FEDERAL TRADE COMMISSION

In the Matter of:)
MERGER BEST PRACTICES WORKSHOP)
)
----------)

Thursday, June 27, 2002

Room 332
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20850

The above-entitled workshop commenced at 12:00 p.m.

P R O C E E D I N G S

- - - - -

MERGER BEST PRACTICES WORKSHOP

MR. COWIE: Good afternoon. I'm Mike Cowie, an Assistant Director in the Bureau of Competition. With me are Steve Bernstein and Rhett Krulla, both Deputy Assistant Directors, and Joe Simons, Director of the Bureau of Competition.

This is the sixth of seven Merger Best Practices Workshops. We've had workshops in five cities. The last one will be July 10th, focusing on economic, financial and accounting data. That also will be here in Washington, D.C.

The purpose of these workshops is to get input from the business community, other affected parties and their advisors on how the FTC can improve and make more efficient the merger review process.

This session is being transcribed, so if you have input, please identify yourself by name and company. Transcripts of other sessions are now available on the FTC website. We also have on the website papers submitted by various law firms, bar associations and the like.

One of those papers was submitted by David Balto of White & Case and Scott Sher, an attorney from Wilson Sonsini, focusing on high-tech mergers and the second request process in that sector. David, do you have any comments or

same types of documents that more traditional industrial companies would keep. Our impression is that's certainly not the case. High-tech companies are much more lean. If they communicate at all, it's electronically. They don't engage in the kinds of lengthy studies that are oftentimes critical to the second request process.

We make a number of recommendations in our paper and let me say at the outset, we think this is a process which both agencies have gone a long ways at trying to reduce the burdens and improve the timeliness of the process over the past couple years.

Some of the points we'd like to emphasize, improving the process, first, I think agencies should give additional consideration about electronic document production. Bob Cook's paper, which is on the website, I think, elaborates in significant detail why electronic production could be more efficient, and we agree with all his comments.

Second, one of the most critical issues is carefully refining the number of people -- the appropriate persons to be searched, and we suggest in the paper that that determination should be made as careful and in a refined fashion as possible to reduce the amount of burdens involved.

Third, we've questioned the utility of searching for e-mails, and I think Lauren Albert, in her paper, points

out some of the burdens of producing e-mails and how costly that can be. We agree with her view on those things. And so, efforts to secure e-mail should be narrowly limited --

MR. COWIE: Just to intell shott51j -612efly TjI58.25 6

current regime, you have to continually update your production and we think there's a point you reach in investigations where you recognize that you're in the settlement mode, and once you reach that position, I think you should extinguish the continuing obligation to update production.

We have a lot to say in here about guidance that you can provide the private bar, which we think will smooth the process on a great deal. I want to commend to everybody's attention, David Sheffman's recent speech about the types of information that are requested in the second request process. That's on the FTC website.

There have been recent programs at which both Morris Bloom and Rhett Krulla provided information about computer mergers, and Jackie Mendel provided information about pharmaceutical mergers. Those types of programs, those types of speeches where people elaborate about where the firm should focus in the initial 30-day period, what type of information is most valuable, from the staff's perspective, that type of information is tremendously important. If that can be embodied in some type of guidelines or some kind of speech that's publicly released, that would be tremendously helpful for the parties.

In addition, we think there needs to be more guidance given about what substantial compliance means.

That's the issue we end up fighting about across the table, and if the agencies can provide guidance in that area, that would be very useful.

We think it would be useful for the agencies to publish past second requests on some of these specific industries, especially in the high-tech area, so we can get an idea of what type of information is going to be required so that we can prepare.

Finally, we think that an evaluation function by the Bureau of Competition would be tremendously valuable to help you determine what kinds of information requests are most effective. Go back, look at your second request. Go back, look at how much was produced. Try to go and critically access whether you were being too broad or, perhaps, too narrow. What are the most useful specifications? That kind of evaluation process will help you refine the second request.

I bring to your attention the report that the Canadian Competition Bureau produced on their second request process, which did a lot of this type of evaluation. So, those are our comments in a nutshell.

MR. BERNSTEIN: David, just to follow up on one point. I know you've seen a lot of matters at DOJ and FTC. Are there any differences in the way the agencies are handling some of these points you've raised, and if so, who

do you think has it right?

