

1 UNITED STATES FEDERAL TRADE COMMISSION

2 MERGER BEST PRACTICES WORKSHOP

3 June 25, 2002

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June 25, 2002

12:00 P.M.

MR. WIEGAND: Good afternoon. On behalf of the Western Region of the Federal Trade Commission and Jeffrey Klerfeld, the Regional Director, I would like to welcome you to the Merger Best Practices Workshop for Los Angeles.

As you can see, the proceedings here today are being transcribed and it is very important, therefore, for us to identify ourselves when we speak and not talk over one another. That is on one hand. On the other hand, we want to proceed in a town meeting sort of style, so we do want to encourage interaction and folks to agree or disagree with one another and just feel free to jump in.

What we have done is identify several subtopics and we have designated an individual to initiate the discussion on those subjects. They will do that and then we will just go from there into people's responses to it.

MR. WIEGAND: Our first subject this afternoon is the use of the initial waiting period, how the government uses it, and how parties to the mergers could get in trouble by jumping the gun. Henry Thumann from O'Melveny & Myers is going to initiate the discussion on this subject and we would just like to hear what other people have to say.

MR. THUMANN: Would I be redundant if I say I'm Henry Thumann now?

1 THE REPORTER: No.

2 MR. THUMANN: Well, John, Gun-Jumping is one of those
3 classic areas where there is virtually no case law and what
4 little the buyer knows about it comes from agency speeches and
5 consent decrees. And what little case law there is is
6 diametrically contrary with the agency's position, so in
7 thinking of International Travel Associates and the Eighth
8 Circuit, which held that collaboration between two merger
9 partners is subject to -- (inaudible).

10 It does leave the practitioner, I think, with a
11 couple of theoretical questions. For example, how is it that
12 the Commission and the DOJ are able to apply Section 7A and
13 post signs on pre-closing collaboration on the acquired company
14 when the statute only visits the obtaining or the taking of
15 beneficial control and not the "giving up," so to speak of
16 beneficial control. Equally, I guess, theoretically puzzling
17 is the notion that Section 7A has three Congressional purposes,
18 namely (1) to maintain competition between the putative merger
19 partners while the review process is pending, when the
20 Legislative history only identifies two purposes, one which is
21 to permit a review, and the second which is to provide a basis
22 for meaningful relief if there is a successful challenge.
23 Those are really theoretical and probably not a lot of
24 practical consequence that, the International Travel Associates
25 aside, Section 1, I think, is fairly broadly seen as applying

1 to collaboration between the merger partners. So a theoretical
2 question is simply how does Section 7A get added to the consent
3 decrees which is done universally as a joint charge of the
4 Section 1 violation and the Section 7A violation in all of the
5 consent decrees -- I think.

6 More practical is what can the parties do and what
7 can they not do, whether it be Section 1 or Section 7A. There
8 seems to be broad agreement that when -- (inaudible) --
9 concluding from the speeches and the consent decrees that (1)
10 collaboration between the putative merger partners if an
11 information exchange -- unless they are fixing prices or
12 something -- but if they are simply exchanging information via
13 due diligence, via merger, integration planning, that it is a
14 rule of reason analysis and not a per se violation. Second,
15 there seems to be consensus that due diligence is appropriate
16 and reasonable and efficient and pro-competitive in that,
17 without due diligence, it is hard for parties to come together
18 and reach a merger agreement and the consolidation of mergers
19 in the broad economic sphere is pro-competitive where there
20 aren't any anti-competitive constraints created or power
21 created.

22 The area that I think is really ambiguous is what
23 about collaboration with respect to post-merger integration?
24 It is increasingly essential, or so I think business persons
25 will tell you, to start that process prior to the final closing

1 of the agreement. And this is a rapidly changing world, and
2 the areas such as technology, if you hold off all integration
3 efforts, all integration planning, employee consolidation has
4 actually occurred, the chances to effectively and efficiently
5 accomplish the integration are themselves impaired and
6 compromised. So what we have are, I think, essentially consent
7 decrees from both agencies that I am aware of that address the
8 issue.

9 And we have a couple of speeches which really give
10 enormous guidance. We have a speech by Mary Lou Steptoe in
11 1994 in which she said, "Planning the efficient integration of
12 the firms after a consummation is appropriate." And we have a
13 1998 speech by Bill Baer in which he says, "While parties have
14 argued that their intent was really to plan integration rather
15 than to implement it, we do not think this distinction meets
16 the requirements of the Act."

17 So I guess my question is, what guidance have I
18 missed or can you provide with respect to the appropriateness
19 of integration planning while the review process is underway,
20 where there is no implementation, or there is adequate, there
21 is sufficient confidentiality maintenance with respect to
22 having a group that is a planning group act to exchange the
23 information and not have it passed on to the people who are
24 currently operating and in competitive process between two
25 companies? Who is right? Bill or Mary Lou?

