

Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding the Hart-Scott-Rodino Second Request Process

The Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission ("Modernization Commission") in response to the Commission's request for public comment dated May 19, 2005 regarding specific questions about the Hart-Scott-Rodino Second Request process ("HSR process"). The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the ABA.

Summary of Comments

The Modernization Commission posed three questions regarding the HSR process. First, should the second request process be revised to address the burden imposed by second requests and the length of agency investigations? Second, should the HSR merger process be revised to address issues relating to the number and type of transactions requiring premerger notification? Third, should the HSR merger review process be revised to increase the transparency of the enforcement agencies' decisional processes?

With respect to the first question, the Antitrust Section believes that the second request process should be revised to reduce the burden imposed on private parties, as well as to reduce the length of merger investigations. Despite prior efforts by the agencies and the private bar to reform the process, the cost and burden of second request compliance has risen steadily over the years. Consequently, the Antitrust Section believes that more aggressive and more substantial revisions to the merger process should now be considered. An incremental approach to reducing burden has not produced meaningful results. In this paper, the Antitrust Section presents four options for consideration by the Modernization Commission.

With respect to the second question, the Antitrust Section does not believe that the HSR merger process should be revised to address issues relating to the number and type of transactions requiring premerger notification. Congress effectively addressed this issue in 2000 by increasing and indexing the notification thresholds. Thus, the Antitrust Section does not believe that any further action in this area is necessary at this time.

With respect to the third question, the Antitrust Section believes that the Justice Department's Antitrust Division and the Federal Trade Commission have been aggressive and effective in seeking to increase the transparency of their decisional processes. The Antitrust Section lauds the agencies for these efforts, and does not believe that any further action in this regard is required at this time.

I. ISSUE – SHOULD THE SECOND REQUEST PROCESS BE REVISED TO ADDRESS THE BURDEN IMPOSED BY SECOND REQUESTS AND THE LENGTH OF INVESTIGATIONS?

A. Concern(s)

Despite repeated efforts on the part of the agencies and the private bar since the early 1990s to improve the merger review process, the expense and burden of second request compliance has steadily increased and is becoming untenable. Second requests unnecessarily impose significant temporal and financial costs upon both the private and public sectors, without necessarily achieving optimal results. The burden of responding to a second request has grown enormously since the early 1990s. This growth is reflected in terms of the cost and length of time required to comply, and is primarily due to the far greater volume of documents and data (primarily electronic) being produced pursuant to second requests today than was the case 10 years ago. This is largely a function of two factors: (1) corporations store and retain increasing volumes of electronic data (e-mail, databases, *etc.*); and (2) the agencies more regularly require the manipulation and production of such data. If these issues go unaddressed, the volume of documents and data requested by the agencies and produced by merger parties will not only continue to be an increasing burden on the private sector, but will become a logistical and investigational impediment for the agencies that are required to assess proposed mergers.¹

The costs associated with responding to a second request can increase even further as a result of the conduct of the parties and the reviewing agency – two sides to a potential litigation. This is especially true when the parties, the reviewing agency, or both, attempt to “game” the system through full assertion of their rights under the HSR process. For example, the reviewing agency can effectively suspend the HSR clock by demanding that the parties comply with a literal reading of the second request or by otherwise instituting a “compliance battle” (*i.e.*, asserting that minor variations from the requirements of the second request constitute a failure to substantially comply). Alternatively, as FTC Chairman Majoras has noted, parties can simply produce enormous volumes of documents and data to the agency at one time and assert substantial compliance, leaving the reviewing agency with only 30 days to review the information, make a determination as to the merger’s competitive effects, and, if

¹ “Though electronic submissions are in theory more easily searchable than paper documents, Majoras said they effectively remove any restraints on the volume of information applicants can submit. That makes it easier to obstruct reviews with what Majoras called a ‘blitz and run’ approach – dumping huge volumes of information on the FTC, much of it nonessential, and leaving it to regulators to sort through. ‘We have to be technically ready for it, but we also have to be better at zeroing in on what we want,’ Majoras said, ‘because I believe it will become easier and easier for the parties to just throw more stuff at us electronically.’” Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, Daily Deal, (May 11, 2005).

necessary, prepare a case to bring in federal court to enjoin consummation of the transaction.²

There is consensus in the private bar that second requests are unduly burdensome. There also appears to be growing recognition and concern about the burden of second requests at the antitrust agencies. Simultaneously, there is a consensus within the private bar and the agencies that the Antitrust Division and the FTC need access to some of the data, documents and information typically called for in a second request to investigate and, if necessary, challenge transactions. There is not, however, a consensus on how to most cost-effectively provide the agencies access to the data, documents and information needed without unnecessarily burdening the private sector.

