Reforming the HSR Act Notification and Report Form: A Modest Call to Substance

Robert S. Schlossberg

The notification and review process required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976[1] (HSR Act) is commenced by the filing of one or more Notification and Report Forms (the Form).[2] Since the Form was first promulgated over thirty years ago,[3] it has been meaningfully amended only a handful of times.[4] The Item 4(c) requirement has been much debated but never amended.[5] The Form remains solely a product of the Federal Trade Commission and the Antitrust Division of the Department of Justice pursuant to authority delegated to them under the HSR Act; it has never been subject to judicial interpretation.

Relatively little has been written about the initial notification required by the HSR Act,[6] although Item 4(c) of the Form has generated some commentary.[7]

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1 Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390–94 (codified as amended at 15 U.S.C. § 18a).

2 The Form and its Instructions are published at 16 C.F.R. pt. 803 app. (2009); the Form, Instructions and the antitrust enforcement agencies' recommended Style Sheet for Hart-Scott-Rodino Filings are also available from the Premerger Notification Office (PNO) at http://www.ftc.gov/bc/hsr/hsrform.shtm (Form and Instructions) and http://www.ftc.gov/bc/hsr/pnostyl2.shtm (Style Sheet).

3 The Form was first made public as part of the 1976 Proposed Rules. The original Report Form can be found in Mergers and Acquisitions, 41 Fed. Reg. 55,488, 55,495–55,501 (proposed Dec. 20, 1976). Section 7A(d)(1) of the Clayton Act, 15 U.S.C. § 18a(d)(1) (added by Section 201 of the HSR Act), authorizes the FTC to determine the nature of the notification to be required under the HSR Act and to designate for inclusion "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate" to a determination of the legality of the proposed acquisition. 15 U.S.C. § 18a(d)(1); *see also* S. REP. NO. 94-803, at 67 (1976).

4 *See, e.g.*, Marian R. Bruno, Ass't Dir., Premerger Notification Office, Bureau of Competition, Fed. Trade Comm'n, Hart-Scott-Rodino at 25, Prepared Remarks before the ABA Conference on Mergers & Acquisitions: Getting Your Deal Through the New Antitrust Climate (June 13, 2002), *available at* http://www.ftc.gov/speeches/other/brunohsr25.htm.

5 The instructions to Item 4(c) of the Form mandate the submission of "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, Instructions, Item 4(c), 16 C.F.R. § 803 app. at 666, 670 (2009) [hereinafter Instructions to FTC Form C4]. The Instructions to FTC Form C4 are also available at http://www.ftc.gov/bc/hsr/P989316PMNRulesandFormalInterpretationsElectronicSubmission-Instructions.pdf.

6 *See* Malcolm R. Pfunder, *Some Reflections on, and Modest Proposals for Reform of, the Hart-Scott-Rodino Premerger Notification Program*, 65 ANTITRUST L.J. 905, 923–25 (1997) (proposing a number of modifications to the HSR Form, some of which were ultimately adopted by the FTC). Recently, a proposal has been made for the program to be expanded to include voluntary filings of transactions that do not satisfy the filing thresholds. *See* Robert B. Bell, *Voluntary HSR Filings: A Modest Proposal*, ANTITRUST, Spring 2009, at 69. *See generally*, *Symposium: Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 ANTITRUST L.J. 813 (1997).

7 *See, e.g.*, Malcolm R. Pfunder, U.S. v. Iconix: *A Recent Hart-Scott-Rodino Act Civil Penalty Case Emphasizes the Need for Thorough "Item 4(c)" Document Production—A Brief Item 4(c) Primer*, ANTITRUST REP., Issue 3, Fall 2007, at 9; William J. Baer & Deborah Feinstein, *Item 4(c): The Next Step in HSR Reform*, ANTITRUST, Spring 2002, at 43; Marian R. Bruno, Brian C. Mohr & Bruce J. Prager, *Some Practical Guidance for the HSR Practitioner: Locating and Identifying Item 4(c) Documents*, ANTITRUST, Spring 2002, at 46.