MR. BALTO: Well, the one comment that I've heard from other practitioners, though I haven't experienced it myself, is that DOJ is more willing to enter into timing agreements early on in the process. So that if the parties say that they will complete production by such and such a time, the DOJ promises to make their recommendation by a certain date.

Certainty is tremendously important to the parties involved in these transactions, and having some kind of date certain, even though that date can change, in which the staff agrees to make a decision, make a recommendation, really helps keep a merger together where otherwise it may unravel.

MR. COWIE: Former Bureau Director Rich Parker is here today. Rich, do you have any observations on the merger review process?

MR. PARKER: Yes, I sure do. Like David, I really think it's a good idea and I commend you for doing this. I don't have a formal paper like David did, but I just sort of went through and thought about it in the various stages.

During the initial waiting period -- well, let me start with the proposition that, having been on both sides of the table here, you are going to want more documents than our clients are going to want to produce always. I mean, that's what's going to happen. I mean, because frankly, this is

But sometimes if you're willing to sit down with a business person and talk about issues, even during the second request, that may make it easier to negotiate modifications and may help the staff emphasize points that are important, and from our point, eliminate points that cause us a lot of headache, but really don't go anywhere.

So, I think that what I'd like to do is bring people in and sit around with staff informally and talk about the issues in an effort to narrow the investigation, and by narrowing it, to focus it.

I think one point that might be helpful is that second requests tend to say the same thing year after year after year, and that's for good reason, I think. And maybe you ought to test that. I'm not talking about a formal survey, but what if you got people in front of us that are some of our most-experienced people to sit down and go through the second request and say, now we got this spec, and we'll always toss it out, how much have we really ever gotten that is really useful in a case from this category.

You know, let's talk about the real world, because at the end of the day you have to file your exhibits with the District Court when you go in and you can't file 30,000 boxes. You have to have a narrow group that you file. And in any case I've ever seen, the number of documents that end up really meaning anything are about this thick (indicating).

would you know that's where you ought to go, and query whether you really need to do these spec type organizations because that's another real pain and I'm not sure if it would really help, so long as you have an organization chart.

And most certainly one of the things I should have mentioned during the first 30 days that's helpful is to bring one in so you understand who the players are. That's good for us, too, because anything that enables you to focus is ultimately good for the other side as well.

One final point, and this is not -- I'm sorry, I want to raise this issue because it leads to a point. On the transcripts, not giving them up until the end -- and those of you will know even when I was in government I had a question about this policy, but I -- look, I don't need these transcripts to prepare my witnesses. I can take notes and I

sometimes we need to translate that to our clients who are involved here to the extent that we can make the process be more of a -- something where we really are trying to get to the right information that leads you to the right result. We can advocate one way, you can advocate another. But the process is really trying to get to the core information and come to the right result sooner rather than later rather than having the process become an end in and of itself.

So, from my perspective, I think that outside counsel, our role is really to get the information to you, to advocate and then to help you manage the process. And, I think, from the other side, it really should be managing the process and evaluating information. But whenever things shift to -- I understand Rich's point. You do need to be prepared for litigation. But, you know, treating it from Day 29 forward as though this is litigation does create a lot of excess production, a lot of inefficiencies that I would hope that we'd be able to cut through.

Things that come up, you know, obviously substantial compliance can especially lead clients to think, you know, what's going on here. You know, I feel like I'm really being pulled in different directions by people that I'm paying money as a taxpayer. It doesn't seem like the right thing to do, as well as the other hot buttons that come up. Just to repeat, the electronic and the back-up is just a

nightmare and a quagmire that everybody faces, and also the extensive organization chart searches.

I want to focus mainly on what happens in the first 30 days or 60 days or 90 days, and by that I mean what happens before you actually get the second request because I think that we can avoid a lot of the litigation side and aspects of production if we can make as much use as possible of the period before a second request would issue.

Some suggestions are -- and I don't know how

Opening type questions that come out, strategic plans, customer list, things like that, you know, people who do this all the time understand it. Sometimes you get questions that you aren't ready for, so I don't know if there are -- if there's a best practice set of questions that are likely to come out -- and I think this is one of David's suggestions. In this kind of industry, you're likely to get the following questions, that would be very helpful, and also helpful, I think, in terms of advancing the process. Some clients are very sophisticated and have been through it many times. Other clients haven't.

