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Merger Process Reform: A Sisyphean Journey?

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THE MERGER REGULATORY PROCESS as we know it has existed for thirty years. There have been marginal shifts (up and down) in enforcement intensity with changes in administrations and personnel, but there has been one constant: complaints about the burden of the Second Request process. Some of this is inevitable—prosecutors and potential defendants will rarely have identical perspectives. But there has been enough consensus on the flaws in the process that there have been a series of agency efforts to improve it. The problem has not been solved, and we believe a real solution will require a completely different approach to the problem. This article proposes such a new approach.

Ten years ago, Joe Sims and Deborah P. Herman[1] (now Deborah Platt Majoras) wrote a lengthy article about the first twenty years of Hart-Scott-Rodino.[2] They concluded that the implementation of the statute had far exceeded the goals of its drafters and, like so many other legislative enactments, had taken on a bureaucratic life that dwarfed the relatively modest expectations of its legislative authors.[3] Since that article was published, there have been several serious attempts at reform,[4] but the antitrust community is still debating most of the same issues. Indeed, notwithstanding all the good faith efforts by the agencies to improve the situation, the problem has actually gotten worse in some important respects.

Before we catalogue the problems, it is worth recognizing some ways in which the process is better. Raising the qualifying thresholds,[5] as the Sims/Herman article advocated, has happened, and it did make a difference—not enough, since too many transactions are still caught in the HSR net, but, to borrow a phrase, the situation is not as bad as it could be. In addition, in many (but not all) circumstances, there has been a noticeable improvement in transparency, with agency staffs being more open about their issues and concerns earlier in the process. We say not all, because this is still more a function of particular staff lawyers' attitudes than it should be, but on balance agency transparency during the merger review process is better than it was a decade ago. This is important, since in the vast majority of transactions both sides should have the same goal—finish the process as efficiently as possible and only then argue about the outcome, if necessary.

So there have been some improvements, but they have not kept up with either technology or economic sophistication. Two reinforcing phenomena—electronic document/data availability and more sophisticated economic analysis by the agencies—have led to burdens on the parties that dwarf these positive effects. There are many problems with the Second Request process, a number of which we will discuss in this article. But the 800-pound gorilla is the technology problem—too much electronic material available and too much of it demanded by the agencies. These are the primary forces driving the average cost of a Second Request today to $5–$10 million—*ten to twenty times what it was a decade ago!* Intensive or lengthy Second Request investigations can cost the parties twice that amount or more.

Some tension is inevitable here. The agencies need enough information to make an informed decision about whether to challenge the transaction. No one wants those decisions to be made without the necessary information; the arguments here are about what is necessary. In addition, in the relatively small number of circumstances where the agencies actually challenge or threaten to challenge a transaction, they eventually need to have the facts and data necessary to carry their burden of proof in court. No responsible person can object to the *reasonable* discovery necessary for that; again, the debate is about the scope and timing of that discovery. Finally, it is not practical to expect the agencies to forgo seeking to review *potentially useful* information that is *reasonably* available to the parties; again, the debate is all about the adjectives. But there is at least one point that is not debatable—if the chickens are to be protected, the design of the process cannot be left exclusively to the foxes.[6] Letting the prosecutors unilaterally decide how to draw the line between the relative burdens on the agencies and the parties is not likely to produce a balanced outcome.[7]

This is the practical conundrum: many (perhaps most) would agree that the merger review process could be less burdensome, more efficient, and quicker, while still accomplishing its legitimate public purpose. But there is no real chance for systemic, balanced change so long as the agencies get to make all the decisions. The one constant in all the various reform efforts over the years—again, no doubt well-intentioned and undertaken in good faith—is that they have not solved the basic problem of Second Request burdens.

There is a better way, and it is something that the agencies have feinted at but not properly implemented: impose binding, not recommended, limitations on Second Request production requirements in exchange for the agencies having both the time and the opportunity to perfect their discovery in federal court when they decide to challenge a transaction. Pre-complaint discovery would be minimized in return for post-complaint discovery limited only by the federal rules and

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a court's discretion, with the agencies assured of the time to engage the court by the imposition of a limited automatic stay upon filing of a complaint in federal court. Properly implemented, this approach would allow the agencies to obtain through Second Requests the information they need to make an informed decision about which transactions to challenge, and to impose substantial discovery burdens only on challenged transactions. At the same time, all parties would see a significant reduction in the pre-complaint merger process burden.[8]

This approach could result in a higher percentage of transactions challenged, if the agencies take the approach of litigating in closer cases because of the opportunity to gain additional discovery. But we doubt it would produce a significant difference. And it would mean that for those transactions that were challenged, the amount of time required to litigate the matter might increase. But if the result of this approach was a shorter average Second Request investigation time for *all* transactions, combined with a slight increase in the number of transactions challenged and a somewhat longer average litigation time, the net impact would be strongly positive.

While the requirement to go to court is a critical constraint on the agencies' power, there is no comparable constraint on the burdens they can and do impose during the Second Request process.

Of course, there is one other feature of this approach that will make some at the agencies nervous—becoming just another litigant, subject to the discretion of a federal court as to what additional discovery, over what time period, would be available post-complaint. It is hard to be too sympathetic to any agency concerns about having to conduct their discovery pursuant to federal court rules and oversight, assuming they could be guaranteed sufficient time to have the court make informed decisions on their discovery and timing requests. The agencies would no doubt worry that the parties would make the standard claims of exigencies, and that at least some courts might not take the time to give the agencies' requests the consideration they deserve. That is why our approach requires something that was considered (but rejected) in the original HSR legislation: a limited automatic stay of any transaction challenged in federal court.[9]

An unlimited stay would give the agencies too much leverage and would create too big an incentive to bring marginal cases for our comfort, so we would limit the automatic stay to thirty days. This would give the agency the time to make a showing to the court as to what additional discovery was required and why; give the parties a chance to respond; and give the court the time to itself make an informed decision, not only about discovery but also about the schedule for a preliminary injunction hearing (or possibly a trial on the merits, if the parties agreed). As a practical matter, most parties will also want time in the federal court proceeding to conduct discovery because that is their first opportunity for third-party discovery. So a short automatic stay, during which all the parties to the litigation and the court sort out the remaining schedule, should be both efficient and a source of comfort for the agencies that they will have the time to have their positions heard and considered by the court.