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This article suggests reforming the Form, modifying it in ways that may reduce the burden on the notifying parties, and, at least as importantly, will better serve the substantive inquiry required under Section 7 of the Clayton Act[8]—in short, this is a modest call to substance. The article will not discuss the 4(c) requirements of the Form, but instead will suggest that the agencies abandon Item 5 of the Form, and by consequence Item 7 of the Form, and replace them with one or more questions designed to have the parties address directly the issue of horizontal competition between them.

The Logic of the Form

The approach or philosophy of the current Form is, in a word, objective, not subjective. To overstate (slightly) the point, the Form implicitly proceeds from the premise that the notifying parties are not to be trusted or at least what they might say in a discursive way in response to open ended questions is not worth anything—or at least not as much as their response to objective questions. Thus, the Form seeks to ferret out or discover the horizontal competition between the parties[9] in two ways: Item 7 of the Form has the parties identify in which NAICS codes,[10] if any, they both report revenue for the current year;[11] and (in)famous Item 4(c) requiring the production of certain documents prepared for the transaction that discuss competition or the elements of competition.[12]

There are a number of problems with this approach. The reporting of revenue in Item 5 of the Form for the so-called base year—now 2002—and the current year by NAICS (formerly SIC) codes has the twin evils of being more burdensome and far less informative than probably originally envisioned.[13] More burdensome because extensive anecdotal evidence shows that parties rarely have that information readily available—notwithstanding that Item 5 builds on a classification system derived from a U.S. company's obligation to report revenue by those codes to the

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[8] 15 U.S.C. § 18.

[9] In 2001, among other changes, the FTC amended its premerger notification rules by eliminating former Item 8, which had asked for information about any vendor-vendee relationships. Premerger Notification; Reporting and Waiting Period Requirements, 66 Fed. Reg. 8680, 8686–87 (Feb. 1, 2001).

[10] As of July 1, 2001, all revenues reported in the Form must utilize North American Industry Classification System (NAICS) codes rather than Standard Industrial Classification (SIC) Codes. *See* Premerger Notification; Antitrust Improvements Act Notification and Report Form, 66 Fed. Reg. 23,561, 23,562–65 (May 9, 2001); Premerger Notification; Antitrust Improvements Act Notification and Report Form, 66 Fed. Reg. 35,541, 35,541–42 (July 6, 2001). The NAICS system classifies economic units with similar production processes in the same industry. NAICS was developed jointly by Canada, Mexico, and the United States in response to criticism about the SIC system, to reflect changes in the global economy, including the rapid growth of service and technology-based industries, and to provide a comparable classification system for the three countries. NAICS divides the economy into 20 sectors and identifies 9 new service industry sectors and 358 new national industries. In 1997, the United States Office of Management and Budget (OMB) adopted NAICS for use by all statistical agencies of the Federal Government. *See* Premerger Notification, 66 Fed. Reg. at 23,562–63; *see also* B. Michael Verne, Premerger Notification Office, Bureau of Competition, Fed. Trade Comm'n, Surviving the Shift to NAICS, Presentation at the Mergers and Acquisitions Conference in New York City (June 13, 2002), *available at* http://www.ftc.gov/speeches/other/naics.shtm.

[11] The Form provides:

> If, to the knowledge or belief of the person filing notification, the acquiring person filing notification derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired person that is a party to the acquisition also derived dollar revenues in the most recent year . . . then for each such 6-digit NAICS industry code [supply the following].

Instructions to FTC Form C4, *supra* note 5, Item 7, 16 C.F.R. § 803 app. at 671.

[12] *See id.* Item 4(c), 16 C.F.R. § 803 app. at 670.