When assessing the benefits and burden of second request compliance, the Modernization Commission should weigh the agencies' need for information relative to the parties' costs of producing the information. The focus of any proposed solution should be on the cost and burden of producing marginally relevant or largely duplicative information, not the burden of producing necessary and probative materials.

B. Prior Consideration of the Issue

The burden imposed by the second request process is not a new problem. The Antitrust Section has regularly addressed it. Most recently, in 2004, the Antitrust Section issued "The State of Federal Antitrust Enforcement – 2004."³ Other commentary on problems associated with second requests include: Guidance for Federal Merger Investigations,⁴ Comments from the Section of Antitrust Law of the ABA regarding the Merger Review Process (Letter to Joseph Simons, dated August 6, 2002),⁵ The State of Antitrust Enforcement 2001,⁶ and Report of the Section of Antitrust Law of the American Bar Association (March 1, 1993).⁷ We commend these detailed prior studies to the Modernization Commission and we do not repeat their recommendations here.

² *Id.*

³ Available at www.abanet.org/antitrust/comments/2004/federal_at_enforcement.html.

⁴ Available at www.abanet.org/antitrust/guidelines_for_mergers_12_00.pdf.

⁵ Available at www.abanet.org/antitrust/comments/2002/simons.doc.

⁶ Available at www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

⁷ Available at www.abanet.org/antitrust/comments/1993/1993-comp-policy.pdf.

C. Basis for Change

Despite some procedural improvements in recent years, the merger review process imposes significant, and escalating, costs and delays upon the parties to a transaction.⁸ The collection, processing, review and production of electronic documents have become the most expensive and burdensome aspect of a second request. The proliferation of electronic communications (e-mail, Blackberrys, etc.) has caused the volume of documents that must be retrieved, processed, reviewed and produced to increase exponentially. The review and production of large volumes of electronic documents is a complicated task that requires sophisticated outside computer consultants/vendors to manipulate the data in order to produce it in reviewable format. This adds a significant cost that did not exist only a few years ago. Moreover, the proliferation of electronic documents makes the review process increasingly burdensome, time consuming and expensive.

The second most burdensome aspect of responding to a second request is preparing answers to interrogatory and data requests that require companies to generate information and data that are different (or in a different format) from that maintained by the company in the ordinary course of business.

It can be difficult, time consuming and expensive for a party to provide data or data in a format that it does not regularly maintain. While some parties have sophisticated, integrated databases that can provide the data sought by an agency in a second request, other parties struggle with a patchwork quilt of “legacy” computer systems that do not integrate data and databases across the company. In these cases, responding to interrogatory requests can require hundreds or thousands of man-hours of work by the company’s executives, in addition to assistance from outside counsel, economists and other consultants.

The direct and indirect costs associated with responding to a second request can be very substantial. In this regard, it has been noted that “[d]eals that raise the specter of a near monopoly or which regulators think will limit consumer choice can get a second request for information from the FTC that prolongs the review by an average of six months and costs merger parties an average of about \$5 million to comply. More complex cases can require an additional year and cost applicants up to \$20 million. Indirect costs, such as employee time and opportunity cost, are difficult to quantify but nonetheless very significant. According to FTC Chairman Majoras, ‘merger parties need more predictability about costs and timelines.’ ”⁹

Recognizing the growing burden of second requests, the agencies and Congress have attempted in recent years to reform the merger review process and to reduce the

⁸ American Bar Association, Section of Antitrust Law, “The State of Federal Antitrust Enforcement – 2004,” at 6.

⁹ Lindell, *supra* note 2.

burden and delay of second requests. These efforts, however, have had only limited impact, and even then, only at the margin. Moreover, few of the reforms have had a lasting positive effect. Instead, second requests continue to be more and more burdensome.