1 MR. HOFFMAN: Let me answer that two ways.
2 Obviously, I don't think we are going to be able to answer a
3 lot of questions here and, you know, as John indicated, that
4 really isn't the purpose of this. Most of our purpose is to
5 listen to questions and thoughts like that, and to take them
6 back and try to assimilate them and come out with some sort of
7 response.

8 With that in mind, I would like to say two things:
9 first is, what kind of guideline would you like from us? I
10 mean, in this issue, are you talking about as to published
11 guidelines like the Guidelines on Intellectual Property, or the
12 Health Care Guidelines, or something else? Second, I'd like to
13 open up to anybody else to comment on the question of Gun-
14 Jumping and pre-approval integration, and what kind of
15 experiences everyone has had with that and what kind of
16 thoughts they have on what we could do to maybe alleviate what
17 certainly seems to be a pretty high and pretty well- based
18 level of confusion out there about what the agencies will go
19 after and what they won't.

20 MR. REDCAY: This is Ron Redcay. I think the answer
21 is we know what guidelines likely you are referring to, but I
22 do think that filling in the space between the speeches -- the
23 two lines in the speeches that Henry referred to -- would be
24 helpful. Specifically, it seems to be that planning has got to
25 be okay; the question is, when the planning goes beyond mere

1 planning and gets into pay announcements and reorganizations, I
2 mean, I think having gone through a fairly large merger which
3 took a long long time from the time it was announced until the
4 time it closed, it certainly was a major concern in all the
5 various businesses what you could do and what you couldn't do.

6 And there were very few guideposts out there. And so
7 I think someone would like something more definitive than you
8 have, but not all the way to formal guidelines.

9 MR. SHER: This is Scott Sher. I think it would be
10 helpful to have more decisional law or more public speeches
11 about the topic. I mean, we know from Computer Associates that
12 you can't stall Vice Presidents in target companies to control
13 prices and, you know, deviations from distributor agreements.

14 But we don't really know whether or not, and this is
15 especially pertinent in the high tech industry, we don't know
16 whether or not it's okay to have joint customer calls to assure
17 customers that the target company, that their product lines,
18 likely will survive in some form post merger. And when you
19 have an investigation that is going to last three months, four
20 months, five months, or six months, and you have a small target
21 company whose product life cycle is short, you know, that type
22 of uncertainty surrounding that company's products is deadly.

23 That company's products are likely dead in the water
24 and the technology can end up being squandered. So it's more
25 of the ambiguous areas that we really don't have any guidance

1 on. There was a brown bag, I think, two months ago and I don't
2 remember who had made the comment, but someone had made the
3 comment that the merger agreement itself could serve as the
4 basis of an agreement for a conspiracy.

5 Comments like that are scary and it makes it really
6 difficult counseling the client on what's appropriate in merger
7 integration planning prior to the time of consummation.

8 MR. HIBLER: Don Hibler here. I would look back a
9 few years ago and remember a case called The United States vs.
10 Aqua Media in the 9th Circuit where the proposition that it was
11 appropriate relief to hold in both the acquiring and the
12 acquired company, and I would imagine people would find that to
13 be of some authoritative value. That goes back quite a while
14 ago.

15 But I would say that the two things that have been
16 most helpful to me are not necessarily the agency speeches, but
17 I think an article by Will Tom on this very topic. And the
18 recent collaboration guidelines, which I think, taken together,
19 will allow me to go through the appropriate qualitative
20 analysis that would solve most of my problems. And I don't
21 know how much better would I feel at the end of the day if I
22 had the Bureau of Competition -- these are hypotheticals. I
23 think maybe on another scope, but not myself.

24 MR. HOFFMAN: Well, assume there is not a big push
25 out there for us to generate some additional decisional law on

1 this.

2 MR. HIBLER: Right. Have you seen the Aqua Media
3 decision?

4 MR. HOFFMAN: I haven't thought at all about this
5 topic prior to coming in here, so I don't really know what -- I
6 know we actually internally are looking at Gun-Jumping in
7 general and there's sort of an overall internal review about
8 what level of planning and actual integration is going to be
9 problematic and what we do about that, but I haven't got a lot
10 of additional thoughts of my own about that. Peter, do you
11 have any thoughts on that?

12 MR. RICHMAN: Peter Richman, from the FTC. We have a
13 couple of deals in the last, oh, post-dating Bill Baer's
14 speech, in which the Day 1 planning went forward at what might
15 have been troubling on its face, but was done very, very well
16 to prevent the flow of information, which is a primary concern.
17 If we are going to have a problem with the entire deal, we
18 don't want any competitive information transferring. If we are
19 going to have a problem with part of the deal, we don't want to
20 have that information transferred because those employees are
21 going back.