And so, the more you can say this isn't just me telling you this because I've done it before, this is the agency saying, these are the kind of things we're going to

Withdraw and refile -- and here I'm plagiarizing from another session that I attended -- but it's not really clear how often withdraw and refile works and what the outcomes are, and if there were a way to get a sense of what that -- you know, how often does it work, how often do you avoid a second request, do you get a second request 90 percent of the times after you withdraw, that would be very helpful for us in counseling clients and for clients understanding whether it's something that they actually want to do.

Also, the premerger office policy of 48 hours, I think the policy is still if you withdraw and refile within 48 hours, you can do so without paying the filing fee. Well, that kind of puts parties in a position of having to make a choice of, well, I'd really like to spend some time working with the agency and spending a couple weeks getting them comfortable before I refile and start the clock again. But

MR. COWIE: Okay. Were you suggesting, John, that there be like a standard access letter? Were you envisioning that we publish what it is we'll request during the first 30 days?

MR. DUBROW: Yes, kind of like the standard second request, model second request. It doesn't obligate that that's the only thing you'll ask for, but it will hit a large percentage of the cases.

MR. BERNSTEIN: Are you finding that what we're requesting in the initial 30 days is inconsistent either across shops or across agencies?

MR. DUBROW: Yes, I found some -- you know, the standard strat plans, customer lists and competitor assessments, product brochures, and then in some cases I've had some additional, pretty detailed pricing data asked for. It has differed.

MR. BERNSTEIN: I believe Joe Winterscheid is here with some comments.

MR. WINTERSCHEID: Steve asked me to try and address somewhat the international dimension of the process. In that connection, best practices has sort of become a real focal point for merger review for the ICN, the International Competition Network. And it's been interesting to be involved in that process and seeing it from a comparative standpoint.

And, again, I think from that comparative standpoint, looking at it intermanagementally, again, I think the agencies' pre-merger, FTC and Justice, again to be commended because by and large, I think we do enjoy here an atmosphere of best practices and where they're not best practices in the international community, they're still pretty darn good practices.

But there are some areas where I think that improvements can be made and looking at it again sort of from the international dimension. That dimension has really changed the merger review process fundamentally from when a good number of us started to practice in the anti-trust area. It certainly changed the way that the private bar needs to counsel clients in working through the process with now 80-some jurisdictions with merger laws on the books. It's changed the way that the agencies approach mergers. I think, also, in the context of greater global coordination on multi-jurisdictional mergers.

And I think also it has had some beneficial results in the way that we deal -- the U.S. bar, anti-trust bar, deals with the U.S. agencies. The requirement in the EU, for example, where you really stake out or are required to stake out your position on market definition and to engage in pre-notification sessions with the European Commission and the dialogue there, I think has helped to educate us and our

clients as to the benefits of early communication, early dialogue with the agencies.

And from that standpoint, I think that the international process had a very beneficial effect on the way we deal and interact with the U.S. agencies as well, from lessons learned in the international context.

But going down some of the specific topics, on waiting period, and again, just a quick comparative, the 30-day waiting period under Hart-Scott is -- you know, again, was, I think, sort of the model for most jurisdictions, EU 30 days, Germany 30 days, Canada now 42 under the long form. So, in that context, I mean, there is that international consistency by and large, few outliers.

There is, however, a disconnect at the front end. The waiting period, once it starts to run, the same here -- we'll just focus on the EU 30 days or one month. But, of course, you can't file in the EU until you have your definitive agreement and that can cause a disconnect in terms of coordinating the review process.

But the EU is looking at revising that practice and that's also being examined in the ICN Procedures Group, which Randy Tritell is heading up, and that is something that the U.S. agencies should pursue. And I know that both Randy at the FTC and Bill Kolaski at Justice are pursuing that procedural harmonization in the international community to

facilitate coordinated review in multi-jurisdictional transactions.

MR. COWIE: Joe, what's the difference there? I had thought that in Europe and here you can file on a letter of intent. Is there a difference?