The Mountain Is Getting Higher

While it may seem (and perhaps is) completely irrelevant today, there is really no doubt that what Congress intended when it passed the HSR Act in 1976 was to provide the federal antitrust agencies advance notice of, and a minimal amount of easily retrievable information about, significant proposed transactions.[10] The agencies were supposed to request data "already available to the merging parties [and] lengthy delays, and extended searches should consequently be rare."[11] But today's HSR process bears little resemblance to this model, having become a full-blown merger regulation system. As a practical matter, the HSR process is distinguishable from any other regulatory system only by the fact that the agencies must seek court intervention to actually block a transaction.

While the requirement to go to court is a critical constraint on the agencies' power, there is no comparable constraint on the burdens they can and do impose during the Second Request process. Clearly, the costs associated with complying with a Second Request are well beyond what was originally intended or contemplated by Congress, and are growing exponentially. The ABA Antitrust Section collected information on costs from its members and provided aggregated results to the Antitrust Modernization Commission (AMC) in 2007.[12] Other commentators also provided estimates of the length and cost of the Second Request process.[13] The average Second Request investigation was reported as taking six to seven months and resulted in average compliance costs of $5 million. Those are average costs; for larger deals costs can quickly rise to the $10–$20 million range.[14] And since those data are two years old, and costs seem to be constantly rising, the actual numbers today are certainly higher.

A primary driver of increased costs is the explosion in the use of electronic communication and recordkeeping and the resulting massive increase in the number of electronic documents and data that are gathered from individuals' computers and companies' network drives. In larger deals, upwards of 175,000 pages per source is not uncommon—and this number has tripled in the last three years. Although electronic review methods have improved to help deal with this document explosion, there is an associated increase in the cost of complying as each additional page still needs to be reviewed to determine its responsiveness to the agencies' request and whether it is privileged.

Electronic review is a cost and burden primarily borne by the merging parties as they cull down the documents to a subset that is responsive to those requested in a Second Request. The average number of electronic pages gathered from a merging party for the transactions we have worked on in the 2006–08 time period was over 6 million pages. The average number of electronic pages produced to the agencies during that same time period was 1.8 million. If this is typical, and we have no reason to think it is not, parties are reviewing more than three times the large volume of documents actually being turned over to the agencies. Accordingly, the huge growth in electronic documents is having a disproportionably larger impact on the parties to transactions than on the agencies.[15]

Nonetheless, the agencies have also been affected. This year, former DOJ Assistant Attorney General Tom Barnett noted that the agencies have increased their storage capacity to hold data turned over by parties by 14,000 percent since 1998, and they anticipate that their electronic storage will grow by 36,000 percent by 2013.[16] Unfortunately, storage is relatively cheap, so this growth is not likely to generate increased incentives for the agencies to reduce parties' burdens.

Another source of increased costs is privilege review. There is a strong correlation between the cost for each individual searched for responsive documents and the number of privileged documents kept by that individual. This is hardly surprising, as reviewing for privilege is more expensive, usually requiring more than one wave of review and then (under current agency procedures) an intensive process of drafting a log that complies with the specifications laid out by the agencies. Of course, the agencies do not bear a similar burden and, indeed, in recent times have increasingly used quibbles over minutiae on the log to delay substantial compliance claims. In fact, at the DOJ there seem to be agency staff members who are specializing in privilege log review, since they reappear on multiple transactions in that role. This implies that at least the DOJ is devoting increased resources to privilege log review. Since we are not aware of any evidence that parties are systemically misusing the privilege designation, why this would be done is unclear. There is no question that creation of the privilege log and arguments over it lengthen the review process and significantly add to the expense.[17]

Apart from the actual costs of complying, lengthy investigations also leave the parties to transactions in limbo, with all the associated costs and problems. And while the average deal is in limbo for seven months, a non-trivial number of the larger transactions are delayed longer, sometimes over a year. During that time, any savings and efficiencies sought through the transaction are delayed, and the parties face other risks, including the loss of important personnel and limitations on how they can respond to marketplace opportunities or changes. Recent experience in the credit markets is an extreme illustration of how time is the enemy of transactions, and the Second Request process has now become, in many cases, the gating event to closing.

It is not meant to be a criticism of the agencies' staff at all to state the obvious—there is little institutional incentive to speed up the process. Just the opposite is true, more time to respond gives the staff more time to think, analyze and become more comfortable with their decision. One constant we have found across the Second Requests we are familiar with is that the intensity of the staff focus on compliance with the nuances of the requests drops dramatically, and the staff willingness to negotiate burden-reducing modifications increases dramatically, once the staff is assured of ample time for its investigation. Again, this is both logical and hard to criticize, but it does impact the burdens on the parties. While there are people at both agencies who do their best to move the process along, relying on these personal efforts is not a systematic solution to the problem.

