

FEDERAL TRADE COMMISSION COMMITTEE NEWSLETTER

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EDITOR’S NOTE

Dear Committee Member:

After almost 90 years, the Federal Trade Commission continues to evolve – with expanding authority and responsibility. This newsletter tackles three aspects of the Commission’s changing law enforcement landscape and takes some looks into the future. Our topics are the FTC’s increased responsibilities and stepped up enforcement on privacy issues, the prospect of a paperless HSR process, and the FTC’s use of Section 13(b) of the FTC Act to pursue consumer redress in competition matters. We also review the Committee sponsored discussions at the Spring Meeting.

Our first piece, by David Medine, reviews the privacy law authority vested with the Commission and its latest enforcement efforts. Privacy has become a key focus of public attention in recent years, and privacy law enforcement is a growing part of the Commission’s legal arsenal and agenda.

Robert Cook, in our second article, takes us to the future, where the HSR process is conducted electronically – paperless. He outlines the benefits, and obstacles.

Our third article dives headlong into the thicket surrounding the Commission’s expanded use of Section 13(b) to pursue restitution and disgorgement in competition cases. The controversy is raised most sharply where the Commission’s efforts for indirect purchasers are cited as contrary to the principles underlying the Supreme’s Court’s *Illinois Brick* holding that indirect purchasers may not pursue claims for antitrust damages under Section 4 of the Clayton Act. The article covers the legal background and developments leading up to the Commission’s recent *Hearst* settlement. As the article notes, there is more to come.

We also provide brief reports on the informative Breakfast with the Bureau Directors session and privacy law development session sponsored by the Committee at the Spring Meeting.

Arthur N. Lerner, Editor

THE “PAPERLESS” SECOND REQUEST?

Robert N. Cook¹

A “paperless” second request process may be in our future.

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”), certain mergers and acquisitions are subject to premerger antitrust review by the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).² In some cases, DOJ or the FTC will issue requests for “additional information and documentary material relevant to the proposed acquisition,”³ generally referred to as “Second Requests.” Responding to a Second Request is usually very time-consuming and expensive, and firms tend to seek ways to reduce the time and expense involved. Because of the nature of the Second Request process, however, most burden-reducing efforts require the cooperation of the antitrust agency conducting the merger review.

The logistics of processing, copying and producing documents in response to a Second Request impose burdens unrelated to the antitrust substance of a merger review. In theory, logistical burdens can be significantly reduced by producing electronically instead of on paper. DOJ and the FTC, however, often resist proposals for major procedural innovations unless it can be shown that the proposed innovations are consistent with the agencies’ goal of conducting thorough merger reviews within the deadlines imposed by the HSR Act. The private bar, as well, may be unreceptive to procedural innovations because of a risk-averse preference for the tried and true.

In a recent Second Request production, at the behest of the client, we successfully identified and addressed the concerns of the FTC — and overcame our own resistance to change — ultimately making

possible the production of approximately 3.3 million pages of documents in electronic format instead of on paper. The production included both documents originally in electronic format and documents originally in paper format, which were scanned and converted into electronic format for review and production.

The Second Request Process

After an initial HSR filing is made, a waiting period, typically 30 days, must be observed prior to closing.⁴ If substantive antitrust issues cannot be resolved during that period, one of the antitrust agencies will issue a Second Request to each party to the transaction. Issuance of a Second Request extends the HSR waiting period, typically until 30 days after certification of “substantial compliance” with the Second Request.⁵

A Second Request combines a burdensome set of interrogatories with a burdensome document request.⁶ Responding to the interrogatory specifications of a Second Request may entail tortuous excavation of financial databases that were not originally designed to capture the data sought by the government. However, it is the document production specifications that tend to impose the heaviest burden, and that burden has increased over recent years even though the Second Request itself has not materially changed.

