JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE COMPETITION BUREAU (CANADA) DRAFT ENFORCEMENT GUIDELINES ON THE REVISED MERGER REVIEW PROCESS

MAY 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

Introduction

The Section of Antitrust Law and the Section of International Law (the Sections) of the American Bar Association (ABA) appreciate the opportunity to respond to the request for comments by the Competition Bureau (Bureau) in respect of the Bureau's *Draft Enforcement Guidelines on the Revised Merger Review Process* (the *Draft Guidelines*).

In providing comments to the Bureau in the past on various Canadian competition law issues, the Sections have sought to provide a helpful perspective based on the experience of antitrust and competition lawyers in the United States and internationally, while recognizing that there may be differences across jurisdictions due to economic, historical, and other factors. The Sections have commented on a number of the Bureau's initiatives, including recent comments on two related areas: the Bureau's treatment of merger efficiencies in 2008[1] and the Bureau's Draft Merger Enforcement Guidelines in 2004.[2]

Given the increasingly global nature of business and, in particular, the growing importance of cross-border transactions involving firms in the United States, the Sections have a strong interest in the Draft Guidelines. The Sections also have substantial familiarity with the legal and economic analyses of the potential competitive effects of transactions and the merger review process followed in the United States. The Sections believe the experience of the U.S.

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1 Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on Draft Bulletin on Efficiencies in Merger Review of the Competition Bureau of Canada (2008).

2 Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on Merger Enforcement Guidelines (Draft for Consultation March 2004) of the Competition Bureau of Canada.

bar in dealing with the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (jointly referred to hereafter as the Agencies) on merger reviews may be informative to the Bureau, particularly in light of the fact that the Bureau proposes to adopt a review process that is very similar to the one followed by the Agencies. The Sections hope that our Comments will assist the Bureau in the consideration of the Draft Guidelines.

Executive Summary

The Draft Guidelines outline a proposed merger review process that is very similar to the one followed by the FTC and DOJ under the Hart-Scott-Rodino (HSR) Act. The Draft Guidelines "Supplementary Information Request" mechanism bears a significant resemblance to the HSR Act's merger review process described below. The HSR merger review process consistently has been a subject of keen interest to the Sections and its members. The Sections believe that their members' experience with the HSR merger review process is relevant to the Bureau's consideration of its proposed Merger Review Process Guidelines. The Sections offer comments reflecting this experience with the U.S. process[3] in Part I below, as well as several comments regarding specific provisions of the Draft Guidelines in Part II below.

Summary of Specific Recommendations

The Sections make the following suggestions:

- The Bureau should consider more clearly describing the conditions in which "early termination" of the initial waiting period will be granted, and indicate whether early

[3] The Sections have commented regularly on the merger review process over the years, and the Bureau may find these previous statements and comments to be of interest and assistance as it considers the Draft Guidelines. *See, e.g.*, "Transition Report on the Current State of Federal Antitrust and Consumer Protection Enforcement," (2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf; "Hart-Scott-Rodino Second Request Process" (Letter to Antitrust Modernization Commission, dated Dec. 7, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/12-05/hsr-2nd-request-comm.pdf; "The State of Federal Antitrust Enforcement – 2004" (2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/02-05/state_of_fed_enforc.pdf; "Guidance for Federal Merger Investigations," *available at* http://www.abanet.org/antitrust/guidelines_for_mergers_12_00.pdf; "Comments from the Section of Antitrust Law of the ABA regarding the Merger Review Process (Letter to Joseph Simons, dated August 6, 2002), *available at* http://www.abanet.org/antitrust/at-comments/2002/08-02/simons.pdf; "The State of Antitrust Enforcement 2001," *available at* http://www.abanet.org/antitrust/at-comments/2001/reports/antitrustenforcement.pdf; and Report of the ABA Antitrust Section Special Task Force on Competition Policy (March 1, 1993), *available at* http://www.abanet.org/antitrust/at-comments/1993/reports/1993-comp-policy.pdf.

termination will be granted as a matter of course immediately upon a determination that a transaction is not likely to have anticompetitive effects;

- The Bureau should consider whether it has the authority to allow merging parties to address unresolved issues without resort to a Supplementary Information Request;

- The Bureau should consider establishing a formal process by which the investigation staff will inform the merging parties of the competitive concerns that lead to the issuance of a Supplementary Information Request;

- The Bureau should not treat the Guidelines' presumptive limitations on the search of custodians, documents and data as effective minimum standards that are to be applied in every case;

- The Bureau should consider whether a pre-issuance dialogue regarding scope of search issues will limit the Bureau's ability to undertake a substantive assessment of the transaction during the initial 30 day waiting period, and, if so, how to limit prejudice to parties that engage in a pre-issuance dialogue;