22 And firewalls, while implemented well during the
23 pendency of the merger investigation, don't prevent the
24 transfer of information later, and especially if it is
25 competitive pricing and output information. The Dan Ducore

1 shop is studying what those law firms did very well and it's
2 hard, Scott, I don't want to give kudos to any of your
3 competitors anyway, but they're studying what went well and
4 trying to figure out how to provide that sort of guidance.

5 If hypotheticals aren't that helpful, that is
6 something that we ought to be thinking about. And if there is
7 something that would give more definition to the question
8 because, you know, in the industries I deal with, which are
9 rust belt industries, there is no new technology that is going
10 to be lost in six months during the pendency of a merger review
11 as in software, or new drug development, or whatever it is that
12 might be a shorter time frame where investors are running away
13 from something while we are investigating.

14 You may need more information. But I know that the
15 Compliance Division is spending a lot of time and resources on
16 this question.

17 MR. THOMPSON: There is one other possible resource
18 and I don't want to get anybody in trouble -- this is Marty
19 Thompson -- the Pre-Merger Notification Office has actually
20 given me help sometimes on specific questions: "If we do this
21 while it's pending, will you call that Gun-Jumping?" And they
22 have been able or willing to deal with very specific instances.
23 Yeah, speeches tend to be the path of least resistance as far
24 as getting information out there you can point to.

25 One area where I think there has become a dearth of

1 speeches to point to is on the question of what the recommended
2 or acceptable processes are for sharing extremely confidential
3 information. And I know my clients on the whole tend to be a
4 conservative bunch, and yet still, when I tell them that
5 certain things and certain phases may be a little too sensitive
6 to share directly, maybe you better get a consultant to launder
7 it for you, give you a composite of information, there is a
8 certain hesitancy to spend the money.

9 If there was a speech that said here are some
10 recommended approaches that are likely to be acceptable, it
11 would certainly give me more credibility in telling them I need
12 to spend some extra money.

13 MR. HOFFMAN: You know, we have heard a little bit
14 about the consultant idea and I would certainly be interested,
15 you know, at some point probably we should turn to talking
16 about the Second Request. I don't mean to drag this topic out
17 indefinitely, but we would like, also, if anybody wants to
18 submit written comments or anything like that to us, this is an
19 area I would be interested in hearing some more about is what
20 people think about the practical utility of conducting your
21 merger through consultants while the agencies are performing
22 their review.

23 I have some pretty mixed things -- pros and cons
24 about the problems that are involved in doing that. I don't
25 mean to limit submitting information to that topic by any

1 stretch of the imagination. Send us anything or any comments
2 on anything you think we can do better.

3 Anything else on Initial Waiting Period?

4 MR. REDCAY: I guess I wanted -- this is Ron Redcay -
5 - in response to Peter's comment. One of the questions I think
6 I have got is, all the discussion we had recently seems to talk
7 about this topic in the context of extreme confidential
8 information. And I guess I wanted to clarify things that for
9 us is to see what are the other objectives or reasons why
10 you're concerned about Gun-Jumping, because I think it is
11 broader than that.

12 Those are some of the questions that get more
13 complicated -- things like maintaining the vitality of
14 businesses, preserving the ability to have effective merger
15 remedies. It is in that area rather than the exchange of
16 competitive information that I think we may need more guidance
17 because I do think people do a pretty good job through
18 consultants and firewalls and preventing information from going
19 back and forth, but it's these other areas that I think are a
20 little more touchy-feely and need some clarification.

21 MR. RICHMAN: We have had one Remedy workshop.
22 Others may or may not be in the works, but these issues are
23 specifically addressed, along with the over-arching what are we
24 doing with remedies and buyers in front? And again, Dan DuCore
25 is in charge of those.

1 MR. WIEGAND: Did anyone have any comments about what
2 the government -- what our agency should be doing during the
3 Initial Waiting Period, whether we are using the time
4 effectively, or whether we are missing opportunities?

5 MR. SHER: I think it varies from staff to staff. I
6 think some review staff uses the 30-day waiting period very
7 effectively. Some issue fairly boilerplate voluntary request
8 letters and don't really push beyond that. Or, because, maybe
9 it's in part because of the failing of the clearance agreement,
10 it takes too long to get a request for information out and it's
11 already beginning to bump up on the end of the 30-day waiting
12 period by the time an initial 30-day voluntary request letter
13 comes in. So I think it really varies from staff to staff.

14 We have seen over the past year some really good
15 improvements on the type of information that is asked and the
16 responsiveness of staff. People have been very upfront with us
17 about their concerns, where they're coming from, and what we
18 need to do to address them to make sure that we can either
19 limit the scope of the Second Request or get out of one
20 altogether.