MR. WINTERSCHEID: Not in the EU. You cannot file in the EU until you have a definitive agreement in place. Now, they exhibit some flexibility in what constitutes a definitive agreement, but here where we can file on the letter of intent, we sometimes like to be in a position to file at the same period -- in the same window with the

having certainty, that there is a hard stop at the end of the process. Of course, trying to harmonize that is very difficult given the very different procedural settings. EU notification is really front-end loaded, the form CO, which has been described as a second request without the documents. So, you really have to lay everything out there in contrast to the Hart-Scott-Rodino form which, you know, NAISC codes and the four Cs are sort of the guts of it.

So, we have the minimalist approach front end, but you pay the price at the back end, and therefore, that's really where the U.S. agencies start to get their more important information.

So, unlikely that we'll see any ability to really reach that hard stop in the U.S. context also because it's a litigation-oriented context as opposed to a final administrative determination. But short of that, going back to David's point, Rich's as well, objective standards on substantial compliance, timing agreements are all things that I think should be seriously considered to try and harmonize practice and give that legal certainty. Maybe not a hard stop, but at least a light at the end of the tunnel for our clients.

The second request process also, I think, can benefit in the international context, to the extent possible to have the international agencies, U.S., EU and other

significant affected jurisdictions to coordinate their information requests. Again, it obviously cannot be identical. The markets may be different. The scope may be different. But at least to perhaps work with the parties to come up with common definitions of revenue, sales and so forth to facilitate a coordinated information gathering initiative by the client.

Translation burdens have been spoken to I know in other sessions, and I think that in the international and multi-national environment, in particular, it's even more important now than ever to try and refine the U.S. translation requirements were possible, indexing excerpts, whatever, to be more focused, because we have to bear in mind that clients are facing that request now with increasing frequency in five, six, 10, 12 different jurisdictions.

Also in the international context -- and I'll go back to square one -- filing fees. Not on the agenda, but at least worth mentioning. Again, in terms of the international community looking to the U.S. as a model and understanding the importance of the filing fees for agency funding, it would be a bad state of affairs if the international community picked up on that model, again, in this environment. And that is something that is of great concern to the international business community, and in that respect, the United States, fortunately, is an outlier.

Finally, just a couple of thoughts on transparency in the coordination process itself, that is coordination among the enforcement agencies in different jurisdictions. We know that that is occurring and we hear, broad-brush, exactly what it involves. That the Commission is working closely daily with their counterparts at the European Commission, the Canadian Bureau and so forth, and not just in general but on specific transactions.

It would be immensely helpful for us, I think, to have a better sense of the nature of that coordination so that we can better advise our clients as to things like, and specifically, the benefits of a waiver, a confidentiality waiver. We can articulate in concept the benefits of a waiver.

That is -- I mean, waiver of Hart-Scott-Rodino confidentiality so that information can be shared between the Commission and the -- the Federal Trade Commission and the European Commission, and the things -- or the obvious conceptual advantages are coordination on information requests, more expedited review of the transaction being reviewed by both agencies, harmonization of possible remedies so that you're not getting one jurisdiction, not intentionally, but one jurisdiction versus the other.

Those are the concepts. It would be immensely useful to have more concrete examples from the agencies as to

those types of benefits so that we're in a better position to educate our clients as to the benefits of the waiver process in the coordination of the multi-jurisdictional review.

MR. COWIE: Joe, or anyone else, is there anything we should be doing different in connection with the waiver process? One issue that seems to recur is that the parties are asking -- are getting conditional waivers or requesting that.

In other words, we'll say we want to share some HSR materials with the EC, we need a waiver letter, and you come back, yeah, I'll give a waiver but you've got to give me notice and describe each document you submit or keep a log and tell me exactly what you're transmitting or give me -- you know, tell me what document you want to give and let me have prior approval. On a theoretical level, there could be value in having a standardized waiver letter or even a form.

MR. WINTERSCHEID: And there are certain forms -- I mean, certain, more or less, standard forms that are used here and by the EU, that that is a -- I know a common request and one that's motivated to try and be able to know what's going to the other agencies so that where necessary, we can put materials in context. The sensitivity, obviously, is to the extent that that type of request or condition may involve disclosure of work -- your work product, as it's communicated.

But I think the clients are sensitive to what's going over, wanting to know what's going over and when it's going over so that they can, among other things, undertake appropriate precautions at the other end as well, on the incoming side.