- The Bureau should define more clearly the "exceptional cases" that may merit a departure from the Draft Guidelines' general limitations on the scope of a Supplementary Information Request;

- The Bureau should assess whether it has sufficient capacity and expertise to manage and review the volume of data and documents submitted in response to any Supplementary Information Request;

- The Bureau should give careful consideration to designating an independent third party, rather than a Senior Bureau official, to review challenges to the scope of a Supplementary Information Request; in any case, the Bureau should give consideration to publishing, in abbreviated form if necessary to preserve confidentiality, the issues raised, and their disposition, in any Appeal proceeding;

- The Bureau should provide additional guidance on the standard for complying with a Supplementary Information Request;

- The Bureau should give careful consideration to designating an independent third party, rather than a Senior Bureau official, to review challenges to parties' compliance with a Supplementary Information Request; and,

- The Bureau should commit to periodic reviews of the efficacy of the merger review process.

Comments

I. Experience with the HSR Process in the United States

Under the HSR Act in the United States, parties may not complete their transaction until the expiration of a 30-day waiting period (15 days in some cases), during which either the FTC or DOJ investigates whether the transaction may substantially lessen competition in violation of Section 7 of the Clayton Act. The reviewing Agency may extend the waiting period and conduct a more substantial investigation by issuing a request for additional information, commonly referred to as a "Second Request." Citing the fact that the Agencies generally will have only one opportunity to issue a Second Request for a particular transaction, the Agencies invariably draft the request so as to require the parties to supply a massive amount of information regarding the transaction, ordinary course operations of the parties, the markets affected by the transaction, and its competitive effects. After the parties substantially comply with the Second Request, a second 30-day waiting period starts (or shorter for some forms of transactions), during which the Agency must decide whether to clear the transaction or challenge it in court.

Under this pre-merger notification process, the Agencies are able to review and challenge mergers before they are consummated. This process has been in place in the United States for over 30 years, and throughout this time period, the Agencies and merging parties have struggled with striking the appropriate balance between the Agencies' legitimate need for information to assess the competitive merits of a transaction and the burden and costs imposed upon parties in responding to Agency requests for information.

Although the enactment of the HSR Act was intended to make merger enforcement more effective, the process has imposed significant costs on both merging parties and the Agencies. A review of the legislative history of the HSR Act shows that Congress assumed that the burden and cost of responding to a Second Request would be modest, noting that the Agencies should request materials "already available to the merging parties [and] lengthy delays and extended

searches should consequently be rare."[4] However, the actual burden associated with responding to a Second Request far exceeds Congress' original intention. Responding to a Second Request typically results in 1) the expenditure of several million dollars for document and data processing and attorneys' and economists' fees and 2) the production of millions of pages of documents and dozens of gigabytes of electronic data and documents. In fact, a 2003 survey conducted by PricewaterhouseCoopers concluded that the external costs to the merging parties subject to a Second Request in the United States were at least double that of any other jurisdiction.[5] The Second Request process also typically is a very lengthy one; the average length of an HSR investigation can be six months or longer.[6] Some investigations in fact last much longer and continue for one year or more. Extensive investigations not only are costly, but also delay the savings and efficiencies that the parties expect to achieve through their transaction. There is also a risk that lengthy merger reviews can result in the loss of key personnel and/or limit each party's ability to respond to changes in the marketplace.

The increases in merger review process costs and duration over the years are largely a function of three factors: 1) corporations store and maintain increasing volumes of electronic documents and data, 2) the agencies have engaged in more extensive economic analysis that requires the production of substantial amounts of electronic data, and 3) the process increasingly is used to conduct pre-trial discovery. The costs in a given investigation also can be significant as a result of the conduct of the merging parties and the reviewing Agency. Both sides, potential litigants, may seek to assert fully their rights under the HSR process.[7] For example, parties may choose to produce tremendous volumes of data and documents to the Agency at one time and assert that they have substantially complied with the Agency's request, leaving the Agency with 30 days to the review the submission and, if warranted, prepare a case seeking to enjoin the

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4 122 Cong. Rec. 30,876-77 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino).

5 PricewaterhouseCoopers, "A Tax on Mergers? Surveying the Times and Costs to Business of Multi-Jurisdictional Mergers Reviews, at 42 (June 2003).

6 *See* Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing (Nov. 17, 2005) (noting that approval for transactions receiving Second Requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Hart-Scott-Rodino Second Request Process, at 4 (Dec. 7, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/12-05/hsr-2nd-request-comm.pdf.