In 2001, the Antitrust Division released the details of its Merger Review Process Initiative,¹⁰ in which the Division committed to focusing quickly on critical legal, factual and economic issues for investigation; utilizing voluntary requests for information; encouraging early consultation with the parties concerning any competitive issues; narrowly tailoring second requests; and encouraging parties to negotiate investigational frameworks/timing agreements with the Antitrust Division.

Similarly, the FTC in 2002 issued its Report on Best Practices in Merger Investigations.¹¹ In its report, the FTC set forth several new policies aimed at reducing the burden of second requests or otherwise improving the process. For example, witnesses may now obtain investigational hearing transcripts. Documents no longer need to be sorted or identified by specification. The inadvertent production of privileged materials is no longer treated as a waiver of the attorney client privilege or work product protection. The FTC has also lessened its requirement for a “second sweep” of documents when responding to a second request.

In 2004, the FTC released its Model Second Request for Retail Industries in an effort to make the second request process more transparent and predictable. FTC Chairman Deborah Majoras recently has announced another initiative to streamline the merger review process. “Pressed by an information overload that threatens to overwhelm the antitrust review process, the (FTC) is taking a ‘soup-to-nuts’ look at ways to streamline reviews, (Majoras) said.”¹²

Congress also has attempted to reduce the burden of the merger review process. In 2000, legislation was enacted directing the DOJ and the FTC to establish an internal process to allow parties to appeal decisions regarding the burden or duplicativeness of a second request and the issue of substantial compliance with a second request.¹³ Moreover, the agencies were directed to conduct internal reviews, reform the merger review process and report to Congress within 180 days.

¹⁰ See, e.g., Antitrust Division Releases Details of Merger Review Process Initiative – Program Stresses Early Identification of Issues and Negotiation of Investigative Plans (October 12, 2001), *available at* www.usdoj.gov/atr/public/press_releases/2001/9305.htm.

¹¹ FTC Report on Best Practices in Merger Investigations, *available at* <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>.

¹² Lindell, *supra* note 2.

¹³ Public Law 106-553. In the same legislation, Congress amended §7A of the Clayton Act to increase the size of transaction threshold for reporting a transaction and set a tiered HSR fee schedule based on the size of a transaction.

Despite these well-intentioned (and sometimes successful) efforts to streamline the merger review process and reduce the burden of compliance on private parties, the burden of second request compliance continues to steadily grow. There are several reasons why this is the case. First, the volume of e-mail and electronic documents retained by companies continues to grow. As a result, a greater volume of electronic documents is responsive to a second request and thus must be produced. Second, over time there is “second request creep.” In other words, second requests tend to “grow” as the agencies add additional specifications and or interrogatories but do not delete other sections. Third, staff adherence to certain reforms can recede over time as senior management responsible for such initiatives depart or retire.

D. The Burden Exceeds What Congress Envisioned

The burden imposed by second requests today far exceeds what Congress originally envisioned in enacting the HSR Act. A review of the legislative history is instructive on this point. Congress specifically intended to apply a “reasonableness standard” to the agencies’ information requests. “And plainly, Government requests for additional information must be reasonable.”¹⁴

Moreover, Congress did not intend to require the parties to create new data or information:

*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. If the merging parties are prepared to rely on it, all of it should be available to the Government (emphasis added).*¹⁵

Nor did Congress grant the agencies the authority to require merger parties to engage in *protracted* efforts to gather, assemble or compile data or other information, though current interrogatory and document requests often do so:

But lengthy 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, by the Senate and the House Monopolies Subcommittee, of the automatic stay provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination

¹⁴ 122 Cong. Rec. 30,876-77 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino).

¹⁵ *Id.*

would clearly constitute a misinterpretation of this bill. ¹⁶
(emphasis added)

Finally, Congress did not intend for the agencies to require the production of data of marginal relevance or of data that would be extraordinarily time consuming to compile:

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. In these cases, a failure to comply with such unreasonable portions of a request would not constitute a failure to “substantially comply” with the bill’s requirements. All of the equities of the particular situation should be considered in determining what constitutes “substantial compliance.” ¹⁷
(emphasis added)

Other jurisdictions with effective merger enforcement, such as the E.U., the U.K. and Canada, do not require merger parties in a second phase investigation to respond to a massive subpoena. The jurisdictions instead use a more focused, surgical approach. The enormous expense and burden of second request compliance might be justified if there were strong empirical evidence that the process resulted in better decisions. There is, however, no evidence that the burden imposed by the second request process in the U.S. leads to better decision making.