The Latest Round of Reforms and Results

Working with another firm that is very active in the merger review process,[18] we compiled a series of statistics on deals that the two firms handled that resulted in Second Requests. In particular, we evaluated the following data points: (1) length of time to comply; (2) number of custodians; (3) time limit for search; (4) volume of documents per custodian; (5) privileged documents; (6) data requirements; and the (7) appeal process. Obviously, this is a very limited sample, but it is all we had access to; it would no doubt be interesting to see a broader range of data.[19]

Length of Time to Comply. In 2006, both agencies introduced reforms to the merger review process that were designed to reduce the length and burden of Second Request investigations.[20] But their duration has not been reduced. During fiscal year 2005, the average length of an investigation was reported by the AMC to be about six to seven months.[21] Post-2006, our experience is that investigations last an average of seven months, and some take much longer. It is clear that a major part of the length of Second Request investigations is a result of the huge burden on parties to assemble all the documents and data for compliance. But in addition, the reforms themselves unintentionally have built in additional delay with their timing agreement requirements.

In their 2006 reforms, in order for the parties to qualify for a lower number of employees to be searched, the agencies required the parties to agree to a form of timing agreement.[22] Timing agreements contain provisions setting out when the parties will substantially comply and by when the parties will turn over their documents and data. They often include other details, such as which employees are deposed and the dates for their depositions or investigational hearings. To qualify for lower custodian limits—and this is what we were referring to earlier as a feint toward a real solution—the agencies also require the parties to agree to a sufficient period for the agencies to conduct post-complaint discovery should the investigation result in contested litigation.[23]

This is a seed that could and should be grown into a real reform, but as now being used, and in the context of other-

wise unlimited discretion for the agencies, it is not useful. Parties in DOJ transactions do not take advantage of the promise of this reform initiative because the burden of providing the agencies with a guaranteed period of post-complaint discovery is not being offset with a commensurate reduction in the Second Request burden on the parties.[24] Parties in FTC transactions are much more likely to agree to a timing agreement, but that is largely because FTC staff practice is to make all modifications of the Second Request contingent upon such an agreement. Indeed, as currently extant there is no logical relationship between timing agreements and the supposed burden-reducing focus of the reforms. Our experience since the 2006 reforms is almost uniform: staff focuses heavily on the timing agreement from the outset, postponing serious consideration of the merits of the case or how to facilitate compliance.

Like many of the other suggested initiatives, the timing agreement has also morphed into more than the guidelines contemplate. For example, the FTC guidelines call for *either* a rolling production or a thirty-day extension to the post-compliance period,[25] but our experience is that staff (supported by and at the urging of Bureau of Competition management) are now typically requiring both, and are adding more constraints, such as a requirement that compliance not be certified before a specific date. In all but one of the post-2006 reform transactions in our sample, there has been an extension to the post-compliance period *and* a rolling production.

Timing agreements should be eliminated altogether as a condition for limitations on the scope of Second Requests. It will be in the interest of many parties to have the certainty of a timing agreement, but it should not be a condition to reasonable limitations on the scope of Second Requests. Our proposal eliminates the need for agencies to use Second Request modifications as leverage to gain a timing agreement.

Number of Custodians. A core feature of the 2006 reforms was the presumption that no more than a definite number of employees needed to be searched. The FTC set the default number at thirty-five, while the DOJ decided on thirty custodians.[26] In our experience, this default number is almost completely irrelevant. The AMC reported, based on data submitted by the ABA Section of Antitrust Law, that the average number of custodians searched was 126.[27]

In our sample, the average was lower—forty-seven custodians—still considerably higher than the default. These numbers are somewhat misleading, however, since embedded in them is what often seems to be an interminable negotiation (and accompanying information production) required to convince staff to reduce the number of custodians to be searched. Clearly, the exceptions have swallowed the rule here.

While it may seem arbitrary, what is needed is an absolute limit that cannot be exceeded during the Second Request process. And since (1) more and more often it is the data that are critical to the analysis, not the documents, and (2) a relatively small number of custodians will virtually always have all the documents reasonably needed to make a complaint decision, the limit can be relatively small. We would suggest twenty-five custodians. Only an absolute limit will be effective, given the natural instincts of most staffs to assure they will not miss something that might possibly be useful.

Time Limit for Search. A line that both agencies drew in the sand in their 2006 reforms was a two-year default relevant time period for which a party is required to search for documents.[28] This was a reform over the Model Second Request that previously provided for companies to produce responsive documents from January 1 of the calendar year three years prior to the issuance of the Second Request.[29] The DOJ also set a three year cut-off for data that is not in the FTC reforms, another one of those inconsistencies that are so frustrating to the outside world.[30] In fact, these supposedly hard lines also have been largely ignored.

Generally, the agencies will ask for documents from the beginning of a calendar year two years previously—not from the date of issuance of the Second Request—resulting in the actual time period for documents varying between two to three years on average. In about a quarter of the deals in our sample, agencies have either required production of documents for longer periods or requested longer time periods for certain document requests (or custodians) that vary between three to six years. Because most of the burden on the parties is for search and review, rather than the actual production, curtailment of only some specifications to a shorter period often does little to limit the burden.

A similar trend is found for data requests, except the average data time periods are three to four years, and up to ten years for some deals. This is a significant source of unnecessary burden on the parties. We understand the dynamics here—if we were agency economists, we might want more data rather than less. But this instinct requires some balance. The reform time limits were a step in the right direction, but they need to be more rigorously adhered to.

Volume of Documents per Custodian. Our data show that the volume of documents per custodian, mostly electronic documents, is growing dramatically. In 2005, the average number of pages gathered from each source was 43,396. In 2006 that number had almost doubled to 75,557. But in the 2007–08 time period the average jumped to 179,205—four times greater than the average just three years before. Similar to the number of custodians, the cost of compliance is highly correlated to volume. Staff's response has usually been suggestions to reduce the volume of *production*, which does not assist the parties in dealing with the process of *collection and review* of the documents.

