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The United States: An Ideal Merger Review Process?

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I. INTRODUCTION

At the time the Hart-Scott-Rodino Act came into force in the late 1970s, the United States was virtually alone in investigating and challenging mergers and acquisitions. For years, the United States had been proselytizing merger control to jurisdictions around the world. Today, there are scores of jurisdictions with merger control regulations that involve some form of mandatory or voluntary notification and waiting period requirements. Almost all countries apply their merger control regulations extraterritorially to foreign parties doing deals in other jurisdictions. Local effects requirements vary widely and in some cases have no practical impact in limiting the scope of a local enforcement agency's jurisdiction. With the explosion of merger control regulations around the world have come inevitable conflicts over filing requirements, investigation burdens and inconsistent substantive outcomes. These conflicts have been the subject of extensive international discussion for well over ten years. In light of this proliferation, it is now fair to ask: Is there too much global merger control? Or at least: Is there any way to identify and adopt rational and efficient procedures that produce predictable outcomes and minimize burden and delay?

This paper outlines the key features of the merger review process in the United States. It describes the procedural and substantive aspects of U.S. merger review, with an eye toward their impact on global firms and transactions. It also discusses the more significant areas in which U.S. merger process has been criticized as being overly burdensome and unpredictable, with some explanations as to why these deficiencies exist. The paper also summarizes some of the things that have been implemented or proposed to ameliorate these deficiencies and identifies some of the key strong points of the U.S. system that merit emulation around the world.

II. BASIC OVERVIEW OF THE HSR REVIEW PROCESS

Section 7 of the Clayton Act prohibits mergers that may tend to lessen competition in any line of commerce (product market) in any section of the county (geographic market). The principle enforcers of Section 7 are the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). In addition, the attorneys general of the individual States can seek to stop mergers under Section 7. While the States frequently review mergers, their participation is almost always in conjunction with the reviewing Federal agency. Finally, private parties can challenge mergers under Section 7, but their participation in merger control has been limited.

The process of reviewing mergers for possible investigation and enforcement action takes place under the auspices of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act").[1] Parties to covered transactions must notify the FTC and the DOJ of their proposed transaction by filing a Notification and Report Form for Certain Mergers and Acquisitions ("HSR filing"), which contains information about the parties and the transaction. Once the HSR filing is submitted, the parties must wait a specified period before closing their transaction. Only one of the agencies will investigate a given transaction, and so there is an allocation (or "clearance" as it is called) process, pursuant to which the FTC and the DOJ divide up incoming filings. This allocation process is roughly based on past experience with a product or industry; however, in many cases it is not clear which agency has the better experience, and the process becomes a negotiation between the two.

It is important to understand that the HSR Act is procedural, not substantive. HSR simply prohibits the consummation of a transaction pending the submission of a notification form and the observance of a waiting period. The expiration or termination of the waiting period does not constitute an official approval of the transaction. Transactions that clear HSR, or that are exempt or fall below the jurisdictional thresholds, can be challenged by the FTC, DOJ or private parties, even after closing, although this rarely happens. Moreover, HSR does not give the FTC or DOJ the ability to stop a transaction. HSR gives the FTC and DOJ the means to investigate a transaction before consummation so that the reviewing agency can exercise its prosecutorial discretion to challenge a transaction in court. A pending transaction can be blocked or restructured only through an injunction proceeding in Federal court. And while the FTC can challenge a transaction through an internal adjudicative proceeding, it can obtain a pre-consummation injunction only from a Federal court.

A. Jurisdictional Thresholds

The filing and waiting period requirements of the HSR Act must be observed for transactions that meet the statute's jurisdictional threshold requirements and do not qualify for an exemption. The jurisdictional thresholds, exemptions and required information are determined with reference to the HSR "persons" involved in the transaction. The Premerger Notification Rules[2] ("Rules") identify the parties to a transaction as the "acquiring person" and "acquired person." For purposes of HSR, a "person" (acquiring or acquired) is defined as the group of entities starting at the top with "ultimate parent entity" (an entity not controlled by any other entity) and including all entities controlled directly or indirectly by the ultimate parent entity.

