

PREPARED REMARKS OF
SUSAN A. CREIGHTON,¹
DIRECTOR, BUREAU OF COMPETITION,
FEDERAL TRADE COMMISSION,
BEFORE THE
ANTITRUST MODERNIZATION COMMISSION:
HART-SCOTT-RODINO SECOND REQUEST PROCESS
NOVEMBER 17, 2005

I am delighted to appear on behalf of the Federal Trade Commission to discuss the issue of the Hart-Scott-Rodino merger review process. Because the HSR review process is the principal means by which the Commission investigates and analyzes mergers, the Commission has a strong interest in an efficient and effective process that prevents mergers that harm consumers. At the same time, the Commission is keenly aware of the costs, both in time and money, that the merger review process may impose on transactions that are wholly or largely beneficial to consumers, and the Commission is eager to work towards ways in which these costs can be reduced, consistent with its consumer protection mission.

In recent years two trends – one technical, the other substantive – have led the Commission to conclude that we needed to undertake a thorough, top-to-bottom review of our

¹ The views expressed herein are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

existing procedures. The first trend is familiar to anyone who has been involved in the HSR review process during the past several years, namely, the explosion in the number of documents maintained by business firms. As electronic data storage has become cheaper and more convenient, people and firms have retained ever-increasing volumes of documents. The result is that the number of documents that need to be searched and produced per custodian has grown exponentially. Data from one source that we received suggested that a custodian who maintained four boxes of documents in 1998 would be likely to maintain roughly 140 boxes of documents today. As might be expected given this exponential increase, document productions have grown increasingly burdensome even when the number of custodians searched has not.

A few years ago we received only two productions of over a million pages; more recently we received nine such productions. Adding to this complexity from the Commission's perspective is the need to accommodate a steadily widening array of software used to manage electronic documents and data, together with new or varied formats for e-mails, spreadsheets, instant messaging, and so on. A few years ago very few productions were provided electronically; today, almost every production involves mostly electronic documents.

The second change that has occurred since the Hart-Scott-Rodino Act took effect has been more gradual, and that is the evolution of substantive merger analysis away from structural presumptions and towards a more economically rigorous analysis of likely competitive effects. It is worth recalling that only ten years before enactment of the HSR Act, the Supreme Court in *United States v. Vons*, 384 U.S. 270 (1966), upheld a merger challenge on the ground that the combined firm would have a 7.5% market share, at a time when the number of single-owned grocery stores in Los Angeles had dropped from 5,365 to 3,818 during the preceding decade. It

is safe to say that we do not conduct merger analyses in quite the same way today. We focus less on structural presumptions and more on whether there is evidence of actual successful entry in similar markets; what the data show regarding previous bidding events; natural experiments showing price effects related to market entry or exit; efficiencies in previous transactions; and so forth. At the same time, courts have required such evidence in increasingly elaborate preliminary injunction proceedings in order for the Commission to sustain its burden of proof. The increasing sophistication of substantive merger analysis, the rigorous standards required by the courts, and in particular the steadily increasing use of data-dependent economic analysis, all are factors that must be taken into account in any review of the efficiency and effectiveness of HSR merger review.

In recognition of the challenges posed by these simultaneous developments, Chairman Majoras has embraced the goal of reducing the burden on the Commission and the parties posed by the review and production of large volumes of documents, while at the same time ensuring and enhancing the effectiveness of the Commission staff's substantive review. In her comments at the ABA Fall Forum one year ago, the Chairman announced a significant initiative aimed at accomplishing these objectives, with the creation of a Merger Process Task Force at the Commission. This week at the Fall Forum, the Chairman stated that she intends to roll out some significant reforms to the merger process in the near future.

