

**Summary of Antitrust Modernization Commission Hearing on
Hart-Scott-Rodino Pre-Merger Review Process
November 17, 2005**

The Antitrust Modernization Commission (“AMC” or “Commission”) held a hearing on November 17, 2005 to obtain testimony regarding the Hart-Scott-Rodino (“HSR”) Pre-Merger Review Process. The hearing focused on potential solutions to the growing compliance burdens resulting from (1) new data storage technologies that have dramatically increased the number of documents retained by companies and (2) the agencies’ increasing focus on obtaining the transactional data they need to generate the rigorous economic models that have supplanted structural analysis as the cornerstone of merger analysis. Although there was no consensus on precisely how second requests could be narrowed to address the explosion in the number of documents produced, all of the panelists agreed that the problem was a serious one, that reducing the number of custodians to be searched would have to be a key element of any solution, that any solution would require cooperation between the agencies and the parties, and that the solution should come from the agencies, not from the legislature. While none of the panelists were able to offer any concrete suggestions on how to address the burdens associated with the agencies’ increasing need to collect transactional data from the parties, they all agreed that it is a serious problem that warrants further study.

I. Summary of Written Testimony:

- A. Wayne Dale Collins. Partner at Shearman & Sterling LLP. Mr. Collins was formerly Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice

Dale Collins argues that the HSR Act provides an adequate framework for pre-merger review, but that there are some things the agencies could do to improve their implementation of that Act. First, Mr. Collins argues that the agencies should articulate clearer standards regarding their enforcement policies and prosecutorial decision-making. Second, the agencies should improve the efficiency of their pre-merger review processes by balancing the costs of compliance against the benefits. Third, the agencies should be more transparent in conducting their investigations. Fourth, senior management should actively manage merger investigations to create more uniformity in pre-merger investigation processes. Finally, the agencies should look for opportunities to increase their accountability by subjecting more of their decisions to judicial review.

- B. Susan A. Creighton. Director of the Bureau of Competition at the Federal Trade Commission.

Susan Creighton explains that two trends have led the FTC to do a complete review of their pre-merger investigation process. The first trend is technical. Companies have begun to retain ever-increasing volumes of documents because of the availability of low-cost electronic data storage. Thus, document productions have become more burdensome. The second trend is substantive. Merger analysis has shifted away from

structural presumptions and towards more data-dependent economic models. Thus, the FTC needs to collect more transactional data from the parties.

The FTC will be rolling out significant process changes designed to ameliorate these problems in the near future. For example, the FTC is considering changes such as limiting the number of custodians to be searched and reducing the time periods covered in second requests. The FTC is also considering changes that would reduce the burdens associated with preserving and producing back-up tapes and compiling privilege logs. The success of any of these reforms will be highly dependent on cooperation from the parties and their attorneys.

The FTC has also implemented internal changes to increase the efficiency of the pre-merger review process. For example, the FTC is expanding its capacity to handle electronic documents produced in a variety of formats and is increasing the amount of information available on its website. In addition, new internal processes are in place that will increase the involvement of senior management in every phase of the pre-merger review process.

C. J. Robert Kramer, II. Director of Operations of the Antitrust Division of the United States Department of Justice.

Robert Kramer begins by providing statistics demonstrating that, in the vast majority of cases, pre-merger review proceeds quickly and imposes minimal burdens on the parties. For example, between 2002 and 2004, 82% of merger transactions were cleared without either the DOJ or the FTC opening an investigation or requesting any information from the parties beyond the initial filing. Even in cases in which an investigation is opened, second requests are issued infrequently. For example, in 2004, fewer than 15% of investigations resulted in second requests. And, even when a second request is issued, investigations are frequently closed before the parties fully comply with the second request.

Although these statistics demonstrate that the pre-merger review process works quickly and efficiently most of the time, the Antitrust Division (“the Division”) recognizes that there is still work to be done to minimize the burdens associated with those few transactions that do result in second requests. The Division is currently reviewing historical merger challenge recommendations to determine which second request specifications solicited information and which custodians produced documents that were ultimately used in deciding to challenge the merger.

The Division is also attempting to reduce the compliance burden by drafting second requests more narrowly and by negotiating fast and limited investigations with counsel for the merging parties. However, these techniques can only succeed with the cooperation of the parties and their attorneys. The Division cannot limit the scope of an investigation unless the parties provide early and accurate information to the Division. Moreover, limiting the scope of investigations imposes significant risks on the Division

in the event of litigation. Thus, the Division may ask the parties to agree to appropriate post-complaint discovery in exchange for limiting the initial scope of the investigation.

- D. Mark D. Whitener. Senior Counsel for Competition Law and Policy at General Electric Company. Mr. Whitener was formerly Deputy Director of the Bureau of Competition at the Federal Trade Commission and is Editorial Chair of the ABA Antitrust Section's Antitrust magazine and a member of that Section's Merger Process Task Force.

Mark Whitener praises most elements of the United States merger enforcement process. However, he argues that now that companies are retaining more and more data as a result of the increasing availability of electronic data storage, the burden of complying with a second request has come to exceed the benefit to the government. Mr. Whitener warns that unless significant reforms are implemented to make the second request process more efficient, the problems with the second request process may undermine the business community's respect for the entire HSR pre-merger review system.