The HSR Act requires a notification (from both the acquiring person and the acquired person) if a transaction meets three criteria: impact on interstate commerce, the size-of-transaction threshold, and the size-of-person threshold. The transaction-size and party-size thresholds are designed to exclude from coverage small transactions between small parties. A transaction will meet the interstate commerce threshold if either of the parties is engaged in

[1] 15 U.S.C. § 18a, as amended.
[2] 16 C.F.R. §§ 801-03.

commerce or in any activity affecting commerce. This threshold is met virtually in every transaction.

Size-of-Transaction Threshold: If the value of voting securities and assets the acquiring person will hold as a result of the transaction exceeds $50 million (as adjusted),[3] the size-of-transaction threshold is satisfied.

Size-of-Person Threshold: If (1) one person has at least $100 million (as adjusted) in annual sales or total assets (according to the most recent balance sheet and year-end income statement), and (2) the other person has at least $10 million (as adjusted) in annual sales or total assets, the size-of-person threshold is satisfied. When the acquired person is not engaged in manufacturing, only its total assets, and not its sales, are considered for the size-of-person threshold, unless its sales are at least $100 million (as adjusted). Note that when the value of the transaction exceeds $200 million (as adjusted), the size-of-person threshold does not apply and HSR is applicable regardless of the size of the parties.

COMMERCE TEST SATISFIED?	**SIZE OF TRANSACTION** (value of acquired voting securities and assets)	**SIZE OF PERSON** (sales or assets)	**REPORTABLE?**
No	N/A	N/A	***NO***
Yes	$50 million ($59.8 million) or less	N/A	***NO***
Yes	Greater than $50 million ($59.8 million); AND $200 million ($239.2 million) or less	Neither party has $100 ($119.6 million)	***NO***
Yes	Greater than $50 million ($59.8 million); AND $200 million ($239.2 million) or less	One party has at least $100 million ($119.6 million); AND the other party has at least $10 million ($12 million)	***YES***
Yes	Greater than $200 million ($239.2 million)	N/A	***YES***

HSR covers acquisitions of minority as well as controlling interests. Accordingly, HSR requires filings each time a designated notification threshold is exceeded. There are four notification thresholds. A new filing is required anytime a new notification threshold is

[3] The various threshold amounts are adjusted each year based on changes to the gross national product. See the chart below for the current threshold amounts.

exceeded, except that once an acquiring person has acquired 50 percent or more of the voting securities of an issuer, no further filings are required to increase that stake.

ADDITIONAL SIZE-OF-TRANSACTION THRESHOLDS
Voting securities or assets valued at $100 million ($119.6 million) or greater but less than $500 million ($597.9 million)
Voting securities or assets valued at $500 million ($597.9 million) or greater
25% of the voting securities, if the 25% is valued at greater than $1 billion ($1.1958 billion)
50% of the voting securities of an issuer, if the 50% is valued at greater than $50 million ($59.8 million) *Once the 50% is crossed, subsequent acquisitions of securities of that acquired entity are exempt.*

The Rules require that the acquiring person consummate the filed-for acquisition within one year after the expiration of the waiting period. If the transaction is not completed in one year, a new filing would be required. Once the filed-for acquisition is timely consummated, the acquiring person can make additional acquisitions from the acquired person, up to the next higher notification threshold, for a period of five years, after which a new filing would be required for acquisitions that exceed the previously filed-for threshold.

HSR requires the acquiring person to pay a filing fee. The fee varies with the size of the notified transaction. Although the Rules require the buyer to pay the fee (procedurally, the fee must be remitted to the FTC by the buyer), the parties often agree to share this expense.

SIZE OF TRANSACTION	**FILING FEE**
Less than $100 million ($119.6 million)	$45,000
$100 million ($119.6 million) or more, and less than $500 million ($597.9 million)	$125,000

$500 million ($597.9 million) or more	$280,000

B. Exemptions

The HSR Act and Rules identify certain transactions that are exempt from the filing requirements. In general, the exemptions are meant to cover transactions that are likely to pose no competitive concerns, are principally foreign, or that are subject to other regulations. The FTC (as opposed to the DOJ) administers that HSR Act and Rule, and has the authority to interpret the exemptions contained in the statute and to add new exemptions as circumstances warrant. Exempt transactions include acquisitions of goods and realty in the ordinary course of business; acquisitions that do not exceed ten percent of an issuer's voting securities and that are made solely for the purpose of investment; intra-person acquisitions; certain acquisitions by institutional investors; acquisitions subject to other regulations; acquisitions that do not increase the buyers share of the issuer's voting securities; and acquisitions pursuant to DOJ or FTC consent decrees.