The Merger Process Task Force consists of 18 attorneys, economists and managers, most of whom have a decade or more experience investigating cases under the HSR regime. The Task Force has spent the past several months assessing the merger review process and is now developing proposed recommendations designed to change the process in a way that is consistent

with the agency's enforcement mission, but that also reduces the burden of large and unwieldy productions. Our changes will be based on the work of the Task Force, consideration of past reforms, informal input from the ABA's Mergers & Acquisitions Committee, input from practitioners who have offered opinions along the way, and a detailed review of recent HSR matters in each of the merger shops. The Chairman has asked us to consider changes that will make a difference, including, for example, options to reduce the size of productions through smaller search groups and a shorter time period covered by the Second Request, and to reduce the burdens associated with such requirements as preserving and producing back-up tapes and compiling detailed privilege logs.

One thing that has become absolutely clear as we have worked through proposed reforms is that the success of these efforts will depend importantly on the merging firms themselves. To begin with, in a process designed to be expedited and focused, it will be necessary for the parties to be prompt, accurate, and complete in the information they provide to the agency. Errors, omissions, and delay will undermine efforts to streamline the merger review process. In particular, the decisions staff will have to make throughout the merger review process often will call for company-specific information that only the firms themselves can provide. Such information may include firm organization charts; early access to company employees who are knowledgeable about their firm's organization, the way it maintains data, and its various products; and the ability, early on, to engage in a candid discussion with staff about the arguments and facts on which the parties intend to rely (as well as arguments on which the parties do not intend to rely, so that areas of investigation can be eliminated). The earlier in the process the companies provide this information, and the more complete the response to staff's

request for such information, the better the review process will work.

Concomitantly, if firms will not or cannot cooperate with the Commission, efforts to streamline the process will be of limited effectiveness. Our experience with the review process as it stands today is clearly reflective of that dynamic. There are many major transactions where, with the cooperation of the parties, we have been able to narrow the second request substantially, both with respect to the number of employees whose files are searched and the number of boxes produced. At the same time, in those matters where counsel refused to negotiate the second request, was not responsive, or engaged in uncooperative behavior, the size of the second request response was substantially larger than those responses received from more cooperative parties. Any effort to substantially narrow the second request without compromising the agency's ability to fulfill its enforcement mission requires complete cooperation from the parties.

Although I outlined a number of areas above that are a focus of our Merger Process Task Force, our efforts have not been limited to those changes. The Commission, the Bureau of Competition, and the Merger Process Task Force also are engaged in several other initiatives designed to improve the merger review process. For example, the Commission is investing substantial resources to expand the Commission's capacity to handle a larger volume of electronic documents in a broader range of formats. We hope this will reduce or eliminate some of the difficulties that we currently experience in accepting electronic document submissions in various formats.

The Commission also is committed to increased transparency through better use of the Bureau of Competition web site, with the aim of better informing parties and counsel, especially those who are not frequent customers, of ways in which they can work with the agency to

streamline their merger review.

The Bureau also recently has adopted a number of internal procedural reforms to increase rigor, focus, and accountability from the outset of the investigation. These include a detailed second merger screening meeting, tougher review of second requests at the issuance stage, the involvement by the Bureau front office in the development of detailed case management plans, and similar practices. Through increased Bureau and management involvement and accountability, we believe that in the coming months you will find material, substantial improvements in the merger review process at the Commission.

We also recently rolled out a new 5-year attorney training program, designed to teach best practices and investigation and litigation skills to our junior attorneys, and to increase consistency in practices across the Bureau's divisions. This program will support the development of first-rate litigation capability within the Bureau.

Finally, the Bureau is reworking and improving its internal procedure manuals for investigations and litigation. We hope that these materials also will improve consistency among the merger divisions and improve the efficient handling of casework.

Taken together, we believe that these changes, once implemented, will reduce substantially the burden that the merger review process places on both the parties and the Commission. They will do so in a way that is consistent with the Commission's enforcement mission, and allows flexibility to make further modifications as changes in both the technology and the law require.

This concludes my prepared statement, as I have attempted to keep my remarks brief consistent with the amount of time allotted. I look forward to your questions.