Mr. Whitener offers a concrete proposal to reduce the number of documents that must be collected, reviewed, and produced. Specifically, Mr. Whitener proposes that the agencies set a hard cap on the number of custodians to be searched and that they limit the time period covered by the second request to two years. Imposing these hard limits, which could only be deviated from in extraordinary circumstances and after approval from the highest levels of the agencies, would significantly reduce the burden of complying with a second request.

- E. Steven C. Sunshine & David P. Wales. Mr. Sunshine is the head of the Antitrust Practice Group at Cadwalader, Wickersham & Taft LLP and was formerly Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice. Mr. Wales is a partner in the Antitrust Practice Group at Cadwalader, Wickersham & Taft LLP and was formerly Counsel to the Assistant Attorney General in charge of the Antitrust Division at the U.S. Department of Justice.

Steven Sunshine and David Wales argue that the HSR process works reasonably well. However, after grouping transactions that are subject to HSR filing requirements into three basic categories and analyzing how the process works for each, they identify some areas that could be improved.

Sunshine and Wales refer to the first category of transactions as "No Brainers." "No Brainers" are transactions that do not present any serious antitrust problems. Sunshine and Wales offer several suggestions for more efficiently reviewing these transactions: (1) improve the clearance system; (2) reduce the number of 4(c) documents; (3) eliminate the requirement that companies report revenues organized by NAICS codes; (4) consider eliminating HSR filing fees; and (5) adopt a mechanism for extending the initial waiting period by agreement.

Sunshine and Wales use the term “Purgatory” to refer to the second category of transactions. Transactions in this category are, for the most part, unobjectionable, but raise serious issues in a discrete area. Sunshine and Wales suggest that, for these transactions, the agencies should (1) adopt more of a balancing standard for evaluating remedies (2) adopt uniform processes for fashioning remedies; and (3) allow parties to “presell” assets that present competitive concerns.

Finally, there are “Show Stoppers” – transactions that present serious antitrust issues that cannot be cured because a divestiture would destroy the value of the transaction as a whole. Review of these transactions could be made more efficient by adopting procedures that will get the case to court as quickly as possible. For example, the agencies could adopt a different standard of compliance for cases that are clearly headed to litigation. Another option would be for the agencies to agree that disputes over substantial compliance could be worked out in the context of civil discovery once the case is filed in exchange for the parties’ agreement to a temporary restraining order.

II. Highlights from Questions and Answers (Paraphrased):

- A. *What do the agencies think about Mr. Whitener’s suggestions that, absent extraordinary circumstances, second requests should be limited to two or three years and fifteen to thirty custodians?*

Kramer: I agree that Mr. Whitener’s proposal is a good-faith effort in the dialog, and we are open to these types of suggestions. But how do we determine what an appropriate cap on the number of custodians would be? Would we have different rules for different industries? Another way to reach a similar result would be to focus on limiting searches by positions. Perhaps we could limit it to senior management and product management. As for limiting the time, I do not have a clear opinion on that. Limiting the time to two years would cut the number of documents in half, but we do use older data because our economists are interested in natural experiments, such as previous entry into or exits from the market.

Creighton: We agree that two of the key variables are the time period, and, most important, the number of custodians. Cooperation by parties, such as providing timely and accurate organizational charts, is critical to our ability to limit the number of custodians. The timing issue is more intractable. As merger reviews have gotten more sophisticated, the decisions turn less on “hot docs” and more on looking at historical industry data.

Collins: As a defense attorney, I am all for more limitations rather than fewer. But as a former government official, I am leery of putting limits on the agencies.

Wales: It would be hard to find a one size fits all solution.

Whitener: I am not advocating legislation. Any caps should be self-imposed on the agencies, and it should be the agencies that decide what limits will work. I also agree that good faith is very important to making any reforms work.

B. I would like to hear the panelists' thoughts on this proposal. If the notifying party checks a box when it makes its HSR filing, the following procedures would apply: (1) The party would provide complete and accurate organization charts at the time of the initial filing; (2) The party would also provide the name of a corporate officer who could answer any questions regarding the company's organizational structure; (3) In exchange for providing this information, there would be a cap on the number of custodians to be searched based on the dollar value of the transaction. If the agency needed information from additional custodians, it would have to obtain permission from a judge. This procedure would be optional. If the parties did not opt-in, the normal procedures would continue to apply.

Collins: There is still the issue of having a hard constraint on the number of custodians, particularly since some transactions involve numerous different products. Also, I would have to tell my clients not to check the box – they don't have a clue what an accurate organizational chart looks like and couldn't prepare one if their lives depended on it.

Creighton: Without getting into the nitty-gritty, the proposal does recognize the importance of having cooperation from the parties. There is an iterative nature to this process. We would have to figure out ways of dealing with the fact that the parties do not always know what defenses they will raise. Having to go to court to increase the number of custodians would create a real inflexibility.

Kramer: How do you determine what the cap on the number of custodians would be? Shouldn't it vary based on the number of products? Should the agency be in the position of having to say, for example, "should I look at efficiencies or have I already used up my people?" As for having to go to court, I am not sure how to integrate that into the process. There are very few situations aside from wiretapping where an executive agency has to go to a court to get discovery. And what happens if the parties want an early preliminary injunction hearing?

C. *Could the NAICS codes be eliminated?*

Creighton: We are in the process of getting updated to the 2002 codes. We would not want to eliminate use of the codes because they are indispensable to review by the pre-merger notification office to determine overlaps.

Kramer: NAICS codes are very important to our initial review. They are one of the first things the staff looks at.