Of particular note here are the exemptions for foreign transactions.[4] First, acquisitions of assets located outside the United States are exempt, unless the assets generated sales in or into the United States of more than $50 million (as adjusted) in the last fiscal year. Second, acquisitions by U.S. acquiring persons of foreign issuers are exempt, unless the foreign issuer (1) directly or indirectly holds U.S. assets valued in excess of $50 million (as adjusted), or (2) generated sales in or into the United States of more than $50 million (as adjusted). Third, a non-controlling acquisition of a foreign issuer by a foreign acquiring person (i.e., the ultimate parent entity is headquartered and incorporated outside the United States) is exempt, regardless of the how much U.S. business is done by the acquired foreign firm. Acquisitions of control of foreign issuers by foreign acquirers are also exempt, unless the acquired foreign firm, directly or indirectly, holds U.S. assets valued in excess of $50 million (as adjusted) or generated sales in or into the United States in the last fiscal year in excess of $50 million (again, as adjusted). Finally, acquisitions of control by foreign persons of foreign issuers are exempt (even where the foreign issuer exceeds the $50 million U.S. assets and sales thresholds noted above), where both the acquiring person and acquired person are foreign, the value of the overall transaction does not exceed $200 million (as adjusted), and the acquiring and acquired persons do not collectively hold aggregate total assets in the United States valued at $110 million (as adjusted)[5] or more, and did not collectively generate aggregate sales in or into the United States exceeding $110 million (as adjusted). Thus, for HSR to apply to transactions between two non-U.S. firms, one or both of parties together must have a significant U.S. presence and the acquired entity must do a significant amount of business in the United States.

HSR's technical coverage rules give rise to incentives to structure transactions in ways to avoid HSR's filing and waiting period requirements. Any such efforts are subject to the Act's rule against devices for avoidance: "a transaction or device entered into or employed for the

[4] 16 C.F.R. §§ 802.50, 802.51.
[5] Currently the figure is $131.5 million.

purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction."[6] Civil penalties of up to $11,000 per day can be imposed for a failure to comply with HSR. Usually, the acquiring person is fined for non-compliance. However, where the seller is complicit, for example, when the seller prematurely conveys operational control over its business before HSR is cleared, the seller can be fined as well. The per diem civil penalties continue to accrue for so long as the voting securities or assets are held without the requirements of the Act having been observed. Thus, there is no maximum penalty nor is there a statute of limitations for violations of the HSR Act. In the last several years, the government has filed four HSR enforcement proceedings.

C. Waiting Periods

The parties must observe a statutory waiting period before closing their transaction. Typically, the waiting period begins when both parties submit complete filings. However, in cases where the buyer purchases voting securities from a third party (as in an open market purchase), the waiting period begins with the acquiring person files.

The waiting period is 30 calendar days for most transactions, and 15 calendar days for transactions involving a cash tender offer or acquisitions in bankruptcy proceedings. If the last day of the waiting period is a Saturday, Sunday, or holiday, the waiting period will end on the next business day.

The DOJ and the FTC can terminate the waiting period before the expiration date ("early termination"), at the request of either party. Between 1997 and 2006, the DOJ and FTC granted approximately 77 percent of the requests for early termination.[7] Where early termination is appropriate, it is typically granted halfway into the 30-day waiting period. However, it is not uncommon for early termination to be granted toward the end of the period in cases where the reviewing staff had to do some work to confirm that the transaction posed no competitive concerns.

On the other hand, if a transaction warrants a more in-depth investigation, the reviewing agency can extend the waiting period by issuing a request for additional information and documents (called a "second request"). This request for additional information must be issued before the initial waiting period expires. Only one such request that extends the waiting period can be made. Consequently, the agencies have an incentive to protect themselves by taking their "one bite at the apple" at the end of the initial waiting period, and to make that one bite as big as possible to ensure that no relevant information is missed.