Much of this additional volume comes from electronic documents in company shared drives. Often companies have shared drives that serve as an electronic central filing system used by the entire company. Since shared drives are a repository for information for numerous employees—they often contain a vast quantity of documents and data that the agencies treat as a separate source of information to be reviewed,

limited only by the generally applicable default time period for documents. To cope with this burden, we are aware of some law firms and parties simply turning over the shared drives without any review, making the agencies' task more difficult, and risking disclosure of privileged information. We don't find this an attractive solution. Unfortunately, the reforms do not allow parties to pull files belonging only to the agreed-upon custodians from the shared drives. There is no good reason for the agencies to use the existence of shared drives to be used to effectively expand the custodian list to include every document on the shared drives. Instead, the custodian limitation should encompass only natural persons, and a search of each custodian should include a requirement that the parties ask each custodian on the search list which documents he or she accesses on any shared drives and only those documents should be reviewed for responsiveness.

Privileged Documents. Our analysis revealed a very high correlation between the volume of privileged documents and the cost of production. This is not surprising as firms often have additional reviews for privileged documents, and the agencies require parties to provide a log of the privileged documents that sets out various details, such as recipients of the document, date, etc. We have also noticed an increase in the number of privileged documents per custodian. Most likely thanks to e-mail and the ease with which documents are transmitted, the number of privileged documents per custodian has increased by approximately eight times since the pre-2006 time period.

The FTC tried to address the burden imposed by the privilege log with their partial privilege log initiative.[31] A party opting for the partial log provision is first required to provide a complete list of all the names of the custodians and the number of documents contained in each custodian's files that will be withheld under a claim of privilege.[32] The FTC will then identify within five business days 10 percent of the total number of custodians searched or five custodians, whichever is greater, for which the party is required to produce a complete log.[33] In order to exercise this option, a party must agree to provide a complete log for all custodians within fifteen days of a discovery request.[34]

In theory, this initiative seems to promise a reduction in the number of privileged documents needing to be logged, but it has not produced that result. The partial privilege log provision often becomes simply another source of delay from negotiations over which custodians should qualify for the partial log.[35] The result of all the various issues that arise regarding the partial log is that the parties will often end up doing a complete log anyway as their privilege teams are already in place and it would be more arduous to put together a complete log in fifteen days a few months later in response to a discovery request if the transaction ends up being challenged.

Privilege logs are a significant burden and impose very significant costs on the parties. We suggest that, at a minimum, the FTC adopt the DOJ process of allowing documents to and from counsel to be omitted. And indeed, absent some reason to believe that the parties or their lawyers are abusing the privilege issue, we suggest that complete omission of the privilege log requirement would not make a meaningful difference in the agencies' ability to make a challenge decision, while it would significantly reduce the Second Request compliance cost and time involved for the parties to a transaction. A log could be required in any litigation, or if there is some reason to believe that the parties or their counsel are abusing the privilege exemption.

The most dramatic source of growing burden going forward is likely to be data. Merger analysis is increasingly data driven, as are business decisions, and more data means more opportunities to demand and analyze data.

Data Requirements. All of what we have discussed so far is important, but the most dramatic source of growing burden going forward is likely to be data. Merger analysis is increasingly data driven, as are business decisions, and more data means more opportunities to demand and analyze data. The problem here is not so much the amount of data demanded by the agencies but rather how they insist on it being provided. Turning over raw data that has not been archived is often not a source of huge delay and expense as the data almost always exists and can be produced or accessed electronically. But the agencies generally require parties to create and run programs to turn the large volumes of data into a format that the agency prefers to work with. Reprogramming mountains of data is time-consuming and very expensive, since it frequently requires significant involvement by outside economists and other consultants. Even worse, the agencies frequently require the parties to extract old archived data, requiring additional programming to make it comparable to more recent data.

As huge as the cost is becoming for economists to manipulate the data to conform to agency requirements, much of the data production cost is hidden because often it is incurred by the client directly, using employees who must be paid overtime and/or neglect their normal duties. Of course, one way to help control these costs is to truly limit the time periods for which data are required. Another very practical possibility is to require that any data the parties use in presentations to an agency or in litigation be provided to the agency in the same form as it is used by the parties. But the potential for inappropriate burdens here remains, and will remain, very significant.[36]

Appeal Process. The appeal process that has become a feature in most of the agencies' reform initiatives is irrelevant.[37] It has been our experience that the frequent departures

from the guidelines are almost always supported by management. In one recent matter, we sought to use software programs to eliminate near-duplicates[38] from a very large production; staff refused, we appealed, and the staff position was upheld, despite the considerable burden that would have been alleviated and (in our view) the minimal effect on the agency's substantive analysis. Indeed, when the rare appeals have been taken, our experience is that it is more likely that agency management will insist upon additional requirements than overrule the staff. As a result, no firm active in this process that we are aware of believes that an agency appeal process creates any real protections against overreaching. If there is to be any effective appeal process, it would have to involve an independent third party, as was suggested in the Sims/Herman article ten years ago.[39] The common reaction to that suggestion was that it was impractical, and that may be correct, which is one of the reasons why we suggest that hard limits on pre-complaint discovery are essential to any meaningful reform.

The Solution

Some things are clear. The merger review process continues to become more costly. Agency "reforms" have not really changed this trend, and logically cannot be expected to do so. The problem is likely to get worse, not better, with the growth in available electronic documents and data and the increasingly data-driven approach to merger analysis taken by the antitrust enforcement agencies.