MR. COWIE: Is the concern that the EC is going to reveal the information to outsiders or is it just a concern in understanding how the agencies are looking at the substance?

MR. WINTERSCHEID: I think a little bit of both. I mean, in part it's to know what's going over so to the extent that there are documents -- look, we know what documents you have and what documents you're focused on and to the extent that we need to try to come in and clarify something, we can do so. When we have documents that are being transmitted overseas not knowing what's there, we don't know what, if anything, we need to be clarifying from that standpoint.

Secondly, there is, I think, not a concern -- the European Commission, I think, has been very good on confidentiality, but you have to understand as well that once it goes to them, it may also be transmitted to any number of the member states in connection with their procedure, and on a member state level, the level of confidence and confidentiality varies.

MR. COWIE: Any other comments on international issues?

(No response.)

MR. COWIE: Mark Kovner of Kirkland & Ellis has some comments. Others here should feel free to comment as well. A few people, like Mark and Jon and Joe and Rich and David, had contacted us in advance to express their concerns or issues. Others should feel free to comment as well. Mark?

MR. KOVNER: Thanks, Michael. It's very difficult to go after all these experienced speakers because all the good points are taken, but I do have a couple of additional comments, and I also like to applaud that you're holding this session. If for no other reason than it allows us to vent, which is a good thing.

I guess my principal issue is transparency in the process, and by transparency I mean both procedural and substantive transparency. On the procedural side, I know the pull and refile mechanism has been mentioned. That's always a bit of a quandary for a client. Obviously, they want to have the thing pulled and refiled if it means a substantially greater likelihood of escaping without a second request. On the other hand, they don't want to do it if it just means an additional 30-day delay and an additional time for the agency to fine tune and make even more burdensome the second request

the lawyer and the agency where both sides are giving each other information.

Identification of the substantive problem areas, I think sometimes there's -- because of the litigation context

second request.

But if there were some objective standards or guidelines that you operated under in terms of when a quick look is appropriate, and I know there have been some, but some presumptions, perhaps, about if a quick look is asked for, there is a presumption that you won't need to respond to the remaining second request.

I guess finally on -- moving off of transparency, but on the second request response, I echo what the others have said. On the e-mail issue particularly, I think that's something that the agency is going to have to spend more and more time on because more and more of the productions are e-mails and more and more of the "bad documents" are being culled from e-mails where people feel freer to sort of lay their cards on the table and tell it like it is.

I would just say that I think the time is coming rapidly that the agency -- I think the DOJ allows this, the FTC doesn't -- should allow you to search through e-mails by using search terms, agreed-upon list of search terms. That would help where the technology allows for it.

And finally, let me make a somewhat radical suggestion, which is the following: I don't think e-mails are all that useful in the front end investigation process by the FTC. E-mails are useful in litigation because they contain all sorts of got you types of statements, but they

don't contain a lot, generally, of substantive, rigorous marketplace analysis, which at least at the front end of things should be what's going on at the agency.

So, maybe there could be some procedure where you ask for the second request -- for the e-mails in the second request because you've got to, it's your one shot, but return of the e-mails, production of the e-mails awaits until later in the process, maybe, you know, upon the filing of a complaint, perhaps even after you've done the rigorous market analysis and then you're looking for the documents to show to a judge.

MR. COWIE: Mr. Balto told us at the beginning that these high-tech companies, they only communicate by e-mail.

MR. KOVNER: Right.

MR. COWIE: They don't have their secretary type a paper memo and store it. And it seems like we're seeing companies using e-mail for their sales call reports, for high level communications with customers, management communications. A lot of that is in e-mail now.

MR. KOVNER: Well, maybe the response then can be tailored to specific kinds of

MR. PARKER: No.

MR. COWIE: Okay. So, prior to litigation, you're conducting discovery of back-up tapes?

MR. PARKER: You can make generalizations, but that's where you end up in many cases, yes.

MR. BALTO: Let me say something just generally about the perspective of, you know, the need for litigation. I want to distance myself from Rich's comments which sort of assume that the FTC has to be in a position to litigate each and every one of these cases. I think the Commission and the Division have to look at the practical reality. This is a regulatory process, which 95 times out of 100 is going to end up with no enforcement action or consent or the deal being dropped. You actually litigate one or two or maybe three cases a year.