7 In many cases the Agencies and the parties will reach agreement on modifications and limitations to the Second Request issued in connection with a merger investigation, but the burdens of responding to a Second Request and reviewing the typical Second Request response are substantial.

consummation of the transaction. Alternatively, a reviewing Agency effectively can extend the HSR process by demanding that the parties comply with a literal reading of the Second Request or asserting that parties' failure to comply with certain aspects of the Second Request constitutes a failure to "substantially comply."

The expense and burden of Second Request compliance is significant and has increased tremendously over the years. For example, the Section of Antitrust Law previously collected information on the average costs and time associated with Second Request compliance. A 2005 Section of Antitrust Law survey reported that 1) median compliance costs were US$3.3 million; 2) investigations lasted an average of seven months; and 3) electronic document production averaged 583,000 pages of email, 555,000 pages of other documents, and 13 gigabytes of electronic data. [8] Other commentators have reported average compliance costs of between US$5 and US$10 million[9] and merging party costs in more complex investigations of up to US$20 million.[10]

The Agencies also have acknowledged the burdens and costs associated with the Second Request process. Over the past 10 years both the FTC and DOJ repeatedly have pursued efforts to make the process less burdensome and more efficient by introducing reforms to the merger review process. In 2001, the DOJ released its Merger Review Process Initiative, which had the objectives of focusing quickly on critical legal, factual, and economic issues for investigation; utilizing voluntary requests for information; encouraging early consultation with the parties concerning competitive issues identified; appropriately tailoring Second Requests; and encouraging parties to negotiate investigational frameworks and timing agreements with the DOJ.[11] The DOJ issued a revised Merger Process Review Initiative in 2006 that was intended to

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[8] "Data Regarding the Burden Involved in Responding to HSR Second Request Investigations" (Letter to Antitrust Modernization Commission, dated February 22, 2007), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_aba_mergers.pdf. As companies store larger amounts of material, these volumes are increasing. A recent article published in the ABA magazine *Antitrust* reported that, in a sampling of transactions that occurred in the 2006-2008 time frame, parties produced an average of 1.8 million pages of documents to the U.S. federal antitrust agencies. *See* Joe Sims, Robert C. Jones, and Hugh M. Hollman, "Merger Process Reform: A Sisphyean Journey," 23 Antitrust 60 (2009).

[9] Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005).

[10] Cecile Kohrs Lindell, "Majoras Hopes to Streamline Reviews," Daily Deal (May 11, 2005).

[11] U.S. Department of Justice, Antitrust Division, *Merger Review Process Initiative* (2001), *available at* http://www.usdoj.gov/atr/public/9300.htm.

take into account the parties' experience with the 2001 reforms.[12] These revisions to the Initiative established presumptive limits on the number of custodians to be searched and the time period for which a party must provide documents, and established a number of other procedural best practices.

The FTC likewise issued a Statement on Guidelines for Merger Investigations in 2002 that instituted several reforms to its merger review process, and in 2005 announced a more ambitious set of reforms.[13] Among other things, the FTC's reforms established presumptions that the FTC will (1) limit the number of employees required to provide information in response to a Second Request, provided the party complies with specified conditions; 2) reduce the time period for which a party must provide documents in response to the Second Request; 3) allow a party to preserve fewer backup tapes and produce documents on those tapes only when responsive documents are not available through more accessible sources; and 4) reduce the parties' burden with respect to the identification of documents they consider to be privileged.

Notwithstanding these reforms, the Second Request process continues to be lengthy and costly. Ultimately, these costs impose considerable burdens on the merging parties and also have required considerable resources from the Agencies. Furthermore, the burdens associated with the HSR merger review process have continued to *increase* for several reasons.

First, parties continue to generate and store increasing amounts of electronic materials.[14] The collection, review and production of electronic documents continues to be an extremely labor-intensive and expensive aspect of responding to a Second Request. It requires the assistance of sophisticated and costly consultants to manipulate and process the documents so that they can be produced in a reviewable format, as well as increased Agency resources necessary to review these documents.

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[12] U.S. Department of Justice, Antitrust Division, *Merger Review Process Initiative* (2006), *available at* http://www.usdoj.*gov*/atr/public/220237.htm. *See also* U.S. Department of Justice, Antitrust Division, *Background Information on the 2006 Amendments to the Merger Review Process Initiative* (2006), *available at* http://www.usdoj.gov/atr/public/220241.htm.