E. There Is No Litigated Legal Standard on What Constitutes Substantial Compliance

One of the ambiguities in the second request process is that the meaning of “substantial compliance” has not been defined by a court of law. Section 7A(g)(2) of the Clayton Act provides that a district court may order compliance or extend the waiting period if a party fails to “substantially comply” with a request for additional information.¹⁸ Unfortunately, the issue of what constitutes substantial compliance has never been substantively litigated. Consequently, there is no guidance from the courts. There is

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Clayton Act 15 U.S.C. §§ 18a (1914).

only one reported case in which one of the enforcement agencies challenged a merger party's failure to comply with a second request. The decision does not include any substantive discussion. *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH) ¶67,976 (D.D.C. 1988) (McCormick enjoined from consummating acquisition until 20 days following "substantial compliance" with FTC second request).

Recently, the FTC filed a complaint against Blockbuster Inc. for failure to provide pricing data as required by the second request issued during the investigation of its merger with Hollywood Entertainment Corp. FTC Complaint for Injunctive Relief Pursuant to Section 7A(g)(2) of the Clayton Act (D.D.C. March 4, 2005). This matter was resolved and not litigated, and therefore does not provide any further guidance.

F. Historical Data on the Issuance of Second Requests

Over the last decade, the percentage of HSR filings that result in a second request has remained within a fairly narrow band, ranging from approximately 2.1 percent of HSR filings to approximately 4.3 percent of filings.¹⁹ For the period 1993 to 2003, an average of 3.3 percent of filings resulted in a second request. Numerically, since the statutory size-of-transaction thresholds were increased in 2001, the number of second requests issued per year was 49 in FY 2002 and 35 in FY 2003.

The percentage of second requests that result in some kind of agency/party action (challenge, consent, fix-it-first or abandonment of the transaction) appears to be somewhat higher at the FTC than at the Antitrust Division over the last six years. Both agencies appear to be increasing the ratio of some type of action (a challenge, consent, restructuring, etc.) to the number of second requests issued.²⁰

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Year	Filings	Second Requests	Ratio
1994	2128	73	3.4%
1995	2612	101	3.9%
1996	2864	99	3.5%
1997	3438	122	3.5%
1998	4575	125	2.7%
1999	4340	113	2.6%
2000	4749	98	2.1%
2001	2237	70	3.1%
2002	1142	49	4.3%
2003	968	35	3.6%

Source of data: FTC and Antitrust Division Annual Reports to Congress, FYs 1994-2003.

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	1998	1999	2000	2001	2002	2003
Second Requests (Total)	125	113	98	70	49	35

G. Examples of Costs Borne by Companies in Second Requests

Parties that must comply with second requests incur a variety of very substantial costs. Unfortunately, the Antitrust Section is not aware of any study that quantifies the cost of compliance.²¹ Anecdotal estimates of direct costs range from an average of \$5 million, up to as much as \$20 million in complex transactions.²²

Some of the primary “buckets” of costs incurred by companies in complying with a second request include:

- Legal fees
- Economists
- Computer/data processing vendors (for the processing of e-mail, electronic documents and electronic data)
- Copy vendors
- The opportunity cost of time spent by parties’ employees in gathering documents and data to respond to the second request
- The cost of delay in consummating the transaction. This is particularly difficult to quantify, and includes not only any delay in realizing the benefits of the merger, but also the diminution in value of the assets associated with the delay in clearing a transaction.

Number resulting in challenges, consents, restructurings, etc.	84	77	80	55	34	35
% resulting in challenges, etc.	67%	68%	82%	79%	69%	100%
Antitrust Division						
Number resulting in challenges, consents, restructurings, etc.	79	68	55	43	22	15
% resulting in challenges, etc.	64%	69%	87%	74%	45%	100%
Federal Trade Commission						
Number resulting in challenges, consents, restructurings, etc.	46	45	43	27	27	20
% resulting in challenges, etc.	72%	66%	74%	85%	88%	100%

Source of data: FTC and Antitrust Division Annual Reports to Congress, FYs 1998-2003; Appendix A of Annual Report, FY 2003.

²¹ The ABA Merger Process Task Force is attempting to collect a variety of second request cost and related data from law firms that regularly represent parties complying with second requests. It is unclear at this time whether this effort will succeed in collecting sufficient data to be representative.