And to approach every second request from the perspective of, I have to litigate the case, I don't think is appropriate, or at least you should reach a position relatively early when you realize you're not going to have to litigate the case and then funnel things -- funnel things significantly.

In addition, when you do the evaluation process, which I think you really should do, at the end of the day, look at -- you know, at the end of the year, look at every second request, look at the number of boxes that were

submitted, and if you have a matter which you entered into a consent and the parties have submitted 900 boxes of documents, then you should ask yourself, you know, was this really necessary.

MR. COWIE: Right. Certainly, it seems as if we should think seriously about staying higher up on the org chart. But on the e-mail issue, that's not just a litigation issue. It's trying to find out where is the salient information, where does it reside within the company. Arguably, it would be irresponsible for us to say, no, we're not going to look at e-mail because we're finding in a lot of cases that e-mail is not just used for conversation. It's not just the source of hyperbole or rhetoric. It's actually where, you know, systematic analysis of customers and competitors is done.

MR. PARKER: One point I forgot to make which is separate from the e-mail -- I mean, from what you're talking about. I think that generally, over a long career of doing a lot of litigation, I think one of the most useless devices in the history of western civilization -- I don't want to understate this -- is interrogatories. I mean, they're never useful in civil litigation unless somebody is really dumb. And I suggest that you look hard at how useful interrogatories are in your second request.

You know, I was not staff, so I haven't gotten my

hands dirty the way you guys have, but I don't even recall anything over in the front office that ever had anything to do with an interrogatory response ever, and I wouldn't expect that to happen either. So, that may be some area where you might look as to how useful some of this stuff really is.

MR. BERNSTEIN: Let me just ask two questions on the e-mail issue. The first is, Rich, you mentioned in private litigation you are asking for e-mails. What kind of techniques are you using at that point to narrow it down or modify the subpoenas you issue?

MR. PARKER: Subject, subject matters.

MR. BERNSTEIN: So, search terms?

MR. PARKER: Search terms. Sometimes people, sometimes whatever you can do to get it down. But it's -- people in civil litigation don't pass up e-mails very easily.

MR. BERNSTEIN: My other question is, what is DOJ doing on the e-mail issue, both regular e-mails generally and back-up e-mails?

MR. KOVNER: My understanding is -- it's not from personal experience but somebody has told me -- that the DOJ is willing to allow you to submit -- to agree upon search terms and use those terms as the parameter for the search, which I think would be very useful. Obviously, there is going to be some debate about what those search terms are. But if you come up with a reasonable list, they should cover

you haven't complied and you've got no leverage, you've got nothing. And the prospect of that is such that that I don't think -- I think lawyers are very qualified in their ability to recommend that. I'm not being, you know, critical of the people involved and the agency, it's just that if it doesn't work, you're in a world of hurt. That's all I'm saying. And the downside is massive for the lawyer and for the client.

MR. SIMONS: Some lawyers seem to do it a lot more than others, like if you listen to Tom Leary, he will say

is one issue that you made a production on that helped to resolve that and, you know, my own experience within the agency -- and I helped Mark Whitener write the papers about the quick look process back in the mid-nineties. My own experience within the agency was that it was used less during the decade.

And I've heard from other practitioners recently, though I haven't experienced the thought that, you know, if you want to have any leverage with the agency, you've got to fully comply. I mean, that's just what I've heard. I haven't had that experience, but that's what I've heard.

MR. SIMONS: Yeah, there are definitely outside counsel who have that view and in every circumstance their strategy will be, we need to comply and we need to do it fast

Then you're at terrible risk to try and go in because you don't know if you're going to cover the quick look issue or there are going to be others that are going to come out.

MR. SIMONS: Right. That's really helpful. Because from my perspective, it would be really useful for us to focus on the things that we can do to encourage people to, you know, conduct themselves like that so that we don't have to get these huge productions and that we don't actually have to worry about compliance, that we can just resolve the thing quickly in a narrow focus without going into all those other issues.

MR. SIMONS: Right.