Given this diagnosis, what is the cure? We propose here a paradigm shift, not just some more tweaking of the current flawed system. Our solution would require new mindsets from both the agencies and the antitrust bar—reflecting a recognition that the merger review process by the agencies does not need to be, and in fact should not try to be, absolutely precise. Today, the agencies try very hard to be right in their enforcement decisions—a laudable goal unless, as has happened, it increases the costs for everyone far above what is gained from a public policy perspective. We think the agencies should try to be mostly right, or put another way, try to achieve the 90 percent solution, not the 100 percent solution.[40]

Adoption of this approach might mean a few more merger challenges, since we all know that some close calls are made not to litigate, but usually only after extended and burdensome Second Request investigations. And more litigation could mean more losses by the agencies, but not necessarily, if they do not significantly change the standards applied in bringing cases. But the potential gains from a streamlined merger review process are enormous.

Just do some very simple math. There are seventy Second Request investigations in a typical year.[41] If the average costs are now approximately $6 million, and we reduced that cost by a third, these savings alone would be $140 million. Add to that the internal savings for the parties, the savings to the agencies, and the additional savings from eliminating the extraordinary outlier transactions, and you are talking real money. More importantly, if we reduced the seven-month average investigation time—let's say to four months—the potential positive impact as a result (in faster realization of efficiencies and elimination of uncertainty) would likely be orders of magnitude much greater than the direct savings. And perhaps just as important, the merger enforcement process would be just that, and not a slog through meaningless documents and data for months on end.

Let's be extremely conservative and just say that we are looking at hundreds of millions in possible savings. On the other side of the ledger, there might be additional costs for a small portion of the transactions—those that are challenged but would not have been challenged with a more expansive Second Request. Even under this system, we believe the number of deals likely challenged would remain small. And for those challenged transactions, there would be post-complaint discovery costs, which might be greater if the magnitude of Second Request discovery is reduced. So the prospect of increased costs for a few balanced against reduced costs to the many (parties to deals and consumers, who realize the results of efficiencies faster) seems a small price to pay.

How exactly would we accomplish this? We urge (through legislation if necessary) imposition of the following conditions on Second Request investigations:

1. Eliminate the timing agreement as a condition of any Second Request modification.
2. Limit the number of custodians that must be searched to twenty-five in every transaction.
3. Limit the time period for documents to two years and for data to three years.
4. Require parties to make rolling productions of data and documents, and to provide the agencies with all data used to support any presentations.
5. Eliminate the requirement of a privilege log; any abuse will likely be rare, would be uncovered in a litigation, and if necessary, specific penalties could be imposed as a deterrent.
6. Require the agencies to make a decision whether to challenge the transaction within forty-five days of certification of substantial compliance.[42]
7. Impose an automatic thirty-day stay on the closing of any transaction from the filing of a complaint in federal court. Require the parties to come to an agreement within ten days on both discovery obligations and a schedule for a preliminary injunction or trial on the merits, or present within another seven days their respective positions to the court, leaving an additional thirteen days for the court's decision. Post-complaint discovery would be subject to the Federal Rules and the court's discretion.

Conclusion

The ABA's Section of Antitrust Law's recently published Transition Report calls for the agencies to assess the impact of their merger process review initiatives.[43] The Antitrust Modernization Commission made a similar plea.[44] Obviously, the

problems that have been a part of this process from its beginnings three decades ago have not yet been solved.

We hope that this article offers some useful ideas toward a solution. While we recognize the data limitations in our sample, we think the two firms whose experience we relied on have a reasonable basis for evaluating how the process is actually working. Risking sounding like the agencies, broader data sets are always useful, and thus we would encourage a more systematic investigation of the actual facts.

Still, the heart of the problem is that today the agencies have the incentive (and in their view the need) to use the Second Request process to prepare for litigation *in every deal*. As a result, the costs and delays that are imposed on transactions that are not challenged are greater than they need to be. The only practical solution to that problem is to eliminate the need for (and ability of) the agencies to strive for that goal, or even just for maximum precision in their decisions whether to challenge. For the staff, more time will almost always be desirable. There is no way to eliminate that natural human impulse. Consequently, it is necessary to place what admittedly are arbitrary limits on what can be demanded and the delays that can be imposed by the agencies pre-complaint.

We recognize that to some extent we are trying to go back to the future and make the Second Request process something more akin to what was originally intended by Congress some thirty years ago. But the core concept of the original HSR legislation was sound—create the ability to evaluate whether to challenge a transaction and then allow that challenge to take place prior to the transaction closing. Unfortunately, inexorable processes of bureaucracy and technological change have overwhelmed this concept and produced instead a regulatory process that is made barely palatable only by the fact that the agencies need to seek federal court intervention to actually block a transaction.

Our proposed reforms attempt to reduce or at least slow down the increase in costs on parties to mergers, while still allowing anticompetitive mergers to be effectively challenged. Let the debate begin. ■

[1] Deborah Platt Majoras subsequently became Principal Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice and then the Chairman of the Federal Trade Commission. In both positions she tried hard to be part of the solution, but despite her efforts the problem remains. Ms. Majoras has no responsibility for the contents of this article.

[2] The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) [hereinafter HSR Act]; Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865 (1997).

[3] At the time, Representative Rodino explained that the HSR notification requirements would only impact "the very largest corporate mergers—about the 150 largest out of the thousands that take place every year. . . . If these premerger reporting requirements were imposed on every merger, the resulting added reporting burdens might more than offset the decrease in burdensome divestiture trials. That is why [the bill] applies only to approximately the largest 150 mergers annually." H.R. Rep. No. 94-1373, at 11, 1976 U.S.C.C.A.N. 2637, 2643. They only missed by about 1500 percent; in 2007, 2,201 transactions were reported under the HSR Act. See Dep't of Justice & Federal Trade Comm'n, Hart-Scott-Rodino Annual Report to Congress 2 (2008), *available at* http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf [hereinafter *2007 HSR Report to Congress*].