²² See footnote 2 supra.

H. Options to Reduce the Burden of Second Request Compliance

There are a variety of different options, with various permutations, to reduce the burden of second request compliance. . The options are not mutually exclusive, and it may be that a combination of two or more of the options outlined below might most effectively address the private bar's concerns.

Second requests are currently structured to provide the government with enough evidence to challenge a proposed acquisition in court. The agencies, however, litigate only a fraction of the mergers that draw a second request. Consequently, most parties that respond to a second request provide far more data and information than is required for an agency to determine whether or not to challenge a merger. The Antitrust Section believes that second requests should be drafted to uncover relevant, probative facts -- not to uncover every *potentially* relevant fact. Several options to reduce the burden of second request compliance are discussed below.

1. Option 1 -- Reduce the Scope of Second Requests

One approach would be to make second requests more focused. This could be done by limiting the number of document requests and/or interrogatories that an agency may include in a second request. Many federal courts have adopted a similar approach to manage discovery in private litigation.

A second approach would be to limit the number of custodians (employees) that the government may require a party to search for the production of data and documents.²³ Since there is a direct, almost linear, relationship between the number of custodians searched and the cost of second request compliance, limiting the number of custodians is probably one of the most effective ways to reduce the burden of compliance.

2. Option 2 -- Allow the Agencies a "Second Bite" at the Discovery Apple

Another option would be to allow the agencies another opportunity for discovery from the parties in any transaction that is headed to litigation. This might reduce the incentive for the agencies to make their second requests so broad and all encompassing. The agencies currently, of course, have that option through civil discovery, but they generally have not used that weapon in second request situations.

²³ A permutation of this approach would include a sliding scale of the number of custodians based on the dollar size of the transaction (e.g., 25 custodians for a \$1 billion transaction; 35 custodians for a \$3 billion transaction, etc.)

3. Option 3 – Designate a Federal Magistrate, Instead of a Senior Agency Official, to Rule on Appeals Concerning Second Requests

A third option would be to designate a Federal Magistrate to rule on appeals by parties of staff decisions related to second request compliance. Both the Antitrust Division and the FTC have adopted internal appeals processes, with a senior agency official acting as the decision maker. There have reportedly been a few appeals at each agency. However, the Antitrust Section believes that the internal appeals process has not been successful.

Several years ago, Congress considered creating a second request appeals process with a Federal Magistrate. Both agencies opposed the proposal, largely on the grounds that a Federal Magistrate would not have the understanding and expertise to resolve complex discovery disputes.²⁴ In the face of such agency opposition, the legislation was amended and Congress directed the Antitrust Division and the FTC to develop an internal appeals process. At the time, it was thought possible that the agencies could develop robust, transparent, second request appeals processes that successfully addressed second request compliance issues.

Five years later, however, it is clear that the agencies have not, and, perhaps, cannot, create a credible internal second request appeals process. Today, the agencies and the private bar have five years experience with the internal appeals process. Private practitioners (including both those with and without direct experience with these internal appeals procedures) have expressed serious reservations about the process. There is no transparency with respect to the appeals process. Nor is there any development of “case law” or precedent resulting from such decisions. In addition, when the decision maker is a senior member of the FTC or the Antitrust Division, there is inherent skepticism about the impartiality of any internal agency appeals process.

Given these limitations of the current appeals process, the Antitrust Section recommends re-consideration of an amendment of the Clayton Act to establish a formal second request compliance appeals process with a designated Federal Magistrate. The Antitrust Section believes that the agencies’ concerns about Federal Magistrates do not withstand careful scrutiny. Federal Magistrates routinely resolve complex discovery disputes before the courts. Thus, it is difficult to understand why second request compliance issues would be too complex for Federal Magistrates to understand and resolve.

²⁴ See comments of Senator Leahy on Passage of S.1854, 146 Cong. Rec. S10920-21 (daily ed. October 24, 2000).