[13] The FTC responded to contemporaneous public comments criticizing the use of SIC codes in 1978 by stating that "the use of SIC-based categories should not be unduly burdensome. Reporting persons are presumably required to compile SIC-based data for submission to the Bureau of the Census." Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,527 (July 31, 1978).

Census Bureau.[14] For whatever reason or myriad reasons, it is not that common for a company to answer Item 5 by simple reference to a form completed for, or recently filed with, the Census Bureau.[15] This of course is even more true for overseas companies that are exempt from[16] or ignorant of Census Bureau reporting requirements.

The burden of Item 5 NAICS reporting is real, although it has never been quantified in the aggregate. Equally important, however, its utility appears to range from marginal to zero, because the NAICS codes are too blunt an instrument from which to gauge the horizontal overlaps, if any, between the parties, being both over- and under-inclusive—and of course the Item 5 burden is imposed on all parties whether or not the parties to the transaction are indeed competitors.[17] The simple point is that the NAICS code will rarely define a relevant antitrust market, and in those rare instances when it does, it is unlikely to yield useful information at all or such information that justifies the burden imposed on all filers.[18]

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Although there are many examples that can be offered, one glaring deficiency in the Item 5 reporting is that the NAICS system is not well suited for a global economy, or more precisely, where the relevant geographic market includes products manufactured outside the United States, an increasingly common occurrence. Assume the following:

- Company A manufactures widgets only in the United States and is seeking to acquire Company B, a widget manufacturer with no U.S. manufacturing facilities
- There are no meaningful barriers to exporting widgets to the United States and twenty percent of U.S. widget demand is satisfied by imports
- Company B has been targeting U.S.-based widget customers, who account for 30 percent of its sales
- Company A has complained about Company B's U.S. pricing in its own internal strategic plans but not in the 4(c) documents for this transaction.

What useful information does the current form yield? Not much. The NAICS codes will not be revealing: "sales of products manufactured by the reporting person in its own plants located outside the United States should not be shown as manufacturing revenues under Item 5, regardless of where or to whom they are sold."[19] Therefore, under Item 5, Company B will not report that rev-

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[14] *See id.*; *see also* Premerger Notification; Antitrust Improvements Act Notification and Report Form, 66 Fed. Reg. 23,561, 23,565 (May 9, 2001) (stating that "many companies that currently file HSR notifications have submitted economic information to the Bureau of the Census using NAICS codes since 1997").

[15] *But see* Antitrust Modernization Comm'n, Public Hearing on Merger Enforcement, Tr. at 191 (Nov. 17, 2005) [hereinafter AMC Hearing Tr.], *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051117_Mergers_Transcript_combined_reform.pdf (Wayne Dale Collins, of Shearman & Sterling, stated: "I don't consider [NAICS codes] to be a particularly large burden on the companies . . . .").

[16] *See* U.S. Census Bureau, Economic Census, http://www.census.gov/econ/overview/mu0000.html (defining the coverage of the Economic Census as "[a]ll *domestic* non-farm business establishments" (emphasis added)).

[17] *See* AMC Hearing Tr., *supra* note 15, at 184 (prepared statement of David Wales) ("[M]any of our clients spend a lot of time putting together the revenue information that is required. And we have been told by staff on numerous occasions that they rarely look at the rest of the HSR form," [referring to Items 5–8]).

[18] *Cf.* Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers* 3 n.4 (Economic Analysis Group Discussion Paper 06-11, Sept. 2006), *available at* http://www.abanet.org/antitrust/at-committees/at-mergers/pdf/past-programs/heyer-paper.pdf ("Convenient 'industry classification codes' . . . seldom provide adequate clarity.").