Once the second request is issued, the statutory waiting period is extended until 30 days after the parties have provided the information and document demanded in the second request. In the case of cash tender offers or bankruptcy transactions, the statutory waiting period is

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[6] 16 C.F.R. § 801.90.

[7] *See* Federal Trade Commission Bureau of Competition and Department of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report, Fiscal Year 2006*, Appendix A.

extended until 10 days after the acquiring person has complied with the second request. Thus, the second request waiting period varies with the time it takes to comply with the request. Typically, it takes several months for both parties to comply. Accordingly, as a practical matter, the issuance of a second request extends the waiting period four to five months – and sometimes longer. Note that "early termination" is also available in connection with the second request waiting period.

Once the second request waiting period expires, no further waiting periods can be imposed by the FTC or DOJ. Only a court can further extend the waiting period. It is common, however, for the parties and the reviewing agency reach a timing agreement, pursuant to which the parties agree to refrain from closing the transaction, regardless of whether the HSR waiting period has technically expired.

D. HSR Form – Information Required

One of the benefits of the HSR process is that only a limited amount of information is required in the initial filing. The HSR Form identifies the parties to a transaction and certain financial information of the filing company. Financial statements and certain documents filed with the U.S. Securities and Exchange Commission must accompany the HSR Form. Each party must categorize its revenues by North American Industry Classification System ("NAICS") codes. Categorization by NAICS codes allows the agencies to determine whether the parties to a transaction have potentially overlapping lines of business. Both parties also must provide information about their corporate structure and minority shareholders and shareholdings. With respect to the revenue and corporate structure information, the acquiring person must include information regarding all of its operations worldwide, but acquired person must limit the information to the entities or assets being acquired. Also, the acquiring person is required to identify previous acquisitions in areas in which the NAICS codes overlap.

Of special note are the documents that must be submitted pursuant to Item 4(c) of the HSR form. These so-called "4(c)" materials are documents prepared by or for officers or directors of the filing person that analyze the transaction in question in terms of markets, market shares and other competition-related topics. For the most part, it will be the 4(c) documents that provide the reviewing agency with the most significant overview of the competitive aspects of the transaction, especially with respect to transaction in markets the reviewing agency is not familiar with.

E. Second Request – Information Required

While the initial HSR filing requires the submission of very little information, a second request effectively asks for virtually every significant business document relating to the products under investigation. A second request asks for information going back several years about the company's corporate structure, strategic and marketing plans, financials and budgets, R&D efforts, competition and competitors, pricing policies and prices, trade association activities,

entry conditions, and potential efficiencies.[8] A second request usually asks for "all documents," including electronic documents and emails – relating to the topics covered. There are also a set of interrogatories for which written responses must be prepared. In addition, it is common for the reviewing agency to ask for transaction-specific pricing data so that it can perform econometric analyses of the market.

III. SUBSTANTIVE STANDARDS

Over the past 20 years or so, a consensus has emerged in the United States over the basic substantive merger standards. The ultimate question is whether it will create or enhance market power; that is, whether the transaction will cause prices to go up, output to go down, or quality or technological development to deteriorate in a relevant market. The analytical framework used by the antitrust authorities (and generally supported by case law) to answer this question is embodied in the *1992 Horizontal Merger Guidelines* (the "Guidelines"), which were issued jointly by the FTC and the Department of Justice. Under the Guidelines (and the case law), a presumption of illegality is established if the transaction creates an undue market share in a highly concentrated market. The market-share presumption can be rebutted by a showing by the parties that the market shares are not a good proxy for competitive effects. The burden then shifts back to the government (plaintiff) to show that the transaction is in fact anticompetitive.

Thus, the first step in analyzing the competitive impact of a transaction is to define a relevant market (which will have both product and geographic dimensions). This process involves identifying the smallest group of products for which a hypothetical monopolist (*i.e.*, the only current and future wholesale distributor of videos) would be able to profitably impose a "small but significant and non-transitory increase in price" above prevailing or likely future price levels. In this analysis, a hypothetical price increase of 5-10% is typically employed.