[13] Federal Trade Commission, *Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations* (2002), *available at* http://www.ftc.gov/os/2002/12/bcguidelines021211.htm; Federal Trade Commission, *Announcement of Federal Trade Commission Chairman Deborah Platt Majoras On Reforms to the Merger Review Process* (2006), *available at* http://ftc.gov/os/2006/02/mergerreviewprocess.pdf.

[14] *See, e.g.*, AMC Report and Recommendations at 165.

Second, as noted above, the Agencies regularly engage in extensive economic analysis that requires the production of tremendous amounts of data in response to agency interrogatories. Since the passage of the HSR Act, antitrust analysis has evolved from a framework that relies on structural presumptions about the competitive impact of mergers to an effects-based approach that is much more fact and data intensive. As a result, the scope of the Agencies' requests for information has expanded. Responding to the Agencies' interrogatories and other data requests can easily require hundreds or thousands of hours of work by the parties' employees, in assistance with outside counsel, economists and other consultants.

Third, the merger process reforms of the FTC and DOJ, while laudable, are not always applied in practice. Timing pressures, client imperatives, exceptions imposed by the Agencies,[15] and other factors can and often do interfere with the initiatives. The reforms have improved the process at the margins, but have not had the desired impact of significantly reducing the costs for the parties and the resulting burdens on the Agencies. Indeed, those costs continue to increase notwithstanding the reforms.

While the HSR merger review process is more effective than the regime it replaced, it continues to require the expenditure of significant resources by all participants. The topic continues to attract the attention of both private parties and the Agencies. Despite the Agencies' efforts to improve the process, in 2007 the U.S. Antitrust Modernization Commission (AMC)[16] recommended that the Agencies "continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by Second Requests."[17] The Sections encourage the Bureau to review the AMC's findings and

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[15] For example, the Agencies may decide that circumstances warrant a departure from the Agencies' presumptive custodian and time period search limitations. Alternatively, the agencies may condition their agreement to adhere to these search limitations on the parties' willingness to enter into timing agreements that give the Agencies' additional time to review a transaction beyond the statutory waiting period. To the extent that the parties frequently are unable to avail themselves of these presumptive limitations, the benefit of these initiatives is questionable.

[16] The AMC was authorized "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues." It was created by an act of Congress in 2002 and began work in 2004. The Commission was a bipartisan group of academics, economists, practitioners, and enforcers appointed by the President and the respective majority and minority leadership of the House of Representatives and Senate with the goal of ensuring "fair and equitable representation" of various viewpoints. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002). The AMC's "Report and Recommendations" (April 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[17] AMC Report and Recommendations at 162.

recommendations on this topic; Chapter II.B. of its Report and Recommendations provides a relatively comprehensive overview of the Second Request Process and its associated benefits and burdens.

The Sections recognize that the Competition Bureau takes seriously its mandate to enforce Canada's competition laws and also is mindful of the significant costs associated with the proposed new merger review process. Even though the Draft Guidelines state that it is unlikely that the Supplementary Information Request mechanism will be used often, when it is used the mechanism – as currently contemplated in the Draft Guidelines – would impose significant burdens on both the Bureau and the merging parties that the Sections believe are likely to be comparable to those that exist under the HSR process. The Sections therefore recommend that the Bureau consider carefully how it can further reduce the burdens likely to be imposed on both the Bureau and merging parties under the Supplementary Information Request mechanism as it is currently set out in the Draft Guidelines.

II. The Proposed Changes to Canada's Merger Review Process

The Sections have several comments addressing the specific provisions of the Draft Guidelines, and these are set forth below.

A. Termination of the initial 30-day review period.

Section 2 of the Draft Guidelines deals with the initial 30-day review period that begins once the Bureau's Merger Notification Unit receives a complete filing. In the United States, the reviewing Agency often is able to resolve any questions it has about the competitive effects of a transaction prior to the expiration of the initial waiting period.[18] Merging parties regularly request and often receive early termination of the 30-day initial waiting period. The Sections understand that the Bureau also has the power to authorize early termination of the initial waiting period in appropriate cases, and expect that this will become a more relevant consideration now that the initial waiting period has been increased from 14 days to 30 days.

[18] The HSR Act allows the Agencies to grant early termination of the waiting period, and a substantial portion of transactions notified are granted early termination of the HSR waiting period. See, e.g., Department of Justice and Federal Trade Commission, Hart-Scott-Rodino Annual Report, Fiscal Year 2007, available at http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf (showing the Agencies have granted early termination of the waiting period to 77% of the transactions notified in the period 1998 to 2007 (fiscal years) for which it was requested by the parties).