A decade ago, a production of 100 boxes in response to a Second Request would have been considered a fairly large production. Today, productions of 1,000 or more boxes of documents in response to a Second Request have become commonplace. The reason for the change appears to be the widespread use of email and other electronic document formats, though there has not been a formal study of the phenomenon.

The production and review of 1,000 or more boxes of documents in response to a Second Request

presents a considerable challenge, both to the company producing the documents and to the government agency called upon to review them within the timeframe contemplated by the HSR Act. The Second Request process does not have a mechanism for follow-up document requests and affords the government only one opportunity to obtain what it needs to determine whether the facts warrant challenging a proposed transaction. There is no "Third Request." In addition, unlike discovery, there is no direct judicial oversight.

DOJ and the FTC are largely self-regulated in their administration of the Second Request process, and courts do not become involved until a dispute over Second Request compliance ripens into a lawsuit.⁷ Even though the antitrust agencies do not themselves have the power to compel any person to respond to a Second Request, they do have the next best thing.

The HSR Act makes Second Request compliance mandatory before a "Second Requested" transaction can legally close.⁸ The existence of a government letter challenging the adequacy of a company's Second Request response may make it impossible to obtain third-party consents or opinions needed for closing. Even if the company is in the right, litigation to determine whether the company has in fact substantially complied with the Second Request may only contribute to the delay and uncertainty. As a practical matter, a cooperative approach is likely to be more successful than a confrontational approach.

The Second Request process limits the antitrust agencies to only one shot at obtaining the information and documents needed to determine whether to challenge a merger or acquisition. Given one shot, the antitrust agencies not surprisingly tend to choose the shotgun over the rifle. Being largely self-regulated in the administration of the Second Request process, the antitrust agencies tend

to reject proposals that would foreclose access to information or documents until it is clear that the material is not of interest to the investigation.

Negotiating an Electronic Production

The Second Request process is, in part, an ongoing process of negotiation that tends to follow a standard plot with recurring themes, such as the identification of persons whose files are to be searched and the manner of production of documents (for example, rolling versus all-at-once production). The choice of electronic versus paper production simply adds a theme to the standard plot.

Half of understanding how electronic production fits into the standard Second Request plot involves understanding some of the concerns that make electronic production an attractive alternative to a Second Request recipient:

Cost of producing documents. It should be no surprise that avoidance of the cost of copying and shipping millions of pages of paper is viewed by the company producing the documents as a plus on the side of electronic production.

Speed of compliance. The speed of Second Request compliance is increased by eliminating the logistics of physically handling millions of pages of paper. While this increase in speed is to some extent offset by the amount of time required to prepare an electronic production database, the net result appears to be a faster production.

Efficiency of review. While it may seem counterintuitive, handling documents in electronic format appears, at least anecdotally, to improve the efficiency of the document review that must take place prior to production. This is not intuitively obvious, since flipping through a paper document seems to be faster than paging through a document

electronically. It appears, however, that eliminating the manifold inefficiencies of crowded workspaces piled high with boxes of documents more than makes up for the loss of the speed of flipping through paper. In addition, the review of documents in electronic format can easily be distributed over multiple locations, making it possible to use resources more efficiently.

The other half of understanding how the theme of electronic document production fits into the standard plot of Second Request negotiation begins with the fact that the antitrust agencies do not yet have much experience with the electronic production of documents in response to a Second Request. The agencies may also believe that they lack the equipment necessary to handle an electronic production.

The principal burden facing a company offering to produce documents electronically is to show that electronic production will work in practice and that it is consistent with the government's interest in conducting a thorough investigation. To satisfy that burden, the documents must be produced via a reliable system in a readily usable format that is accessible using equipment that the government antitrust agencies already have.

In general, the concerns that we encountered on the government side were foreseeable and were, for the most part, complementary to the concerns on the company side:

No net disadvantage for the government side. A faster production may be viewed as somewhat reducing the government's built-in bargaining advantage side in the Second Request process, because the merger review must normally be completed within 30 days after substantial compliance with the Second Request.⁹ Since the government side may respond to a perceived reduction of its built-in bargaining advantage by

saying no, the net advantages to the government of receiving documents in electronic format must be explained clearly. Those advantages are principally in the form of increased efficiency of review.