After the market is defined, market shares and market concentration are calculated. The Guidelines use the Herfindahl-Hirschman Index ("HHI") to determine the level of concentration in the market. The HHI is calculated by summing the squares of the market shares of all the competitors in the relevant market. For example, the HHI for a market with five participants, each with an equal market share, would equal $20^2 + 20^2 + 20^2 + 20^2 + 20^2$, or 2000. The significance in the difference in the pre-merger and post-merger HHI figures, or the change in HHI,[9] depends on the level of concentration of the relevant market. According to the Guidelines, if (1) the post-merger HHI is less than 1000, or (2) the post-merger HHI is between 1000 and 1800, and the change in HHI is less than 100, or (3) the post-merger HHI is above 1800, and the change in HHI is less than 50, then the proposed merger generally requires no additional analysis. In other words, where post-transaction market concentration is low, or where the transaction has a trivial impact on concentration, the transaction is generally presumed to be lawful without substantial further inquiry. On the other hand, where a transaction results in high market shares in a concentrated market, the Guidelines call for a more detailed analysis to

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[8] The DOJ's and FTC's model second requests can be found at http://www.usdoj.gov/atr/public/220239.htm and at http://www.ftc.gov/bc/hsr/introguides/guide3.pdf, respectively.

[9] The change in HHI can also be calculated by doubling the product of the market shares of the two merging parties.

determine whether a presumption of anticompetitive effect can be overcome by the realities of the marketplace.

The so-called "competitive effects" portion of the Guidelines sets forth a variety of factors to be considered in addition to market concentration to determine whether the transaction will increase the likelihood that market participants will be able to act anticompetitively. In making this determination, the reviewing agency will evaluate whether the transaction will actually result in higher prices, lower output levels, or deterioration in quality or technological development. These anticompetitive effects can take place either through coordinated interaction among the competitors remaining after the transaction, or through the combined firm's unilateral exercise of market power created by the transaction. Factors relevant in determining whether the transaction will result in anticompetitive effects include, among other things, changing market conditions, ease of entry, the nature of the products under consideration, the ability of small firms rapidly to increase sales or of non-U.S. firms to increase exports to the United States, the conduct of firms in the market, the size of the merged firm in relation to other firms in the market, the intensity of competition between the products of the merging firms relative to competition with other firms, and, in some cases, the transaction-specific efficiencies (*e.g.*, production cost savings) the transaction will generate.

Over the past 20 years, both the agencies and the courts have moved away from market share presumptions towards a more in-depth analysis of the affected market and whether the merger in fact will create or enhance market power. Courts increasingly look beyond market shares and HHI indices, and demand evidence of effects. And the agencies, having incorporated economic concepts into merger analysis, have come to question the theoretical connection between market concentration and market performance. This move away from legal presumptions has affected the merger review process in several significant ways. The amount of information needed to analyze a merger has increased significantly. What is gained in analytical flexibility is counterbalanced by a dramatic increase in the amount of information needed to do case-by-case evaluations of mergers. The FTC and DOJ must now do much more than simply demonstrate the concentration as increased appreciably in a relevant market. They must have evidence that a merger in fact will be anticompetitive. And, since the reviewing agency must formulate a litigation-ready theory of anticompetitive effect (as opposed to determining illegality based on shares and concentration) from the information it obtains from the parties and others during the investigation, there is an incentive to leave no stone unturned when asking for documents. Moreover, the movement away from presumptions has made the process less transparent. Without clear-cut presumptions, it is often difficult to assess whether a transaction is anticompetitive until all the evidence has been collected and examined. This makes it difficult to assess the antitrust ramifications of a transaction at the time the transaction is being planned.