The Sections believe that the Bureau historically has been one of the most effective agencies in the world in identifying and clearing non-problematic transactions quickly. The Sections are encouraged by the Guidelines' reference in footnote 3 that "the Bureau will continue to make every effort to provide a response to merger notifications and ARC requests for non-complex transactions within the 14-day service standard period." However, the Sections believe it would be clearer if this statement was expanded and included in the text as a new Section 2.3 that would specifically reference the Bureau's powers and expectations regarding the issuance of early terminations.

The Bureau also may wish to provide guidance on the likelihood of challenge to a transaction after termination of the waiting period. Although termination or expiration of the HSR Act waiting period requirements do not preclude later challenge to a merger or acquisition, in practice the Agencies only very rarely have challenged transactions that had earlier received HSR clearance. (The Agencies have not been forthcoming about why they originally cleared a transaction and then later challenged it, except in situations where the merging parties failed to provide information required under the HSR Act.) The Bureau may wish to confirm that, absent extraordinary circumstances, it will not seek to undo a merger or acquisition that has received clearance.

B. Options to address unresolved issues without resort to a Supplementary Information Request.

Section 2.1 of the Draft Guidelines indicates that, at the conclusion of the initial 30-day waiting period, the Bureau will determine whether additional information is required from the merging parties, and if so that this will "normally" be obtained by way of issuing a Supplementary Information Request (whereas information may be sought from third parties by way of voluntary information requests as well as subpoenas).

The Draft Guidelines do not address whether the parties may voluntarily withdraw and re-file their notification to start an additional 30-day waiting period, or voluntarily extend the initial waiting period. Nor do they discuss situations where a focused voluntary information request to the merging parties may be sufficient.

In the United States, in cases where an Agency continues to have competitive concerns about a transaction at the conclusion of the initial waiting period but believes that it may be able to resolve any outstanding questions without having to issue a Second Request, parties may voluntarily withdraw and re-file their HSR filings to start an additional 30-day waiting period (they may do so only once without incurring an additional filing fee).[19] Withdrawing and re-filing in the United States does not guarantee that the Agency will not issue a Second Request. Thus, merging parties typically follow this practice only if they think it is reasonably likely that the Agency will be able to close its investigation without issuance of a Second Request or will be able to narrow the subject matter and scope of the Second Request if it has additional time to investigate. This informal practice has proven to be effective for a significant number of mergers, and thus the Sections suggest that the Bureau consider whether a similar mechanism should be made available to merging parties under the Draft Guidelines.

Although the HSR regime does not permit the voluntary extension of the initial waiting period by the parties, the Sections encourage the Bureau to explore whether that option could be introduced in the Canadian regime as a practical alternative to withdrawing and refiling a merger notification where a modest additional amount of investigative time is likely to facilitate a more efficient and timely review of the merger. If feasible, the Sections recommend that the Bureau include this option in the Guidelines.

The Sections understand that under the prior Canadian regime, where merging parties were cooperating voluntarily, the Bureau often continued merger investigations after the expiration of the initial short form filing waiting period without requiring a long form filing (and after the expiration of a long form filing waiting period without seeking a temporary no-close injunction from the Competition Tribunal). The Sections understand that this informal practice was efficient and effective in many cases. Accordingly, the Sections encourage the Bureau to replace the phrase "normally by way of a Supplementary Information Request" in Section 2.1 with a discussion regarding circumstances in which ongoing voluntary cooperation by the merging parties would be an acceptable alternative to the substantial time and cost burden of a full Supplementary Information Request.

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[19] *See* American Bar Association, Section of Antitrust Law, *The Merger Review Process: A Step-by-Step Guide to Federal Merger Review*, 141 (3d ed. 2006).

C. Informing the merging parties of the competitive concerns that lead to the issuance of a Supplementary Information Request.

The Draft Guidelines encourage merging parties to consult with the Bureau early and frequently during the merger review process. The Sections encourage the Bureau to state that it will generally endeavour to inform merging parties of the basis for issuing a Supplementary Information Request. In dealing with U.S. Agencies, the Sections' members have found that Agency staff frequently discuss their competitive concerns with the parties. However, the AMC expressed concern in its report that this dialogue "may not occur in all cases or such discussions may not always fully reflect an agency's competitive concerns."[20]

Providing an explanation of the competitive concerns that have led to the issuance of a Second Request or a Supplementary Information Request is useful because it 1) can facilitate substantive discussions between the merging parties and the reviewing agency, and 2) can enable the agency and the parties to assess more effectively what kinds of information and documents are likely to be most relevant to the agency's investigation. Requiring an articulation of the nature of the Bureau's concerns also may result in a more appropriately focused Supplementary Information Request.