MR. KOVNER: Some comfort that there's a reasonable prospect that this process is going to work better than the alternative, and this may sound somewhat naive, but sometimes it does come down to simply your trust and your relationship with the staff person. If you feel the staff person has been sort of frank with you about the areas that he or she is less concerned about, the areas they're more concerned about and you've got a good dialogue going and a rapport, then I have used the quick look procedure once or twice where I think that there is a very strong chance on my side that we can convince you. We can convince you, so it's worth the risk.

But Rich is absolutely right. The client, you know, whether they see a million dollars a day being lost because every day the transaction is held up is saying, you better be right.

MR. PARKER: Yep.

MR. SIMONS: Well, maybe if you had -- what I'm wondering is if there's something that management -- the Bureau of Management could do in that regard.

MR. COWIE: In negotiating second requests, we obviously have an appellate process. It has been used infrequently. Does anyone have any views on whether it's a sensible process, if there are ways to improve it?

David, I'm looking at you because your paper -- which I assume you wrote -- suggests that we should publish our decisions and develop a common law of second request negotiation practices.

MR. BALTO: I was cringing because those people I know who participated in the process seemed rather frustrated by it, and all my paper suggests is because the issue of substantial compliance, there's no guidance on what substantial compliance means, that it would be useful when you make those decisions and in other fashions to try to elaborate what substantial compliance really means.

MR. COWIE: I think we would potentially have some problems on HSR confidentiality, but it's not clear to me that that's insurmountable.

MR. BALTO: Yeah, you could just mask who it involves. There's no reason, you know, the private bar would care at all who the parties were.

MR. WINTERSCHEID: There's a common law of the second request process. I think David is envisioning a loose leaf here.

MR. KOVNER: In my experience, the problem with negotiating second requests is not so much that the agency won't, at the end of the day, agree to cave on certain things. It's that the process takes so long that the burden associated with actually -- because you've got to start

clearance agreement died. You know, we have no guidance about where a software merger would go, though some of us would prefer seeing Rhett in the morning and other ones would prefer seeing Scott Sax. You know, it would be nice to have software and biotechs and clear lines about where those -- you know, who has jurisdiction.

MR. SIMONS: We would agree with that. In fact, this was like a personal thing for me because when I first

how to.

MR. SIMONS: Well, I think the biggest problem is somehow --

MR. PARKER: Rich isn't saying anything.

(Laughter).

MR. SIMONS: The biggest problem we had I think was that Carl Hevener retired and then we couldn't figure out how to replace him because when Carl was here, we never had problems. We've been having problems without Carl.

All right. Anything else?

MR. COWIE: Rhett, you've been quiet. Are there things that folks out there are failing to do for you that you can talk about?

MR. KRULLA: Well, we talked about quick looks and withdraw and refile. I think in my experience in recent years, where we have a focused make or break issue, where we say, well, we see a case here, a potential case, but here are the things that may unravel that case, and if we can demonstrate that quickly, then we can move on to other things.

And I think one of the reasons you're seeing fewer formal quick looks is we're able to focus by better use of the first 30-day period, focus what the key issues, key concerns are that could cause us to go away and use the withdraw and refile mechanism to quickly get us to a comfort

level. We don't always achieve that. In a few cases, we -- because the time ran out, we talked about the 48-hour deadline for avoiding a refiling fee, and that's something, I think, we need to look at.

We wind up issuing a second request, but we -- in

good faith basis for thinking it may be in the company's interest to do so. Our mind is never made up in these things and if the question were put to me, well, is there anything we can do to cause you to go away, I'm not in a position to say, no, I'm going to court come hell or high water. There are several people I've got to go through before I get there.

But I will provide a good faith assessment as to whether I believe, whether the Assistant Director or the other Deputies believe that it would behoove the parties to withdraw and refile. That is, are we on the fence on this or are we not on the fence. And we have, in numerous instance told companies, frankly, we don't think it would be worth your while to withdraw and refile.

While the concept of withdrawing and refiling always comes from the company, it's up to the company, it's not up to us to do it, we have, in some instances, raised the subject with companies and where we raise that is where we think, gee, we're pretty close to conclusion on this, but frankly, where as now, we need to issue a second request because we do not have the confidence level that we're missing an anti-trust problem. And when we get burned, we miss those problems, we wind up in Part III litigation, we wind up going through exercises that could be avoided with a second request. So, we're cautious in closing out a file.