4. Option 4 -- Retrospective Study

Efforts to assess the burdens of second request compliance and to recommend possible solutions are hampered by the paucity of reliable data. The Antitrust Section is not aware of any thorough study of the costs of second request compliance. Nor is the Antitrust Section aware of any agency study or analysis as to which section(s) of a second request produce the most useful data and/or what level of company employees tend to produce the most probative documents.²⁵

Consequently, a fourth option is for the Modernization Commission to direct the agencies to conduct a thorough review of second request compliance. This effort could include: (1) a retrospective study of second requests; and, (2) the collection of data from parties with respect to cost of compliance. After completion of such a review, the Modernization Commission could evaluate potential statutory and/or internal agency reforms.

Among the issues that could be examined in a such a review are the following:

- Which second request specifications have historically yielded the most useful information? Which have proven least useful?
- Which categories of documents obtained by the agencies are the most useful? Which are typically least useful?
- Which type and level of employees have provided the most probative documents?

With respect to the cost of compliance, the review could include the collection of data on the following types of expenses/costs:

- Legal fees
- Economists
- Computer/data processing vendors
- Copy vendors

²⁵ We understand, however, that such an internal analysis may be being undertaken.

- Hours spent by party employees responding to interrogatory and document requests

Other types of information that could prove useful to collect include:

- Elapsed time from date of second request issuance to merger clearance by transaction
- Elapsed time from date of second request issuance to certification of second request compliance
- Number of second requests where parties certified substantial compliance
- Data on previously issued “modifications” to second requests to determine if certain types of requests are routinely modified to alleviate burden

5. Option 5 -- Amend Clayton Act 7 to Create Form CO-like Submission

The Antitrust Section also considered whether more radical changes should be made to the HSR filing process, for example by changing the filing to more closely resemble the European Commission’s Form CO, or introducing a system similar to the “long form” and “short form” approach used in Canada. For several reasons, the Antitrust Section has decided against recommending such changes.

First, in the overwhelming majority of cases, the current HSR form and the initial 30-day HSR review period permit the reviewing agency to conduct an antitrust review of sufficient thoroughness. It is doubtful that imposing the significant additional burden of a preparing a filing similar to Form CO or the Canadian long-form filing would be justified in terms of enabling the agencies to make “better” decisions on which transactions required further investigation. Second, parties can, and often do, today submit detailed position papers to the agencies in transactions that present substantive antitrust issues. Finally, because the agencies can challenge a merger only by seeking an injunction in federal court, the Antitrust Section does not believe that a move to a Form CO-like filing would meaningfully reduce the scope of any second request that might be issued for a given merger. The issuing agency likely would continue to seek significant amounts of information so that it could be prepared to litigate in the event that it decided to challenge the transaction.

II. ISSUE: SHOULD THE HART-SCOTT-RODINO MERGER PROCESS BE REVISED TO ADDRESS ISSUES RELATING TO THE NUMBER AND TYPE OF TRANSACTIONS REQUIRING PRE-MERGER NOTIFICATION?

The Antitrust Section does not recommend that the Hart-Scott-Rodino merger process be revised to address issues relating to the number and type of transactions requiring pre-merger notification. In 2000, Congress enacted legislation increasing the “size-of-transaction” threshold from \$15 million to \$50 million. 21st Century Acquisition Reform and Improvement Act of 2000, S. 1854, 106th Cong. (2000). In addition, Congress indexed the threshold. The new, higher threshold appears well designed and has been effective in reducing the burdens imposed on both the private sector and the antitrust enforcement agencies by a threshold that had not been adjusted for inflation in over 20 years. For example, in FY 2000, 4,926 merger transactions were reported under the Act.²⁶ In FY 2002, the first full year of reported transactions under the raised thresholds, 1,187 transactions were reported. This number declined to 1,014 in FY 2003.²⁷

III. ISSUE: SHOULD THE HART-SCOTT-RODINO MERGER REVIEW PROCESS BE REVISED TO INCREASE THE TRANSPARENCY OF THE ENFORCEMENT AGENCIES’ DECISIONAL PROCESSES?

This issue reflects concern over whether the enforcement agencies’ decisional processes are sufficiently transparent to adequately inform parties of current enforcement policy. The International Competition Network, in which the Antitrust Division and the FTC are major participants, included transparency among its recommended merger review best practices.²⁸ Historically, the Antitrust Division and the FTC have endeavored to promote the transparency of their enforcement policies through a number of means. These have included joint promulgation of the *1992 Horizontal Merger Guidelines*, explanatory speeches by agency officials, FTC Commissioner Statements, DOJ Tunney Act disclosures, recitations in consent settlements and agency press releases clarifying the reasons for agency actions. More recently, the agencies have undertaken additional efforts to increase transparency. For example, both agencies have released reports retrospectively examining past merger

²⁶ FTC and DOJ, Annual Report to Congress Fiscal Year 2003, at 1.