IV. DEFICIENCIES AND REMEDIAL EFFORTS

Understanding the procedural nature of HSR helps to understand the bases for the most common criticisms of the HSR process. In the first place, merger review is complicated and fact intensive. Any serious investigation of a problematic deal will involve an extraordinary effort by the reviewing agency. However, HSR gives the reviewing agency just one opportunity to ask for information the submission of which is tied to timing of the waiting period the agency has to

review a the transaction. If the information is not asked for in this request, in all likelihood it will not be provided in a timely manner. Thus, to be safe, the reviewing agency will typically include a broad request for information in the formal request. Furthermore, the team investigating a transaction knows that the matter may end up in Federal court. Given the exigencies of M&A transactions, most merger litigations are done on an expedited basis. Consequently, a merger investigation takes on the characteristics of litigation discovery and positioning. The reviewing staff wants as much information as it can get and as much time as possible to prepare for potential litigation. The merging parties want to get their deal done quickly, and they want to control as best they can what information the staff obtains and minimize the time the staff has to prepare for court. Thus, it is not surprising that the agencies have been criticized for issuing overbroad second requests that impose substantial costs and lead to delay. At the same time, it is not surprising that many of the efforts made by the agencies to address these criticisms have not been embraced by merging parties. Many of these measures ask parties to be more cooperative in identifying competitive concerns (a reasonable request if the objective is to identify and stop anticompetitive mergers) and to provide the agencies with more time to review a transaction in exchange for narrowing the scope of a second request.

At bottom, an investigation of a problematic merger will never be easy or cheap, no matter how efficient the process is. It usually takes months for the parties to collect and process all the information responsive to a second request. And, as it has become cheaper to create and store electronic documents (and as regulations mandate more expansive document retention policies), the number of documents that would be responsive to a second request has likewise expanded. In addition, responding to a second request imposes significant demands on the company's executives, who must be actively involved in the process. Moreover, the delay resulting from a second request can adversely affect the company's relationships with customer and suppliers.

The burden of an in-depth merger review is compounded by shared jurisdiction. First, the FTC and the DOJ share jurisdiction and must allocate each transaction between them. This "clearance" process not infrequently leads to conflict. In some cases, the clearance process takes most of the initial 30-day waiting period, necessitating an extended investigation that otherwise might have been completed during the initial period. Furthermore, there are procedural and, to a lesser extent, substantive differences between the FTC and the DOJ. For example, the consent decree policies and procedures differ markedly. The FTC has the power to adjudicate merger challenges internally before an administrative law judge, while the DOJ must litigate the ultimate merits in Federal court. The fact that the FTC is a collegial body with five voting commissioners leads to a different review process from the process at the DOJ, which has a single decisionmaker at the top. And, while both the FTC and the DOJ use the same guidelines and are subject to the same caselaw, there are opportunities for differing substantive positions that could lead to inconsistent outcomes. Second, merger enforcement is shared with the States. While the States do not have the benefit of the HSR notification and waiting period rules, they frequently participate in merger investigations that are conducted by the DOJ or the FTC. In these investigations, the states ask for documents and seek to participate in any settlement discussions. As a consequence, State merger enforcement typically adds costs to the review process.

The burdens associated with concurrent state and federal jurisdiction has been an issue for some time. Recently, the Antitrust Modernization Commission ("AMC") recognized that while state enforcement can play a useful role in merger enforcement, concurrent jurisdiction can result in uncertainty, conflict, and additional burdens to merging parties and therefore, ultimately, to consumers. The AMC recommended that federal and state antitrust authorities further coordinate their merger-enforcement activities and seek to avoid subjecting companies to multiple and inconsistent proceedings by harmonizing their application of substantive antitrust law and making data requests and confidentiality regulations as consistent as possible. Time will tell to what extent the antitrust authorities act upon these recommendations and what benefits will result.

The agencies have attempted to reduce the costs to parties during the merger review process, and have introduced reforms designed to alleviate the burdens associated with an investigation. For example, in order to mitigate the inflexibility of the "one bite at the apple" second request option at the end of the initial 30 day waiting period, the agencies have implemented a "pull-and-refile" option that permits the parties to resubmit their original HSR filings, with Item 4(c) updated, but without the imposition of another filing fee. This procedure allows the parties to give the reviewing agency more time to vet a transaction without triggering a second request. In addition, if a second request is issued, the agencies are in the appropriate case are amenable to a "quick look" procedure that focuses on a narrow subset of documents and information that might resolve a limited number of dispositive issues. If so, the second request waiting period could be terminated without the parties having to comply with the full-blown request. Both the pull-and-refile and the quick look process have been used successfully to limit burden of an investigation while giving the agency the information it needs to evaluate the transaction. There are trade-offs in opting for these procedures, however. There is always the risk that the reviewing agency will not be able to resolve its concerns, and full compliance will still be necessary, but with more time added to the process.