Where we encourage companies to withdraw and

refile is what I think years earlier was the quick look circumstance which said, okay, let's issue a second request and the issue is entry or the issue is product market and let's focus on that. And we try by making more effective use of the first 30-day period to come to quick resolution on those issues, and we have been successful in using the withdraw and refile to do that, and I think one of the things we'll explore after these sessions is how can we make that process more flexible.

MR. SIMONS: Can I ask you a question? One of the things that is really kind of a problem that I'm very sensitive to is one of the things I think Mark mentioned. It's this issue about, we take too long to negotiate and people say, okay, this is dragging on for a month and times a'wasting and we just have to go comply with the thing. To me, that's really important that we try to do whatever we can to avoid that from happening because that's what engenders these dumps.

One thing that would be useful is to kind of get a feel for what folks think is a proper time frame in which to really make a strenuous effort to negotiate the second request down. Is it a week, two weeks? Is it shorter than that? Does it vary by transaction? How about if we told you, you know, we're very interested in getting the scope of the second request down and let's talk about an agreement

MR. KRULLA: Oh, our door is never closed to negotiation. We are under mandates to sit down early, the first week and talk to companies. But I think one of the things that's frustrating, we've had second requests issued at 2:00 in the afternoon. At 4:00 we get a call from counsel saying, okay, we want to sit down and talk. We say, have you gone through the request, have you talked to your people about where the relevant files will be located in terms of what's involved in the search? No, we just want to sit down with you and start modifying and cutting things out.

It's obviously much more constructive, more helpful for us where companies' counsel do their homework, come in early with organization charts, preferably even in the first 30-day period with those organization charts, and come in with the ability to answer our questions about what people do and where people are proposed to be excluded from the search, what does this guy do, what the document flow is, what the decision tree is within the company, how we can expect to capture documents, what happens to call reports, where do they go, where are they retained, and that enables us to make an intelligent assessment of what do we need and what can we dispense with.

But if we said that's got to be done in the first two weeks and you come in on day 15 and say, hey, we'd like a further modification, I'm never going to be in a position to

tell you, no, I can't do that because your time's up.

MR. SIMONS: Basically, we have an incentive to avoid getting too many documents, and so I think a large part of it is going to be on us to say, okay, what's your time frame in order to -- in which we have to negotiate this thing before you go ahead and start just producing the whole thing, and, you know, then figure out what do we need to get there in terms of reducing the scope of the request. I mean, we run into people who refuse to give us org charts.

Yes, Rich?

MR. PARKER: Joe, one thing I heard today that might be helpful is a speech or something at your level that says staff is authorized to do a quick look or to do a file -- refile/file, whatever that is -- under the following circumstances. And so that the standard is articulated. It's all spelled out there and you can show your client exactly what the deal is and it seems to me that you can say, well, you know, Bernstein wouldn't be proposing it unless he believed it met this standard under those circumstances. You see what I'm saying?

MR. SIMONS: Yeah.

MR. PARKER: So, it's right out there. That might be very helpful.

MR. SIMONS: The other thing that happens, in large measure, is that when we have merger screening

meetings, we talk about, you know, what kinds of issues might be dispositive and actually, how the investigation is likely to go. So, oftentimes, it's not just a situation where you've got a staff lawyer or even just -- not just, but even an Assistant Director who is determining, well, gee, this might be enough. You know, the odds are very high that things are actually working the way they're supposed to work. They've already had a conversation with me or the deputies in my office about how to go about this and we've agreed with them.

So, maybe that would be useful to get out, too. It's not just -- usually when this is happening, it's not just the staff lawyers, it's -- you know, the Bureau management has been involved and they're in agreement with the approach.

MR. COWIE: Any other comments?

(No response.)

MR. COWIE: Thank you for your input. We hope to hear from your economists at the July 10th session on data and economic analysis.

MR. SIMONS: Thanks very much everybody. This was really helpful.

(Whereupon, at 1:27 p.m., the workshop was concluded.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P019503

CASE TITLE: MERGER BEST PRACTICES WORKSHOP

HEARING DATE: JUNE 27, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to

the best of my knowledge and belief.

DATED:

_____

SONIA GONZALEZ

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the tranpt.1