For these reasons, the Sections recommend that the Bureau commit in the Draft Guidelines to provide merging parties' with information regarding the Bureau's competitive concerns prior to, at the time of, or within a short specified time (e.g., one week) after the issuance of a Supplementary Information Request.

D. The Draft Guidelines recognize that it is appropriate to place limitations on the maximum number of custodians to be searched, the data responsive period for the production of documents, and the obligation to search and produce information from backup storage media.

Section 3.3 of the Draft Guidelines includes a number of limitations on the scope of a party's search obligations in complying with a Supplementary Information Request. The Guidelines provide that, "in all but exceptional cases," the Bureau will adhere to these

[20] AMC Report and Recommendations 171, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

restrictions in delineating the scope of the request. These include 1) the number of custodians that need to be searched will be limited to a maximum of 30 individuals per party, 2) the production of hard copy and electronic records created or received will be limited to two years from the date of the Supplementary Information Request, 3) the responsive time period for data requests will be three years from the date of filing, and 4) parties will not be required to resort to producing records contained on back-up tapes where sufficient records can be obtained through less onerous means.[21]

In the Sections' experience, the key documents that are reasonably necessary to make an enforcement decision usually reside with a smaller number of custodians and in many merger investigations that number is well below 30 individuals per merging party. In light of this experience, the Sections respectfully suggest that the Bureau consider whether lower presumptive search limits (somewhere in the range of 15-20 custodians) are warranted "in all but exceptional cases". The Bureau also should take into account its right to obtain discovery in injunctive proceedings, and limit the extent to which it uses the Supplementary Information Request mechanism to obtain information that likely is discoverable. The Sections also believe that the Agencies increasingly have relied more upon data than documentary evidence in analyzing the competitive effects of a transaction. For these reasons the Sections encourage the Bureau not to treat its presumptive limits on custodians, documents and data as default or minimum standards.

E. Pre-Issuance Dialogue.

Section 3.3(a) of the Draft Guidelines further state that the 30 custodian maximum is conditional upon the merging parties engaging in pre-issuance dialogue with the Bureau (presumably during the initial waiting period), submitting personnel directories, and making available business people to discuss employee roles and responsibilities. Parties that engage in any pre-issuance dialogue also are encouraged to provide the Bureau with information regarding their archival systems and practices at this time.

[21] Section 3.3(a) of the Draft Guidelines also states that "in appropriate cases," the Bureau will consult with the parties regarding the possibility of limiting the custodians to the list of custodians to which the U.S. Agencies have agreed for purposes of a Second Request. Section 3.6 further states that "the Bureau will accept access to and copies of information and documents produced to a foreign agency as compliance with the relevant terms of a supplementary information request."

The Sections are concerned that requiring merging parties and the Bureau to devote substantial resources to addressing human resources and archiving issues during the initial waiting period – before the Bureau has determined whether to issue a Supplementary Information Request – may have the unintended consequence that the Bureau may not have sufficient time or resources to conduct a proper merits-based initial assessment of the transaction (which will often result in closure of the file instead of a Supplementary Information Request). The Sections encourage the Bureau not to make the custodian limitation conditional upon the merging parties engaging in a pre-issuance dialogue with the Bureau. Merging parties often will voluntarily engage in such a dialogue in cases where the Second Request is very likely, as it is in their interests to undertake preparations for the Second Request before it is issued. However, requiring all merging parties to engage in such a pre-issuance dialogue as a condition of the Bureau's application of its presumptive search limits, regardless of the circumstances of the transaction, may be unnecessary and risks diverting the parties and the Bureau from focusing on the likely competitive effects of the transaction during the initial waiting period. Thus, the Sections believe it would be desirable to state that the 30 custodian maximum applies in cases where dialogue about the Supplementary Information Request occurs post-issuance as well as pre-issuance.

In sum, the Sections believe that the approach in the Draft Guidelines may inadvertently discourage pre-issuance dialogue, which would be unhelpful for merging parties and the Bureau. The merging parties and the Bureau should be able to choose whether to have pre-issuance dialogue or not based on the entirety of circumstances, including whether the parties have provided personnel directories and made business people available. For example, pre-issuance dialogue discussing whether secondary areas of horizontal overlap should be included in a Supplementary Information Request could be very productive to both the parties and the Bureau in focusing the scope of the investigation to be covered during this states of the review.

F. Guidance regarding the "exceptional cases" that may merit a departure from the Draft Guidelines' general limitations on the scope of Supplementary Information Requests.

