

Report to Congress Regarding Merger Review Procedures
as Required by Section 630(c) of Public Law 106-553

Submitted By

Antitrust Division
Department of Justice

June 19, 2001

The Acting Assistant Attorney General (“AAG”) of the Department of Justice Antitrust Division (“Division”) submits this report to Congress pursuant to section 630© of Public law 106-553, 114 Stat. 2762 (2000), concerning reforms to the Division’s merger review process under section 7A of the Clayton Act, 15 U.S.C. § 18a, as amended. Public Law 106-553, enacted on December 21, 2000, requires the AAG and the Federal Trade Commission to “conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process,” and to report to Congress within 180 days, “(I) which reforms each agency has adopted under this subparagraph; (II) which steps each has taken to implement such internal reforms; and (III) the effects of such reforms.”

The Antitrust Division has completed the internal review of the merger review process required by the statute and implemented reforms pursuant to the legislation. This report describes those reforms and their implementation and effect. In addition, it is important to note that the Division is continually trying to improve the merger review process, both to enhance the Division's efficiency in evaluating mergers and to reduce unnecessary burdens on merging parties. The Division's ongoing contacts with the private bar and continuous internal discussions regarding merger review issues periodically has led, and likely will continue to lead, to changes that improve the process.

I. The Internal Review of the Merger Process

To conduct the internal review required by the legislation, the Division solicited comments on the merger review process from attorneys and economists in each section with responsibility for merger matters. In addition to the internal review, the Division solicited comments from a representative sample of private attorneys who recently represented recipients of a request for additional information or documentary material (commonly referred to as a “second request”) in transactions subject to premerger notification requirements. The comments of Division personnel and outside counsel were largely consistent, and while opportunities to improve the process still exist, the internal review and consultation with the private bar indicate that the merger review process is working well.

To begin the internal review, the Director of Merger Enforcement met with the chiefs of the sections with responsibility for merger matters. Then, within in each section, the section chief (or the chief’s designee) met with staff, and discussed the merger review process and, more specifically, the second request process, and then provided feedback from the meeting. The five most common and important observations made by the sections were: (1) the main focus of second request negotiations is reducing the number of facilities and/or employee files to be searched, (2) obtaining documents is generally more useful than interrogatories that solicit narrative, self-serving information from the parties, (3) recipients complain about burden when data requests seek information in a way that is different from the way it is kept by the company, (4) recipients complain about burden when required to search electronic documents, including archival tapes, and (5) some specifications included in the Model Second Request are unnecessary

depending upon the investigation.

For each inactive investigation since April 2000 in which a second request was issued and some production of documents and information occurred, the Division contacted counsel for the acquiring party and solicited comments on the second request process and the merger process in general. A total of nineteen counsel responded and observed the following: (1) the most important modification a staff can make is to reduce the number of employees whose files must be searched; modifying the language of particular specifications, however, does not significantly reduce burden, (2) recipients should not have to produce data in a format that was not used in the ordinary course of their business, (3) production of backup electronic information (including e-mails) is an extremely burdensome and expensive task, (4) flexibility is needed on privilege logs, and the agencies should be more willing to “carve out” certain categories of communications in their modifications, and (5) foreign translations of documents are time-consuming, expensive, and burdensome.

II. Implementation and Results of Reforms

On April 6, 2000, to make the second request process more efficient for the business community and the Division, and in anticipation of the requirements of the new legislation, the Division announced improvements to the merger review process, which clarify current procedures and implement new practices. The April 2000 improvements involved implementation of the following:

- The Division will continue its centralized high-level review of second requests prior to issuance, with a focus on eliminating undue burden and costly duplication.
- The Division will offer early conferences with merging parties to identify competitive issues within five business days of issuance of a second request. The Division has been holding these early conferences, and surveys of staff show that the only time these conferences are not held within five business days is at the parties’ request or because the parties have not responded.
- The Division will quickly respond to requests for modifications to second requests within five business days of receiving such requests. The Division has been promptly responding to modification requests within five business days. Many modification requests are quickly granted, but the negotiation and resolution of other requests occasionally take longer as complex issues are resolved and the parties provide additional information needed to assess the appropriateness of the requests.
- The Division clarified its existing appeals procedure for second requests--regarding whether the request is reasonable or burdensome and whether a recipient has substantially complied with the request--to clarify that a senior official, typically a

Deputy Assistant Attorney General, who does not have direct responsibility for the review of any enforcement recommendation concerning the transaction at issue, will determine the appeal. Since the clarification, the Division has not received any appeals, but it has received a number of appeals in the past under this procedure, in which relief has been granted in some cases and in which the appeal has been denied in other cases. We believe this reflects the independent nature of the appeal process.

In addition, the April 2000 improvements also included commitments to develop “best practices” for second request procedures, to provide specialized staff training on second request investigations, and to continue its ongoing consultation with the business community and the private bar to identify further means of improving the merger review process. In fulfilling these commitments, the Division provided input to the American Bar Association on its *Guidance for Federal Merger Investigations and Complying with “Second Requests”* (Dec. 2000) (a “best practices” document) and conducted training in all the merger sections on improving the merger review process, which included a focus on the announced April 2000 improvements, dissemination of and review of a draft of the best practices document, and other merger issues.

The subsequent internal review of the merger process and comments from the private bar indicate that the improvements adopted in April 2000 generally reflect the prevailing practice among most Division attorneys. However, because the Division’s review pursuant to this legislation identified other opportunities for improvement, the Division has implemented the following additional reforms to address some of the issues raised both internally and by the private bar:

- The Division will seek to discuss electronic issues upfront with the parties and explore options to reduce the burden of searching for and producing electronic documents called for by a second request. Modifications to the model second request will seek to ensure that these discussions involve representatives of the company who are most knowledgeable about its electronic information systems.
- The Division will on a case-specific basis omit interrogatories that are unlikely to provide useful, relevant information to the investigation and, where appropriate, request documents containing the desired information, seeking to minimize the situations where a recipient of a second request is asked to provide information in a format that the recipient does not use in its ordinary course of business.
- In order to facilitate the quick turn-around and resolution of modification requests and negotiations, section management will follow up on modification negotiations that extend beyond 20 days after issuance of the second request and, where appropriate, resolve any final modification issues.
- In addition to the specialized second request training received by Division

personnel over the past year, the Division's annual training for new attorneys will include training on second request negotiations.

- Staffs have been instructed to limit the burden of second requests by omitting specifications from the Model Second Request in investigations where they will not provide helpful information. The appropriateness of specifications from the Model will also continue to be considered in the centralized high-level review of second requests.
- Staffs have been instructed to continue to negotiate appropriate limitations on the number of facilities and employee files to be searched in order to limit the parties burden while insuring that the Division receives necessary documents.
- Staffs have been reminded that foreign translation is very burdensome and should be required infrequently and usually only after consultation with the section chief.

To implement all of the above reforms, the Antitrust Division Manual and the Division's appeals process were revised. These documents have also been publicly posted on the Division's Internet site, providing easy access to the private bar and the business community. In addition, these reforms and the issues raised in the Division's internal review and consultation with the private bar have been brought to the attention of the merger sections through communications from the Office of Operations.

These reforms are part of the Division's ongoing efforts to improve the merger review process by reducing the burden on the merging parties and improving the efficiency of the entire process. The Division remains committed to improving the merger review process and will continue its ongoing dialog with the private bar and the Federal Trade Commission, which is likely to result in the adoption of additional appropriate reforms in the future.