Efficiency of review. In general, the benefits to the government of increased efficiency as a result of receiving documents in electronic format are parallel to the benefits to private parties of producing documents in electronic format. No less than private parties, and in fact even more so, the government antitrust agencies suffer from inefficiencies attributable to crowded workspaces piled high with documents. In addition, resource allocation issues may lead the government to have an interest in reviewing documents in multiple locations, which can be facilitated by electronic review. Both of these concerns can be addressed by producing documents in electronic format.

Integrity of the process. Ultimately, the FTC's paramount concern was to make sure that production of documents in electronic format was a workable alternative to production on paper. Among other things, in order to reach agreement on producing electronically, we had to agree to provide paper copies of all documents produced from the files of persons designated as deposition witnesses, even though such documents were also produced electronically. We also had to agree to stand ready to provide paper copies of additional electronically-produced documents, in response to concerns that the electronic production system might fail or prove unworkable. It is likely that the government's interest in supplemental productions on paper will diminish as the government becomes more experienced at handling documents that have been produced electronically.

Technology. The electronic document production was done through an Internet web site hosted by a third party rather than by producing data on

magnetic media, in large part because the web-based approach made it possible for the FTC to review electronically-produced documents using existing equipment.

Conclusion

Over the past decade, there has been tremendous growth in the volume of documents that must be produced in response to a Second Request, evidently because of a dramatic increase in the use of email and other electronic document formats. This increase in document volume in turn affects the timing and/or cost of navigating the Second

Request process, because the principal variable in the Second Request timetable is the amount of time between issuance of the Second Request and certification of substantial compliance.

Since the pressures on companies to complete mergers and acquisitions promptly have remained unchanged, the burden imposed by the Second Request process has increased as a function of the increase in the volume of material that must be produced. The electronic production of documents in response to a Second Request offers one way to reduce that burden, even in the absence of significant Second Request process reform.

- 1** Mr. Cook is counsel in the Washington, D.C. office of Drinker Biddle and Reath LLP.
- 2** See 15 U.S.C. § 18a.
- 3** 15 U.S.C. § 18a(e)(2).
- 4** For cash tender offers, the initial HSR waiting period is only 15 days. See 15 U.S.C. § 18a(b)(1)(B). Transactions subject to the jurisdiction of a bankruptcy court receive similar treatment. See 11 U.S.C. § 363(b)(2).
- 5** See 15 U.S.C. § 18a(g)(2). For cash tender offers, the time period is 15 days after substantial compliance by the acquiring company. See 15 U.S.C. § 18a(e)(2).
- 6** A “model” Second Request is available on the FTC’s web site. <http://www.ftc.gov/bc/hsr/introguides/guide3.pdf>
- 7** Under 15 U.S.C. § 18a(g)(2), either DOJ or the FTC may seek injunctive relief to prevent closing on a transaction if any party “fails substantially to comply” with a Second Request. See *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH)¶ 67,979 (D.D.C. 1988).
- 8** By its terms, the HSR Act declares that transactions meeting its size-of-transaction and size-of-company thresholds are unlawful unless the Act’s notification and waiting requirements (which include the Second Request process) are satisfied. See 15 U.S.C. § 18a(a) (“[N]o person shall acquire . . . any voting securities or assets of any other person, unless both persons . . . file notification . . . and the waiting period . . . has expired . . .”).
- 9** As FTC Chairman Timothy J. Muris has observed, “Because the [HSR] deadlines are too short to analyze a complex merger fully, we usually arrange an accommodation for more time.” Muris, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity, <http://www.ftc.gov/speeches/muris/murisaba.htm> (Aug. 7, 2001). Notwithstanding, extensions to the waiting period are not automatic and are bargained on a case-by-case basis.