney(s) assigned to the matter should also contact the parties to discuss possible competitive concerns." ^{15/} The

^{12/} The ICPAC REPORT echoes this recommendation. *Id.* at 139.

^{13/} For example, the ANTITRUST DIVISION MANUAL requires the following information in a memorandum recommending a Second Request:

The Second Request recommendation memorandum should contain sections addressing each of the following topics: background on transaction and investigation; investigative theory (including subsections of the theor(ies) of competitive harm; possible product market(s); possible geographic market(s); best estimate of market shares and concentration; probable ease or difficulty of entry and any entry barriers; possible efficiencies; weaknesses in a potential case and ways they can be overcome; discussion of other theories investigated and discarded; EAG projects underway or planned (along with any special concerns of EAG); defense arguments and our initial response; outcome of past investigations in the industry; the ultimate likelihood or attractiveness of a case; and the basis for any proposed deviations from the model Second Request. Exemplars may be obtained from the appropriate Special Assistant. [ANTITRUST DIVISION MANUAL, Ch. 3 n.28 (emphasis added)].

^{14/} Remarks of Chairman Robert Pitofsky, Federal Trade Commission, before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism of the Committee on Commerce, Science and Transportation, United States Senate, February 9, 2000.

^{15/} ANTITRUST DIVISION MANUAL, Ch. 3, § D.3.a.

Section applauds the Agencies' efforts to require staff to explain the issues to the parties after issuance of the Second Request and develop a plan to address those issues, but believes that such meetings should take place in addition to providing the written summary of issues contemplated by S. 1854. The Section also believes that imposing this requirement as a matter of statute or regulation will mean that it cannot be ignored or changed in the future.

C. Standards for determining substantial compliance with the Second Request.

Section 3(a) of S. 1854 would amend the HSR Act to require that the Agency issue a notice specifying with particularity the basis for any asserted deficiency within 20 days from the date of substantial compliance. ^{16/} Currently, there are no specific deadlines by which the Agencies must notify parties of deficiencies other than that the Agency must provide such notice within a reasonable period of time. Agencies and staff within each Agency differ on how timely this notice is provided and often raise compliance issues late in the waiting period. This deadline will provide parties with certainty that they have complied sufficiently with the Second Request.

However, providing this notice well into the second waiting period could cause significant delay to the parties. Although the Agencies currently have no set deadline on advising parties on compliance issues, generally most staff provide such notice much earlier in the waiting period, generally 3-5 days after the parties have substantially complied. Indeed, under current law, the waiting period is only 20 days so this new provision is totally impractical. Furthermore, requiring the Agencies to set forth all deficiencies by a certain date may preclude the Agencies from raising serious compliance issues that may not be discovered until late in the process. This is particularly true with large volume productions where staff is often not able to complete their review quickly due to the volume of materials supplied. Consequently, the Section recommends S. 1854 not change the informal system currently in place whereby staff advises the parties within a reasonable time after discovery of an alleged deficiency.

Section 3(a) of S. 1854 states that a person shall be deemed to have substantially complied with a Second Request if that person's response does not contain any deficiency that materially impairs the ability of the Agencies to conduct a preliminary antitrust review. This is a higher standard for the Agencies to meet to claim deficiency than currently exists and would require Agencies to challenge only serious deficiencies that undermine their ability to complete the investigation.

However, it is unclear what the standard "materially impairs" means under the proposed amendments. The Agencies will still have wide discretion in determining what is a

^{16/} The Bill also would extend the second waiting period applicable to all transactions (other than cash tender offers) from the current 20 days to 30 days. Thus, this deficiency notice would be provided two-thirds of the way into this second waiting period. This delay could cause problems. Furthermore, there is no comparable requirements applicable to cash tender offers which currently have a 10-day "second waiting period" and which would remain unchanged under these proposed amendments. The timing in S. 1854 would not work in these cases.

“material impairment” to their investigation. The definition will remain unclear unless challenged in court and parties may be unwilling to seek a judicial interpretation and risk a broad definition. Thus, the proposed amendment is unlikely to have the intended effect, and the Section recommends that this proposed amendment be abandoned in favor of the informal system currently in place.