[19] ABA Section of Antitrust Law, Premerger Notification Practice Manual 334 (4th ed. 2007).

enue in the 6-digit and 10-digit manufacturing codes in which Company A will report the revenue.[20]

All of this Item 5 effort in theory serves two purposes: the so-called base year—the last year for which the Census Bureau has collected information on sales—provides the staff a denominator from which it can calculate market share; and Item 5 allows an identification of product or service overlap between the parties in Item 7. Because the NAICS code is rarely if ever a relevant antitrust market, this exercise is unjustified. In addition, if the NAICS code is in fact relevant, the base year (the current base year is 2002) has historically been four or more years out of date (currently, it is seven years out of date) and thus a not terribly relevant denominator; and, coming to one of the principal points, if in fact the parties are competitors, there are more efficient ways to test that proposition and produce more useful information.

Although there are many developments of note and relevance since the Form was promulgated decades ago, two in particular inform this proposal: the prevalence of international merger control filings and the Internet.

In testimony before the Antitrust Modernization Commission (AMC), senior FTC and DOJ officials asserted that the NAICS codes were "indispensable" to an efficient functioning of the initial thirty-day screening process. The (then) Director of the Bureau of Competition said:

> [T]he NAICS revenues are absolutely indispensable to the review that the pre-merger notification office does: determining whether there are overlaps and making the determination whether we can grant early termination within a week and a half or so.
>
> And so, far from accelerating the process of our review, I think eliminating that information would greatly extend the time that it took us to make a determination with respect to the 90 plus percent of deals in which we're able to grant early termination simply on the basis of the parties' information [contained] in the parties' filings.[21]

It must be acknowledged that, as there are historically 100–150 HSR filings per month, agency staff needs an efficient way to sort the wheat from the chaff and identify quickly whether the parties are horizontal competitors.[22] Taken at face value, the testimony before the AMC discussed above can be interpreted as saying that Items 5 and 7 are "indispensable" to that effort. Assuming that is true does not of course mean that there is not a more efficient method—less burdensome on the private sector—that is likely to be at least as informative.

Times Have Changed

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[20] *See* Fed. Trade Comm'n, Bureau of Competition, Hart-Scott-Rodino Premerger Notification Program, Item 5(a), (b), (c)—Some general observations on reporting revenues (2008), http://www.ftc.gov/bc/hsr/item5notes.shtm:

> Revenues derived from sales by a foreign entity of goods directly to customers in the U.S. (i.e. the order is placed with the foreign entity and title and risk of loss for the product sold passes to the U.S. customer outside of the U.S.) are not reported in item 5. Revenues derived from sales by a foreign manufacturing entity which are made through a U.S. establishment included within the same person as the foreign entity are reported as wholesale revenues in item 5. *Goods of foreign manufacture are never reported under manufacturing codes in item 5.*" (emphasis added).

[21] AMC Hearing Tr., *supra* note 15, at 189 (testimony of Susan Creighton). Similarly, Bob Kramer, the Antitrust Division's Director of Operations, asserted that "the NAICS codes are very important" and "very valuable." *Id.* at 190 (testimony of Bob Kramer).

[22] For the fiscal year 2008, the agencies reported 1,656 filings. Fed. Trade Comm'n, Performance and Accountability Report—Fiscal Year 2008, at 59, *available at* http://www.ftc.gov/opp/gpra/2008parreport.pdf. The HSR thresholds were raised significantly effective February 1, 2001. For the succeeding seven full fiscal years, the number of HSR filings averaged 1568 per year or 131 per month. *Id.*; Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report: Fiscal Year 2007, at 2 (Fig. 1), *available at* http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf.

ICN. To their credit, the U.S. agencies were founding members of and remain staunch supporters of the International Competition Network (ICN), which now counts over ninety countries as members.[23] In June 2009, the ICN concluded its eighth annual conference in Zurich, Switzerland, attended by over eighty jurisdictions.[24] One of the areas of early focus and success for the ICN was mergers, for which it generated a set of Recommended Practices.[25] At its most recent annual conference, the ICN also issued a report discussing the information requirements for merger notification of a number of jurisdictions.[26] The purpose of the report is to "assist agencies in evaluating their approaches to initial notification" and to advocate adoption of "mechanisms for flexibility in the content of the initial notification."[27]