[4] *See, e.g.*, Fed. Trade Comm'n & Dep't of Justice, Hart-Scott-Rodino Premerger Program Improvements (Mar. 23, 1995), *reprinted in* 6 Trade Reg. Rep. (CCH) ¶ 45,525 (1995) [hereinafter HSR Improvements]; Press Release, Fed. Trade Comm'n, FTC Announces Changes to "Second Request" Procedures During Premerger Review (Apr. 5, 2000), *available at* http://www.ftc.gov/opa/2000/04/hsrinits.shtm; Press Release, U.S. Dep't of Justice, Antitrust Division Announces Merger Review Process Improvements (Apr. 6, 2000), *available at* http://www.usdoj.gov/atr/public/press_releases/2000/4511.htm [hereinafter DOJ 4/6/2000 Press Release]; Press Release, U.S. Dep't of Justice, Antitrust Division Releases Details of Merger Review Process Initiative (Oct. 12, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/9305.htm; Statement of the Federal Trade Comm'n's Bureau of Competition on Guidelines for Merger Investigations (Dec. 11, 2002), *available at* http://www.ftc.gov/os/2002/12/bcguidelines021211.htm [hereinafter FTC Guidelines]; Press Release, Fed. Trade Comm'n, FTC Chairman Announces Merger Review Process Reforms, Feb. 16, 2006, *available at* http://www.ftc.gov/opa/2006/02/merger_process.shtm; Press Release, U.S. Dep't of Justice, Antitrust Division Announces Amendments to Its 2001 Merger Review Process Initiative (Dec. 15, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/220302.htm.

[5] Department of Commerce, Justice, and States, the Judiciary, and Related Agencies Appropriations Act, 2001 P.L. 106-553, 114 Stat. 2762, § 630 (Dec. 31, 2000). *See 2007 HSR Report to Congress*, *supra* note 3, at 2 n.2 ("The decrease in the number of reportable transactions since fiscal year 2000 is, to a considerable extent, a result of the significant statutory changes to the HSR Act that took effect on February 1, 2001. The legislation raised the size-of-transaction threshold from $15 million to $50 million (with annual adjustments for inflation that began in 2005), and made other changes to the filing and waiting period requirements.").

[6] It could be argued that the real chickens here are consumers, who need to be protected from anticompetitive mergers. But while consumers are certainly the ultimate beneficiaries when anticompetitive mergers are blocked, consumers and the parties are the victims when efficient mergers are unnecessarily delayed. During the Second Request process, which takes place before a decision to challenge has been made, and certainly before any determination that the transaction is anticompetitive, the presumed innocents include the parties to the transaction, facing the relatively unconstrained power of the federal government. Ultimately, of course, consumers bear all the costs, both direct and indirect.

[7] *See* J. Thomas Rosch, FTC Commissioner, Reflections on Procedure at the Federal Trade Commission, Remarks at the ABA Antitrust Masters Course IV at 10 (Sept. 25, 2008), *available at* http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf ("Moreover, the pre-complaint investigation is not a level playing field. Staff can and do engage in 'one-way' discovery during this period; Respondents can engage in no discovery until after a complaint is issued. This 'one way' discovery conducted by the staff, particularly when coupled with the 'leave no stone unturned' approach, can be enormously burdensome and expensive for Respondents."). This is all completely understandable. The agencies want to be right on the competitive merits; they do not want to have to rely on what they see as incomplete evidence in deciding whether to challenge a transaction. And they want to be as prepared as possible to litigate a case before they file a federal court action; they do not want to rely upon the uncertainty of federal discovery after a complaint is filed. Let's be candid—the longer it takes the parties to comply with a Second Request, the longer the agencies have to accomplish these, sometimes quite complicated, tasks.

[8] FTC Commissioner Rosch tries to get to a similar result by simply lowering the bar for bringing cases. *See* J. Thomas Rosch, FTC Commissioner, A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge, Remarks Before the NERA 2008 Antitrust & Trade Regulation Seminar (July 3, 2008), *available at* http://www.ftc.gov/speeches/rosch/080703nera.pdf ("But plaintiffs in private antitrust cases (and other litigation) don't have the benefit of the "one-way" discovery that our staff has prior to issuance of a complaint."); *see also* Rosch, *supra* note

7, at 11–12 ("Let me turn now to my radical thoughts. What would happen if a 60% probability were deemed a sufficient reason to believe to vote out an antitrust complaint?"). But it is not the standard for bringing cases that is the problem; rather, it is the reluctance to depend on federal court discovery for those cases that are litigated. Based on our own experience and insights from others, we believe that most former agency decision-makers would concede that, while more information is sometimes (not always) useful, they would be capable of making reasonably informed decisions using the same criteria as today with a significantly lower volume of information than is typically available under current processes.

[9] The Senate removed the automatic stay provision by amendment on June 10, 1976. 122 CONG. REC. 17,426 (1976). See 122 CONG. REC. 30,877 (1976) ("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.").

[10] In 1976, Congress was trying to resolve a perceived enforcement problem that had emerged during that time. In the early 1970s, the enforcement agencies had limited power to halt a merger before litigation. If they were successful in litigation—and they often were during that time period—it was usually too late to meaningfully enforce the Clayton Act. H.R. Rep. No. 94-1373, at 8, 1976 U.S.C.C.A.N. at 2640. During the course of post-merger litigation, the acquired firm's operations were often irreversibly "scrambled" with those of the acquiring firm, making the restoration of an independent competitor difficult if not impossible. *Id.* at 8–9, 1976 U.S.C.C.A.N. at 2640–41. Post-consummation merger litigation also dragged on for years as the acquiring firm had no incentive to speed-up the litigation. *Id.* By contrast, pre-consummation litigation was rapid but the parties had to agree not to close. *Id.* To solve these problems, Congress was asked to pass the HSR Act to require merging parties to provide advance notice of their intention to merge and a limited amount of information about the merger. *Id.* at 11, 1976 U.S.C.C.A.N. at 2643. Once the parties complied with the information requests, they would be free to close their transaction unless the government won an injunction in federal court. *Id.*

[11] 122 CONG. REC. 30,877 (1976).