The agencies have also attempted to ease the burden of the full second request process. In February 2006, the FTC announced a collection of merger review process reforms. The DOJ followed with its process reforms in December 2006. These reforms are summarized below, noting differences between the two.

Limits on Custodians to be Searched. At the FTC, the number of custodians will presumptively be limited to 35 employees (not including personal assistants, secretaries, or persons with the same or similar responsibilities). Staff requests to expand the number of custodians past 35 must receive approval from the Bureau Director.

In exchange, the party must agree to (1) provide organization charts to staff, (2) make its employees available to discuss job responsibilities and data management at the company, (3) comply with the Second Request 30 days before certifying substantial compliance (or agree to a rolling production or other mutually acceptable timing agreement), and (4) if the merger is challenged, jointly propose with the other party and the FTC a scheduling order that contains at least a 60-day discovery period.

At the DOJ, the number of custodians presumptively will be limited to 30 employees. Similarly to the FTC, this limitation imposes a timing requirement, although they are not as specific as the FTC. The DOJ reforms merely stipulates that the party enter into an acceptable process and timing agreement, although in practice the agreement can involve just as much, if not more, of a tradeoff as the FTC's reforms.

Partial Privilege Log. Preparing a log of privileged documents withheld from submission is often extremely time-consuming and expensive. At the FTC, parties may elect to provide a partial privilege log for all custodians. Staff may, within five business days of receiving the partial log, the greater of five employees or ten percent of the total number of custodians, for whom the party will be required to provide a full privilege log. The FTC retains the right to require a full privilege log.

In exchange, the party waives any objection to a discovery request from the FTC if the merger is challenged, except for objections based strictly on privilege. In response to such a discovery request, the party will be required to provide a full privilege log within 15 calendar days after receipt of the request.

The DOJ took a different approach to limiting the burdens associated with the privilege log. Parties may omit documents that were sent between counsel (including outside counsel and in-house counsel acting solely in a legal capacity). Communications between counsel and company employees may be omitted as well, although attachments to such documents cannot be omitted unless they were created by counsel solely for the company.

Relevant Time Period Covered by the Request. The FTC has shortened the default time period covered by its second requests. Now, a party will be required to search for documents in response to a second request for a period starting two years prior to the date of the issuance of the second request and ending 45 days prior to the certification of substantial compliance (75 days if the 30-day notice of substantial compliance applies). This does not apply to data, and staff can expand the time period if it deems necessary. Previously, the relevant time period in the Model Second Request started three years prior to the date of the issuance of the second request and ended 30 days prior to the certification of substantial compliance (14 days for competition and acquisition documents).

The DOJ also has limited the search period to two years (instead of the previous standard of three or four years) for documents and three years for data submissions, in general. Companies that comply within 90 days of issuance will not be required to conduct a second sweep of documents except for certain documents involving the transaction and efficiencies. For those transaction and efficiencies documents, companies must submit documents produced or acquired within 30 days of compliance. If a company takes more than 90 days to comply with the second request, the company must submit all documents produced or acquired within 30 days of compliance.

Empirical Data. Pricing and other transaction data can often be used in econometric analyses of a merger's likely competitive effects. Consequently, the reviewing agencies have been seeking this type of information from the merging parties. At the FTC, staff will inform the

parties of the competitive effects theories it is considering and what times of data will be helpful in reviewing the transaction. Staff will encourage the parties to provide (1) a written description of how they collect, maintain, and use their data, (2) a proposal to limit the data request that includes data samples, and (3) access to employees knowledgeable about company data. A party is entitled to meet with a Director or Deputy Director if it feels that staff has not sufficiently limited its data request.

Electronic Document Preservation. At the FTC, preservation of back-up tapes will presumptively be limited to two calendar days (one for each relevant year) identified by Staff, and documents contained on back-up tapes will only have to be produced if responsive documents are not more readily available from other sources.