Section 3.3 of the Draft Guidelines provides that the Bureau will follow the Draft Guidelines' scope of search limitations in "all but exceptional cases." The Sections recommend that the Bureau provide additional guidance on the factors it will take into account in

determining whether a case is "exceptional." In the United States, the FTC and DOJ often deviate from their scope of search limitations on the grounds that a particular matter raises serious competition concerns or is "exceptional." However, the Agencies have provided little general guidance on the factors that they will take into account when deciding whether circumstances justify an upward departure from their default limits. The Sections suggest that the Bureau articulate what is likely to qualify as an "exceptional case."

G. Bureau capacity and expertise to manage and review the volume of data and documents submitted in response to any Supplementary Information Request.

The proposed Supplementary Information Request mechanism will place significant demands on the resources of the Bureau if it intends to conduct a meaningful review of merging parties' responses. The mechanism is closely modeled on the U.S. Second Request process. Therefore, it is realistic to anticipate that a Supplementary Information Request in Canada may generate similar volumes of information if similar requests are imposed (particularly where the relevant geographic markets span North America or the world). Even taking into account the Bureau's proposed limitations on the scope of any Supplementary Information Request, the potential volume of responsive materials that would be produced in an extended merger review will likely be extraordinary, and the Sections recommend that the Bureau assess carefully whether it has sufficient manpower and technological capabilities to accept and review the materials that merging parties would be required to produce. The production of significant volumes of data and documents also is likely to make it more difficult for the Bureau to identify, locate, and review relevant information submitted by the parties.

In the United States, Second Requests have placed a burden not only on the merging parties, but also on the Agencies. For example, in 1998, Second Request responses produced a total of 0.5 terabytes of electronic material at the DOJ. By 2003, the need for electronic storage capacity had grown exponentially to 12 terabytes. As of 2008, the DOJ had increased its electronic data storage capacity to support 70 terabytes and expects that by 2013 it will have to further expand its capacity to 180 terabytes – a 36,000% increase since 1998.[22] Moreover, the

[22] Thomas O. Barnett, Asst. Att'y General, 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.

Sections perceive that both Agencies have had to substantially upgrade their technical capacity and expand their IT support structures in the past 10 years.

The Bureau's proposed Supplementary Information Request mechanism has the potential to generate similar volumes of electronic documents and data. The Draft Guidelines state that the Bureau intends to use this mechanism sparingly. However, the U.S. Agencies also issue Second Requests on an infrequent basis; between 2002 and 2006, the Agencies issued a Second Request in only 3.1% of all reportable transactions. Yet the Agencies still have to devote considerable human and technology resources to be able to manage the vast amounts of information generated by the relatively few Second Requests issued each year. This information not only includes electronic documents that reside in the files of custodians, but also the vast amounts of data that the Agencies demand in the typical Second Request response. The Draft Guidelines exempt "central files" from its custodian limit, but to the extent "central files" include data that resides on enterprise application software systems and databases, there is a risk that even a single Supplementary Information Request response could exceed the Bureau's capacity to review such materials.

In light of these concerns, the Sections recommend that the Bureau assess whether it will have adequate resources to review and digest information received under the Supplementary Information Request process and whether all of this information is necessary to make appropriate substantive decisions within the timeframes established by the Guidelines. If the Bureau is unable to utilize the volume of information garnered through the proposed Supplementary Information Request process effectively, it should consider using questions with significantly narrower scope than the standard U.S. Second Request in order to focus on obtaining a manageable and useful level of information.

H. Appeal mechanism regarding the scope of a Supplementary Information Request.

Section 3.8(a) of the Draft Guidelines proposes that any party that objects to the scope of all or part of a Supplementary Information Request may, after discussing the matter with the responsible Assistant Deputy Commissioner, submit a request to the Senior Deputy Commissioner of the Mergers Branch to have the Supplementary Information Request reviewed through the Bureau's internal appeal process. This process is similar to the appeals process defined in the United States, where merging parties may pursue an internal appeals process in

which senior officials of the Agencies review and decide parties' objections to the scope of Second Requests.

Based on the experience of its members, the Sections invite the Bureau to consider designating a third party – such as a retired Competition Tribunal member or practitioner acceptable to the Bureau – to rule on any appeals concerning the scope of Supplementary Information Requests. The Sections believe that the internal appeals process followed in the United States has not been successful. As noted in the Antitrust Section's 2005 submission to the AMC, private practitioners have expressed concerns regarding 1) the lack of transparency of the internal appeals process, 2) the failure of the process to produce any precedents resulting from such decisions, and 3) the impartiality of the process.[23] As a result, in 2005 the Antitrust Section recommended re-consideration of a proposed amendment of the Clayton Act to establish a formal Second Request compliance process with a designated federal magistrate. In the United States, federal magistrates routinely resolve complex discovery disputes before courts, and thus would be suited to evaluating and deciding issues relating to the scope of Second Requests.