[12] Letter from Joseph Angland to the Antitrust Modernization Commission re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007) *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_aba_mergers.pdf.

[13] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 163 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm [hereinafter *AMC Report*].

[14] *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Whole Foods Market, Inc. v. FTC, No. 1:08-cv-02121, at 16 (D.D.C., Dec. 8, 2008) ("In total, Whole Foods spent more than $12 million dollars in legal and expert fees and costs in complying with the Commission's Second Request and investigation and defending the merger through September of 2007—and has spent through September 2008 an additional $4.5 million in defending the merger.").

[15] The agencies theoretically allow the use of search terms, but only after they approve them in advance. While there is some variance between the agencies, gaining agreement on search terms can take as long as reviewing the documents. Unless there is some evidence that the parties have jiggered the search terms in some way so as to produce an inappropriately limited collection of documents, how the parties collect and make responsiveness decisions should be left to their discretion, as is the general rule for deciding which are responsive documents.

[16] Thomas O. Barnett, Asst. Att'y Gen., U.S. Dep't of Justice, Lewis Bernstein Memorial Lecture: Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives 22 (June 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234537.pdf.

[17] More aggressive use of clawback concepts would not solve this problem. Few clients will be comfortable with simply producing potentially privileged documents without review, even if (which is not at all clear) they could easily retrieve them if they discovered that privileged documents had been produced. Moreover, the agencies have no ability to change existing state and federal law regarding waiver of privilege.

[18] We thank Arnold & Porter LLP for supplying us with anonymous data from several of their recent Second Requests. The views in this article are those of the authors.

[19] Space constrains us from an exhaustive description of all the aspects of the Second Request process that impose costs and delay. If there is a serious effort at reform, that effort should be thorough. The natural incentives discussed above to seek additional time tend to lead to efforts by too many staffs to stretch out, or use as a negotiating chit, any aspect of the process that can serve that purpose.

[20] *See, e.g.*, Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Reforms to the Merger Review Process 2 (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf [hereinafter FTC 2006 Reforms] ("The reforms are intended to streamline the merger review process by formalizing well-defined best practices. They are designed to facilitate rapid identification of the relevant issues, preparation of more focused second requests, and use of consistent investigation timetables."); *see also* U.S. Dep't of Justice, Merger Review Process Initiative, *available at* http://www.usdoj.gov/atr/public/220237.pdf [hereinafter DOJ 2006 Reforms] ("The goals are to identify critical legal, factual and economic issues regarding the proposed transaction more quickly, to facilitate more efficient and more focused investigative discovery, and to provide for an effective process for the evaluation of evidence, in an effort to deploy the Division's investigative resources more efficiently. These efforts likely will reduce the investigative burden upon all concerned.").

[21] *AMC Report*, *supra* note 13, at 164.

[22] *See* DOJ 2006 Reforms, *supra* note 20, at 6; FTC 2006 Reforms, *supra* note 20, at 15–17.

[23] *See* FTC 2006 Reforms, *supra* note 20, at 19 ("Accordingly, for the custodian presumption to apply to a party, the party must agree that, if the FTC brings a litigation challenge to the transaction, the party will agree to propose to the court jointly with the FTC a scheduling order that contains at least a 60-day discovery period."); *see* DOJ 2006 Reforms, *supra* note 20 ("The [timing] agreement shall include provisions to ensure that the Division has sufficient time to conduct post-complaint discovery if it challenges the transaction in district court.").

[24] *See* Barnett, *supra* note 16, at 25 ("One of the most significant revisions is the new 'Process & Timing Agreement' merger review option, under which parties may be able to limit document searches required by a Division second request to certain central files and a targeted list of 30 employees whose files must be searched for responsive documents. This option will be made available to companies that provide certain critical information to the Division early in the investigation, agree to an investigation schedule, and agree to a sufficient period for the Division to conduct post-complaint discovery should the investigation become one of the few that result in contested litigation. To date, only one company has taken advantage of this agreement. This could mean that, despite the burdens of second request productions, parties believe those burdens are worth bearing rather than to agree to a post-complaint discovery process."). We think it is much more likely that parties do not take advantage of this option because the potential benefits in practice have turned out to be relatively trivial, and thus do not justify any additional burdens.

[25] *See* FTC 2006 Reforms, *supra* note 20, at 15–16 ("For the custodian presumption to apply to a party, the party also must agree to produce the documents and data responsive to the second request 30 days before it submits its certification of substantial compliance with the second request, or to enter into a mutually acceptable 'rolling' production or other timing agreement.").

[26] *See id.* at 9; DOJ 2006 Reforms, *supra* note 20, at 8. The fact that the agencies could not come to a uniform number is disappointing, but reflective of the fact that the two federal antitrust agencies today are more competitive than cooperative.

[27] *AMC Report*, *supra* note 13, at 164.

[28] *See* FTC 2006 Reforms, *supra* note 20, at 19 ("There will be a presumption that the 'relevant time period' for a second request will be from two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party certifies that it has substantially complied with the second request."); DOJ 2006 Reforms, *supra* note 20, at 4;

see also U.S. Dep't of Justice, Antitrust Division, Background Information on the 2006 Amendments to the Merger Process Initiative 13–14 (Dec. 14, 2006), *available at* http://www.usdoj.gov/atr/public/220241.pdf [hereinafter *DOJ 2006 Amendments Background*] ("This definition/instruction has been modified to require the submission of responsive documents created or received by the company within two years of the date of the issuance of the second request, except where otherwise specified.").