For the United States to maintain a credible "bully pulpit" and sufficient moral authority to improve the worldwide merger control process in part by encouraging adherence to the Recommended Practices, it, of course, has to be seen to be following them. The Recommended Practices encourage "flexibility" in the initial notification as a way of not imposing unnecessary burdens,[28] yet the HSR Form is virtually inflexible. Unlike many other countries, for instance, the United States has no short form or alternate form available to be used in those transactions where the parties are not (meaningful) competitors.[29] The Item 5 burden exists for transactions where it obviously serves no purpose. Amending the HSR form can align it more with ICN Recommended Practices.

Why Not Ask the Parties?

The myriad forms of merger control filings around the world—a phenomenon largely post-dating the creation of the Form with its reliance on its NAICS code reporting mechanism—helps us gain some perspective on the Form and suggest a simple reform: Why not ask the parties if they are horizontal competitors?As the HSR Act and Form are intended only to provide the government with advance notice of and information about deals that should be reviewed under Clayton Act Section 7, it is curious at least that the Form does not even request the parties to state whether they are competitors. Other countries pursuing similar premerger notification goals are not so reluctant.[30] For instance:

- **European Union:** For transactions triggering notification requirements (based on the parties' revenue), the notifying party must (i) identify overlapping products, (ii) define relevant geographic and product markets for those overlapping products, and (iii) calculate the parties'

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[23] *See* Int'l Competition Network, Members, http://www.internationalcompetitionnetwork.org/index.php/en/members.

[24] Information concerning the conference, held June 3–5, 2009, may be found at http://www.icn-zurich.org/Home.aspx. Documents from the conference are available at http://www.icn-zurich.org/Materials.aspx.

[25] Int'l Competition Network, Recommended Practices for Merger Notification Procedures, *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

[26] *See* Int'l Competition Network, Notification & Procedures Subgroup, Information Requirements for Merger Notification, Presented at the 8th Annual Conference of the ICN (June 2009), *available at* http://www.icn-zurich.org/Downloads/Materials/ICN_MergerWG_Notification&Procedures.pdf.

[27] *Id.* at 3.

[28] Recommended Practices for Merger Notification Procedures, *supra* note 25, § V(B) cmt. 1, at 11.

[29] Int'l Competition Network, Implementation Handbook 38-41 (2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf (providing examples of seven jurisdictions which laudably implement the Recommended Practices on flexibility through such an approach).

[30] *See* Information Requirements for Merger Notification, *supra* note 26, at 8 (reporting that the "vast majority of jurisdictions surveyed indicated that their initial merger notification forms require parties to provide information about competitive effects").

combined market share.[31] If the parties' combined market share is 15 percent or more in any of the relevant markets, additional information must be provided. Similarly, the notifying party must also provide additional information for vertical relationships if the parties' individual or combined vertical market share is 25 percent or more. In analyzing vertical relationships, it is irrelevant whether there is an existing supplier/customer relationship between the merging parties.

- **Brazil:** For transactions triggering notification requirements (based on the parties' revenue or market share), the notifying party must (i) identify overlapping products, (ii) define relevant markets for those overlapping products, and (iii) calculate the parties' combined market share.[32] In addition, the notifying party must estimate market shares of competitors as well as provide information about customers, barriers to entry, and other market conditions.[33]
- **Korea:** For transactions triggering notification requirements (based on the parties' assets or revenue), the notifying party is required to describe the market characteristics of all overlapping products or services produced or offered by the merging parties.[34] In addition, the notifying party must identify the major competitors (including importers) in the relevant markets and provide their respective market shares as well as identify local and overseas market barriers.[35]

One need not, of course, endorse the practice of asking the parties for detailed market shares or other information in recognizing the wisdom of simply asking the parties whether they are horizontal competitors or sell overlapping products. What accounts for the failure of the U.S. authorities to ask whether the parties are competitors? Maybe it is too much faith in revenue reporting by code and not enough faith in the parties.[36] It also appears to be consistent with a view of the process as more adversarial than cooperative. It is not a satisfactory answer to say competition is in the eye of the beholder or that, given how frequently market definition is the subject of fierce debate between the parties and the agencies, the parties cannot be relied upon to admit to competition between them but will always or often define markets to eliminate the possibility that they will be deemed to be competitors.