The Bureau should also consider also consider making public, to the extent consistent with confidentiality requirements, the issues raised in appeals, and their disposition. As noted, the AMC has criticized the Agencies' failure to be transparent in this regard. Transparency will have the positive effects of encouraging a more fair and reasoned treatment of merging parties' requests, providing confidence to merging parties that the process is not biased, promoting consistent treatment of similar appeals, and helping to avoid the appeal of claims previously addressed.

I. Additional guidance on the standard for complying with a Supplementary Information Request.

The Draft Guidelines should provide additional guidance in Section 3.7 on the standard of compliance will apply to a party's obligation to respond to a Supplementary Information Request. In the United States, parties are required to "substantially comply" with a Second Request, but even this standard provides limited practical guidance to merging parties as to what

[23] "Hart-Scott-Rodino Second Request Process" (Letter to Antitrust Modernization Commission, dated Dec. 7, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/12-05/hsr-2nd-request-comm.pdf.

constitutes an adequate or sufficient response to the government's request for information.[24] The Sections understand that the Canadian standard is that compliance be "complete and correct in all material respects" and, in addition, that parties may elect to not provide information that they consider to be not reasonably available, not relevant, privileged or previously provided. Even where these categories of information are carved-out of a response, it will be considered complete. The Sections certainly do not think that it is feasible to impose a "full compliance" standard on merging parties. However, in the interest of promoting transparency and certainty, the Sections recommend that the Bureau provide additional guidance on how it intends to interpret the statutory standard in assessing whether parties have complied with a Supplementary Information Request. In particular, it would be helpful to know what the Bureau believes would constitute a response that is "complete and correct in all material respects".

J. Appeal mechanisms regarding compliance with a Supplementary Information Request.

Section 7A(g)(2) of the Clayton Act provides that a U.S. federal district court may order compliance or extend the waiting period if a party fails to substantially comply with a Second Request. However, the issue of what constitutes substantial compliance has not been substantively addressed by the courts, and in the history of the HSR Act, there have only been three instances in which the FTC has authorized a complaint seeking an injunction on the grounds that the parties did not substantially comply with the Second Request.[25]

In 2000, Congress required the FTC and DOJ to establish formal internal processes for resolving compliance disputes, which they have since adopted.[26] However, as noted in Section

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[24] The implementing regulations of the HSR Act provide that a party must provide a "complete" response to any Second Request and a statement of any reasons for noncompliance. However, the Clayton Act itself establishes a "substantial compliance" standard. It directs the DOJ and FTC to appoint senior officials to determine whether merging parties have "substantially complied" with a Second Request, and also provides that a U.S. federal district court may order compliance or other equitable relief if a party "fails to substantially comply" with a Second Request.

[25] In *FTC v. McCormick & Co.*, the FTC challenged a merger party's failure to comply with a Second Request, but the court did not substantively address the issue. 1998-1 Trade Cas. (CCH) ¶ 67,976 (D.D.C. 1988). In 2005, the FTC alleged that merging party Blockbuster, Inc. failed to provide adequate pricing data in response to a Second Request, but the matter was resolved and not litigated. FTC v. Blockbuster, Inc., Civ. No. 1:05CV00463 (D.D.C. March 4, 2005). *See also* FTC v. Dana Corp., No. CA-3-81-0003-H (N.D. Tex. 1981).

[26] 15 U.S.C. §18a(e)(B)(i).

H of these comments, the Sections' members experience with the internal appeals process generally has not been a positive one.

The Sections recommend that, as with scope disputes, the proposed review process set out in the Draft Guidelines be placed in the hands of a retired Tribunal member or practitioner acceptable to the Bureau, rather than a Bureau Deputy Commissioner. The Bureau also should establish equitable timelines for resolving such disputes; in the United States, parties often are reluctant to appeal to courts to resolve disputes over Second Request compliance or breadth because of the likely delay in obtaining a judicial decision.

K. Periodic Review of the Merger Review Process

The Agencies, in an ad hoc manner, have periodically reviewed the efficiency and efficacy of their merger process.[27] These reviews have coincided with the ascension of new leadership rather than any formalized review period and thus they are largely subject to personnel changes and leadership interests. The Section suggests that the Bureau formally commit to periodic review of its merger process procedures, in support of a continuing commitment to best practices.

Conclusion

The Sections appreciate the opportunity to comment on these valuable guidelines and would be pleased to respond to any questions the Bureau may have, or to provide any additional information that may be of assistance to the Bureau.

[27] See discussion at pages 6-7, supra.