²⁷ *Id.*

²⁸ See, e.g., International Competition Network recommendations, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES, at 22-23 available at <http://www.internationalcompetitionnetwork.org/mergers.html> (recommending dissemination of publicly available materials which, in addition to basic legislation, “reveal relevant case law, enforcement policies and administrative practices that clarify and develop the basic legal framework”); William Blumenthal, RECENT DEVELOPMENTS IN THE MERGER REVIEW PROCESS IN THE UNITED STATES AND THE INTERNATIONAL COMPETITION NETWORK, Conference on International Competition Enforcement, Tokyo, Japan (April 20, 2005), available at <http://www.ftc.gov/speeches/blumenthal/050516mergreviewprocess.pdf> (summarizes recent efforts in the United States).

enforcement activities.²⁹ In addition, the FTC has issued explanatory press releases or Commission statements illuminating the rationale for closing a number of merger investigations without enforcement action,³⁰ and, in several other merger cases, has provided detailed responses to public comments concerning proposed consent agreements.³¹ Finally, the FTC and the Antitrust Division are presently in the process of preparing a joint Commentary to the *Merger Guidelines*, which, as explained by FTC Chairman Majoras, is expected to be a “kind of guide to the *Guidelines* [that] informed by the experience of the last twelve years, should bring greater transparency to the agencies’ merger analysis and greater certainty to business and merger practitioners.”³²

The Antitrust Section lauds the agencies’ commitment and very meaningful efforts to improve transparency and sees no need to recommend changes in the law or enforcement policies or practices in this area. While the Section considered proposals requiring that the agencies issue a reasoned statement of their conclusions in each matter in which a Second Request is issued or, alternatively, implement a practice similar to that employed by the European Commission of issuing at least a brief statement with respect to each clearance decision, such proposals were rejected. The drawbacks of these approaches -- e.g., the burden on agency resources and the potential tension with merger parties’ confidentiality rights -- were viewed as too great to outweigh any marginal increase in transparency beyond that afforded through current agency efforts. In lieu of recommending changes, the Antitrust Section encourages the agencies to remain vigorous in their commitment to the goal of transparency and to continue their current efforts and progress towards increasing transparency through such projects as the *Merger Guidelines* commentary.

²⁹ DOJ and FTC, Merger Challenges Data, Fiscal Years 1999 – 2003 (Dec. 2003), available at <http://www.ftc.gov/os/2003/12/mdp.pdf>; FTC, Horizontal Merger Investigation Data, Fiscal Years 1996-2003, available at <http://www.ftc.gov/opa/2004/02/horizmerger.htm>; Malcolm B. Coate and Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process: 1996-2003* (2005), available at <http://www.ftc.gov/os/2005/02/0502economicissues.pdf>.

³⁰ See, e.g., In the Matter of *Sunoco Inc. and Coastal Eagle Point Oil Company*, File No. 031 0139 (Dec. 2003); *Genzyme Corporation/Novazyme Pharmaceuticals, Inc.*, File No. 021 0026 (Jan. 2004); In the Matter of *Caremark Rx, Inc./AdvancePCS*, File No. 031 0239 (Feb. 2004); *Synopsys, Inc./Avant! Corporation*, File No. 021 0049 (July 2002); *Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc*, FTC File No. 021 0041 (Oct. 2004); *The Kroger Company/Raley’s Corporation* (Nov. 2002); In the Matter of *Phillips Petroleum Corporation and Tosco Corporation*, File No. 011 0095 (Sept. 2001); In the Matter of *AmeriSource Health Corporation and Bergen Brunswig Corporation*, File No. 011 0122 (Aug. 2001).

³¹ See, e.g., *Wal-Mart Stores, Inc., and Supermercados Amigo, Inc.*, File No. 021 0090, Docket No. C-4066 (Feb 2003).

³² See Remarks by Deborah Platt Majoras, Chairman, The Federal Trade Commission, ABA Antitrust Section Fall Forum, Nov. 18, 2004, available at <http://www.ftc.gov/speeches/majoras.htm>.