This view is not, experience tells us, supported by the practice in other jurisdictions. In addition, the Form will still need to be certified, any discussion would need to be consistent with the 4(c) documents, and there is the natural self-preservation motive of at least "repeat customers" not to be caught by the agencies with taking liberties with sensible market definition.

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[31] *See* Commission Regulation (EC) No 802/2004 of 7 April 2004 Implementing Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings, Annex I, 2004 O.J. (L 133) 1, 9–22, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF.

[32] The Brazilian merger authority is in the process of introducing a new pre-merger notification form that will require the notifying party to provide more information than is currently required.

[33] *See* Global Competition Review, Getting the Deal Through—Merger Control 2009 at 70–72 (13th ed. 2009).

[34] *See* Korean Fair Trade Comm'n, (Re)Notification of the Acquisition (or Ownership) of the Shares of a Company 4–5, *available at* http://ftc.go.kr/data/english/0511244_attached_form.doc (last visited June 2, 2009).

[35] *Id.*

[36] For example, the FTC argued in 1978 that "the submission of data according to SIC-based categories is necessary and appropriate in order to make a preliminary determination of the lawfulness of reported acquisitions under the antitrust laws." Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,528 (July 31, 1978).

What Has the Internet Wrought?

Divining competitive issues from the NAICS code overlap predates the Internet: it harkens back to that time of yesteryear—over thirty years ago—before an almost unmanageable amount of data and information was at our fingertips: with a few mouse clicks, it is often quite easy to see whether the "public record" suggests any issues worth exploring. The Internet resource plus 4(c) documents are highly likely to yield more than enough information on point, or, at a minimum, sufficient information to cross-check the parties' narrative responses. Indeed, casual conversations with current and former agency staffers suggest that 4(c) documents and the Internet are the primary tools used to determine whether a transaction is worthy of further investigation.

Reforming the Form

This proposal, then—this modest call to substance—has the agencies abandoning Item 5 of the Form, and by consequence Item 7 of the Form, to be replaced by one or more questions designed to have the parties address the issue of horizontal competition between them.

This proposal, then—this modest call to substance—has the agencies abandoning Item 5 of the Form, and by consequence Item 7 of the Form,[37] to be replaced by one or more questions designed to have the parties address the issue of horizontal competition between them. This proposal has much to recommend it, and is a logical next step to the second request reforms that the agencies issued in 2006.[38] The direct questions and answers will cause the parties to focus on the Section 7 issues, if any, that are raised by the transaction, and implicitly will start the relevant dialog with the agencies sooner than might otherwise occur under any type of a "file and pray" strategy.

Consider the following: Items 5 and 7 are eliminated and replaced with a short set of questions:

1. Is the Acquiring Person currently a horizontal competitor of the Acquired Entity(ies)?[39]
   ☐ Yes ☐ No
2. Does the Acquiring Person manufacture or offer for sale a product or service anywhere in the world that is (a) identical to, (b) substantially similar to, or (c) that at least a not insignificant number of customers would regard as reasonably interchangeable with a product or service manufactured or offered for sale by the Acquired Entity(ies) anywhere in the world?
   ☐ Yes ☐ No
3. If the answer to question 2 is "Yes," please list the products and/or services as commonly described by the relevant business.
   ☐ List below ☐ N/A
4. If the answer to question 1 is "No" and to question 2 is "Yes," briefly explain why the parties should not be considered horizontal competitors.
   ☐ Brief explanation ☐ N/A

The object of these four questions is to solicit the bare minimum of information sufficient to let the staff determine whether any issues of horizontal competition are raised. The answers should also facilitate review of the 4(c) documents and make for more efficient staff research on the Internet. The intent of the questions is not to begin a major battle or debate over market definition, but rather to have the parties address the issue in simple business terms. For instance, if both par-

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[37] A further consequence would be to modify the instructions for Item 8; instead of basing Item 8 on NAICS code overlaps in Item 7, filing parties would be required to identify previous acquisitions based on markets where the parties are horizontal competitors.