Rather than taking the FTC's approach of limiting the depth of back-up tapes, the DOJ's approach is to limit the breadth. Subject to the DOJ's approval, parties can elect to identify and preserve a limited subset of back-up tapes.

De-Duplication of Electronic and Hard-Copy Documents. At the FTC, the parties must advise staff before using de-duplication processes. At the DOJ, the parties are permitted to submit documents in the electronic form only, unless otherwise requested by the DOJ.

The FTC's and DOJ's reforms are elective and involve tradeoffs to the merging parties. While these new streamlined processes may decrease the burden of complying with a second request for all parties, they are primarily designed to help parties in transactions that agencies will not challenge. The reforms attempt to ensure that the agencies will have sufficient time and ability to conduct discovery if a trial commences, and thus parties will need to carefully evaluate their options. In many cases, the benefits of these reforms are outweighed by the longer waiting period and by the costs associated with negotiating the specifics of any limitations with the reviewing staff.

The conflicts (and resulting delays) emanating from the "clearance" process have proved to be intractable. Numerous efforts have been made to make the allocation process between the FTC and DOJ go more smoothly and quickly. In particular, in 2002, the Assistant Attorney General and the Chairman of the FTC signed a detailed agreement meant to allocate industries more clearly and otherwise harmonize each agencies clearance practices. This initiate ran afoul of members of congress, who were unhappy with the allocation of industries (most easily explainable by which industry would be subject to oversight by which congressional committee – the FTC and DOJ are overseen by different congressional committees). It is unclear, however, whether even this elaborate attempt at streamlining clearance would have worked. On the one hand, most transactions get cleared without significant delay or conflict. Those that are contentious usually involve high-profile industries where there is no clear-cut experience or multiple products satisfying the clearance criteria for both agencies to review the deal. There is no easy way to resolve these conflicts. Fortunately, clearance battles affect only a small number of transactions each year.

In addition to the burden associated with complying with second requests and dealing with more than one authority reviewing a transaction, the U.S. process sometimes suffers from a

lack of transparency, especially in cases where the reviewing agency does not act. Although the Guidelines and other policy pronouncement provide clear overall statements about the analytical methods used, the effects-based, fact intensive evaluation of mergers often makes it difficult to determine what the agencies will conclude in specific cases. In particular, there is little room in the American system for the agencies to publish detailed reasons why enforcement actions are not taken. To ameliorate this transparency concern, the agencies increasingly have been issuing short statements explaining why they have decided not to take enforcement action.

V. IN SUM

The burden and delay occasioned by an in-depth merger review in the U.S. are significant. Fortunately, only a relatively minor percentage of transactions are investigated closely. For example, in the 10-year period between 1997 and 2006, the agencies issued second request in less than three percent of the covered transactions. And the burden of an investigation is imposed only after an initial determination that the transaction poses substantial competitive concern. Although the American substantive principles no longer lend themselves to bright-line determinations of legality, most merging parties prefer the level of uncertainty and related costs in the U.S. system to the certainty that permeated merger enforcement in a bygone era, when, as Justice Stewart noted, the only consistency in the process was that the government always won.

In any event, the U.S. process incorporates a substantial exemption for foreign transactions. A non-U.S. company can buy a minority stake in any non-U.S. issuer without filing. Even acquisitions of control are exempt, unless the acquired firm has a substantial, objectively-determined U.S. presence.

The U.S. system also benefits from its focus on the interests of customers, as opposed to competitors. By downplaying competitor testimony, the U.S. agencies are less likely to be induced to take enforcement action that merely serves the strategic interests of competitors that would otherwise be forced to compete more vigorously against a more efficient rival.

Finally, the U.S. system imposes a check on prosecutorial zeal. Any enforcement decision must be confirmed by a Federal court. Even though litigation to block a merger is rare, the fact that any decision to challenge a merger could be reviewed by a third party adds a valuable check on the agency's evaluation of the facts and application of the appropriate legal standard.

No merger review process is ideal. The United States has been reviewing mergers for many years and has developed an enviable expertise in both the substance and the process of merger control. Notwithstanding this legacy, there are aspects of the U.S. system that need to be changed, and there are good exemplars for this change in the merger control practices of its new colleagues around the world.