D. Judicial review

Section 3(a) of S. 1854 would amend the HSR Act to provide that either party to the merger may petition a designated United States Magistrate Judge in the United States District Court for the District of Columbia for expedited review of the issuance of the Second Request or a party’s compliance with that Second Request. Such petitions must be filed within seven days of the issuance of the Second Request or within seven days of the issuance of a notice of noncompliance with the Second Request (a “deficiency notice”). The decision of the Magistrate would then be appealable to the District Court for the District of Columbia whose decision will be final.

Too often, parties to the Second Request process believe that they have no recourse during this process to challenge the issuance of or compliance with the Agency’s Second Request. Until recently, the appeal process involved review by the Agency’s management supervising the review of the merger raising the dispute and has been rarely used (at DOJ, only 4 times in last two years; at FTC, only 1 time in recent years). Some believe that judicial review may at least create the perception that the “playing field” is level by providing parties with an independent review rather than depending solely on Agency discretion in decisions on the breadth of the Second Request and compliance issues.

However, the fact that the current internal review process has been utilized so infrequently in the past may be an indication that the current system in fact works, rather than an indication that the current system is broken and requires a major overhaul as contemplated by these amendments. Certainly, there are instances where negotiations between the parties and Agency staff have not been successful and parties must then comply with requests that they believe are overly broad and burdensome. But in the vast majority of cases, the current process does work through a cooperative dialogue between the parties and Agency staff. Good faith negotiations typically produce narrowed requests and less burden for the parties. The filing of a petition for judicial review, or even the threat of filing such a petition, could change the Agency staff’s demeanor from cooperation and negotiation to litigation, making the process more adversarial and making reasonable modifications less likely, further increasing the burden and costs on the parties and the Agencies. The Section believes that the Congress should not enact legislation that would dampen the current process and could produce even greater burdens upon the parties.

Judicial review could also result in uncertain precedents on Second Request matters. The Second Request process is a unique and fairly uncommon occurrence and Magistrates and District Court judges have little experience in these matters. On the other hand, the Agencies themselves have developed an extensive experience and knowledge with the Second Request process in the more than 20 years since the HSR Act was passed. This experience has provided parties with at least some informal precedent within the Agencies as to the interpretation of Second Requests and provides parties with some degree of

predictability. This predictability will be lost, at least in the first instance, if judicial review is sought in Second Request matters. Furthermore, judicial review could increase the costs and delay the time incurred as parties attempt to respond to the Second Request.

Consequently, although S. 1854 would provide parties with a process that levels the “playing field,” the proposed amendments could be counter-productive. There are instances where the process has “broken down.” Even though these instances may be rare, they are still a serious problem and the Agencies should make visible and durable internal changes to ensure that they do not happen in the future. The Agencies have recently instituted internal reforms in an effort to address these concerns. In an effort to address the perceived unfairness of the current appeal process, the FTC has recently announced that the FTC’s General Counsel will hear all appeals regarding Second Request disputes, while at the Antitrust Division, appeals will be taken to the Director of Policy. The Section applauds the Agencies’ recognition that the current appeal process can be improved. These reforms should be given time to see if they are effective and durable and not simply fleeting efforts that are quickly forgotten in practice. The Section will continue to work with the Agencies to make sure that reforms are both effective and long lasting.

4. Timing Changes

S. 1854 proposes extending the initial 30-day waiting period under the HSR Act by providing that if the waiting period expires on a Saturday, Sunday, or holiday, then the waiting period is extended to the end of the first business day following. S. 1854 also would extend the 20-day waiting period following substantial compliance with the Second Request to a full 30 days. The Section believes that these proposals are unnecessary and unwise. The HSR Act was intended to have as minimal an impact on businesses as possible. The HSR Act should not unduly delay the consummation of proposed transactions that do not raise serious competitive concerns. Extending the time period under the statute would unnecessarily extend the time period parties must wait to complete their transactions.

Congress intended that the period after substantial compliance to the Second Request be limited so parties would not be unduly delayed from completing their transactions. These time limits provide the parties with the only leverage they have over the Agencies. Although this limited time period may seem unfairly to bind the antitrust Agencies to complete their review in a relatively short time frame, the parties to mergers often grant requests from the Agencies for more time in order to complete their preliminary review, particularly in situations where the Agencies indicate that they continue to have serious concerns about the transaction. However, in those cases that do not raise serious competitive issues, the Agencies can and should complete their preliminary review in a timely fashion. Extending the current 20-day period to 30 days could unfairly delay those transactions for which there are no serious competitive issues.