[38] *See* Fed. Trade Comm'n, Reforms to the Merger Review Process 9–30 (Feb. 16, 2006) (announcement by Deborah Platt Majoras, Chairman), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf; U.S. Dep't of Justice, Antitrust Div., Merger Review Process Initiative 4–10 (Oct. 12, 2001, revised Dec. 14, 2006) [hereinafter U.S. DOJ Merger Review Process Initiative], *available at* http://www.usdoj.gov/atr/public/220237.pdf.

[39] In an asset deal, this would be limited to the assets being acquired.

ties manufactured widgets on different continents and where for reasons that may include transportation costs there was no international commerce and therefore no competition, such an explanation would be provided in response to question 4, after question 1 was answered in the negative and question 2 was answered in the affirmative.

Reviewing the answers to these questions should not materially lengthen the time staff devotes to each filing, and the answers will be at least as informative as Items 5 and 7.

Consider how this Proposal compares to Items 5 and 7 of the Form under various scenarios:

- **Financial buyer:** Q1 and Q2 are answered "No"; Item 7 would show no overlap. The results are the same, but in responding to the proposed questions, the parties did not have to undertake a timely and costly process of providing an Item 5 response in order to determine there was no overlap in Item 7.
- **Direct competitors:** The Proposal yields more useful information than the Form, which would show an overlap and geographic information (Item 7(c)).
- **Potential competitors:** Neither the Proposal nor current Items 5 and 7 provide useful information.
- **Vertical relationships:** Neither the proposal nor current Items 5 and 7 provide useful information.
- **Previous hypothetical with widget manufacturers:** The Proposal yields more useful information than the Form and identifies an overlap that would not be readily evident in Item 5. The "Yes" responses to proposed Q1 and Q2 and the response to Q3 will provide specific information about the competitive products between the two companies, even though one company's products are made outside the United States. The Item 7 response will not identify any geographic overlap because the Item 5 codes will not overlap.

As Item 4(c) under this proposal remains unchanged, and as the Internet is unlikely to become less efficient and less informative, it is difficult to see how under this proposal staff will do a less efficient job of screening filings.

Moreover, the agencies, of course, are not limited to the Form and accompanying documents in seeking to determine whether to issue a Request for Additional Information. The investigating staff routinely follow up with the notifying parties, either through phone calls or slightly more formal "access letters" asking for such things as strategic plans, sales, and lists of competitors and customers.[40] Thus, were such a revised form to raise questions through the parties' narrative answers—either because the parties have been direct about being competitors or seemingly evasive on the point—the agencies can quickly inquire further.

Conclusion

Item 5 of the Form generates appreciable burden and expense without a corresponding benefit. There are better, more efficient ways to solicit information from filing parties to assist in the determination of whether the transaction raises horizontal competition issues. It also does not appear that Item 5 is necessary for the Premerger Notification Office to process effectively the HSR filings.

This article has suggested substituting four direct questions for Item 5 (and Item 7); the questions are designed to drive to the heart of the merger review inquiry, thereby clarifying, not obfuscating, the ultimate issue. Although there may be room to improve these questions, the time has come to eliminate Item 5, bring the Form into conformity with international best practices, and recognize one of the many benefits of the Internet age. ●

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[40] *See, e.g.*, U.S. DOJ Merger Review Process Initiative, *supra* note 38, at 1–3.