[29] *See DOJ 2006 Amendments Background*, *supra* note 28, at 13.

[30] *Id.* at 14 ("In general, specifications that call for the submission of data will be subject to a relevant time period of three calendar years, unless otherwise specified."); FTC 2006 Reforms, *supra* note 20, at 19 ("The two-year relevant time period presumption does not apply to requests for data.").

[31] See FTC 2006 Reforms, *supra* note 20, at 25–26.

[32] *Id.*

[33] *Id.* at 26.

[34] *Id.*

[35] For example, FTC staff will ask for counsel's documents to be logged—virtually all of which likely will be privileged and accordingly useless for the merger evaluation. This is in stark contrast to the DOJ Staff which, while they have not instituted a similar partial log reform, allow the parties to completely omit documents sent only between the company and its inside counsel provided they are acting solely in their legal capacity, and documents between the company and its outside counsel not provided to third parties. *See* U.S. Dep't of Justice Model Second Request, Instruction R.2.g, *available at* http://www.usdoj.gov/atr/public/220239.htm. The FTC Staff has also specifically stated in their Second Request instructions that they retain the right to require the parties to produce a complete log for all persons even if the parties choose to do a partial log, which effectively adds another arrow to their quiver to potentially hold up compliance with a Second Request at their option. *See* Federal Trade Comm'n Model Second Request, Instruction Q.5, *available at* http://www.ftc.gov/bc/hsr/introguides/guide3.pdf.

[36] Commissioner Rosch has argued that the agencies need to focus more on the anticompetitive story (if any) rather than the economic models that have come to dominate agency analysis. *See* Rosch, *supra* note 7, at 10 ("[the staff] present recommendations to the Commission that are primarily based on complex economic analysis rather than on the stories about competitive effects that are told by non-economic evidence."). We agree. First of all, this would significantly reduce the burdens of everyone, parties and agencies. Second, our perception, like Commissioner Rosch's, is that the over-emphasis on economic evidence in merger litigation is a major cause of the poor litigation record of the agencies. "Our economists vs. their economists" is not a prescription for litigation success, since most judges (who are not economists) have a very hard time distinguishing between the two on any principled basis. Some of this over-emphasis on economic analysis, of course, is the result of the decreasing availability of the burden-shifting presumptions (largely based on market share) that used to give the agencies such a huge advantage in merger litigation—remember Justice Stewart's famous aphorism about the only common thread he could see in merger opinions was that the government always wins. That is no longer the case. But as recent history shows, the solution is not more economic analysis. Instead, better story-telling by the agencies is the solution (assuming, of course, there is an anticompetitive story to be told). Unfortunately, Commissioner Rosch would pair this with a substantially reduced agency burden in federal court and internal FTC procedural reforms, the combined practical effect of which would be to eliminate any meaningful opportunity for parties to test an agency challenge in court. That seems hard to justify on the merits, so it is usually justified (as he has) on the basis that Congress "intended" this outcome. *See* Rosch, *supra* note 8, at 16. That is not a very compelling argument.

[37] *See, e.g.*, *HSR Improvements*, *supra* note 4; DOJ 4/6/2000 Press Release, *supra* note 4; FTC Guidelines, *supra* note 4.

[38] Near-duplicates is a term used to describe content that is slightly different, e.g., e-mails that are forwarded between users. Eliminating duplicates and near-duplicates can reduce the documents to be reviewed by up to 30 percent. *See* Sheila Mackay et al., *Document Review and Technologies to Make Them More Efficient*, 733 PLI/LIT 357, 364 (2005).

[39] Sims & Herman, *supra* note 2, at 902.

[40] We would not support, and do not think it necessary to accomplish the objective, a 60 percent solution. *See* Rosch, *supra* note 7, at 11–12.

[41] The DOJ reported an average number of 39.9 Second Requests during the period 1998–2007. U.S. Dep't of Justice, Antitrust Division, Workload Statistics 1998–2007. The FTC reported 384 Second Requests issued from 1996 to 2007, i.e., on average 32 per year. *See* Fed. Trade Comm'n, Horizontal Merger Investigation Data 1996–2007 (Dec. 1, 2008), *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf. On average, therefore, the agencies issue approximately 70 Second Requests each year. In 2007, the agencies issued 63 Second Requests (31 issued by the FTC and 32 by the DOJ). *See 2007 HSR Report to Congress*, *supra* note 3, at 5.

[42] Our view is that the agency should be required to go to federal court within fifteen days of certification of substantial compliance to object to certification. While this seems harsh, our view is that most parties and their lawyers will not improperly certify, and if they do and are determined to have done so they should be subject to some significant penalty. Absent a requirement to go to court, the agencies will have an incentive to reject substantial compliance certifications to buy more time, and absent a real penalty some parties may be tempted to make improper certifications. The penalty could be more time to challenge the transaction following actual substantial compliance, and/or a financial penalty significant enough to deter mis-certification. Part of the Second Request problem is that all parties are penalized to protect against the occasional wrongdoer; the better practice is to severely punish the wrongdoer and eliminate the tax on the innocents.

[43] ABA Section of Antitrust Law, 2008 Transition Report 6–7 (2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf.

[44] *AMC Report*, *supra* note 13, at 167 ("There is little question that second requests have the potential to impose significant costs on the merging parties. The evidence of those costs is largely anecdotal, however, with little systematic quantitative information on the burdens second requests impose. The agencies are in the best position to collect such information.").