21 MR. HOFFMAN: Anything specific in mind that we ought
22 to be thinking of in terms of practices that we could implement
23 across the agency to use that period to its best effect?

24 MR. SHER: Scott Sher again. I think personally from
25 my view point, it would be very helpful to actually set forth

1 information that, depending upon the industry, that you would
2 find most helpful to review the industry because, for some
3 industries, some of the initial 30-day Waiting Period
4 information that you guys ask for is very broad, very general,
5 and doesn't really have to do with the transaction. A general
6 request for, you know, all business plans for the company, it's
7 very, very broad and the information is probably very broad.

8 MR. THOMPSON: Generally in my experience -- this is
9 Marty Thompson again -- the Staff have been quite willing to
10 actually meet physically during the 30 days. As Scott said, it
11 can vary from staff to staff. We have actually had one staff
12 that refused to meet until the Second Request was issued. I
13 never quite understood that. But usually we've been able to
14 use it pretty effectively and have major sessions and dog and
15 pony shows before the 30 days was up.

16 MR. HOFFMAN: Was there a clearance issue in the one
17 case where somebody wouldn't meet with you?

18 MR. THOMPSON: Oh, no. It had already been assigned
19 to a particular office. I got the impression they didn't want
20 to do anything to compromise the surprise value of the Second
21 Request because there was a certain amount of adversity already
22 built into that particular situation.

23 MR. HOFFMAN: That's unfortunate. I think in the
24 interest of time, probably we should -- I mean, again, any more
25 thoughts that folks have on these issues, we'd love to hear

1 them and you can submit them to us. I think there will be
2 guidelines on the website about sending them that way, or you
3 can contact any of us and we'll figure out how to do it. I
4 can't recall off-hand what the mechanism is. Let me turn now
5 to the Second Request, speaking of the surprise value of the
6 Second Request.

7 MR. THOMPSON: And that was not typical.

8 MR. HOFFMAN: Let me maybe turn to that topic in
9 general. We have Marty and Ron who are going to talk about
10 different aspects of or introduce the topics of content and
11 scope and negotiating modifications.

12 I thought it might make the most sense if we just
13 dealt with the Second Request, you know, in its entirety in one
14 piece ranging from is the model working, are there things we
15 should do with the model to fix it? Or are there different
16 variants to the model we should use? What are people's
17 thoughts on how the Second Request asks you to sort and
18 organize information? Timing Agreements, how those work, what
19 we could do better in that regard, or what private parties
20 could do to help us out. Translation, I know, has been a big
21 issue.

22 And our internal appellate procedure for resolving
23 modification disputes, in which we have this appeal set up to
24 the General Counsel's Office which I think is an interesting
25 and useful procedure, but it has been under-utilized. So I'm

1 interested in folks' thoughts on those issues or really
2 anything else having to do with what the second request looks
3 like and how you get it changed during the course of an
4 investigation. So, now let me just turn it over to Marty and
5 then Ron. And then everybody.

6 MR. THOMPSON: The Second Request has actually
7 generated even less case law than Gun-Jumping. I think that's
8 a reflection of the fact that, even though theoretically you
9 have recourse to District Court if things are bad enough, as a
10 practical matter, if you get to that point, it's too late.
11 It's inherently an informal process. And John had asked me
12 before to kind of think of what you folks might do better.

13 And if you would allow me to say that, as of three
14 years ago, there was a lot to say. The problem is with the
15 reform, I think at least on paper, you folks have pretty well
16 picked all the low hanging fruit. I mean, it is an informal
17 process. You've got a situation now where there is what
18 amounts to a mediator in place. Immediately, there is an early
19 meeting.

20 My own observation is there does seem to be a less
21 adversarial relationship in the process than there used to be.
22 And maybe that's just by accident and certainly there are not
23 enough examples in my experience to call it a valid sample, but
24 it does seem to be the case. I don't know, of the staff, if
25 there are people that have noticed that the new statute

1 actually has an amazing amount of detail even getting into the
2 Second Request and what is expected of the agencies, and maybe
3 that is a reflection of some of the consternation earlier.

4 Just looking at what changed with reform and the
5 changes in the rules, I thought one of the interesting things
6 that didn't change -- one of the oddities has always seemed to
7 me about the Second Request -- was the rule that requires the
8 poor administrative assistant that gives you telephonic notice
9 to also offer to read the thing to you on the phone.

10 Now, you know, this day of e-mails and faxes, I've
11 always said no because there's just -- it's not fun to make an
12 administrative assistant read a 40-page document to you on
13 Friday afternoon. But when you're looking at opportunities, I
14 think, to streamline the process, I've always thought that if
15 the person who had to offer to read it on the phone was the
16 lawyer who drafted it you would see much shorter Second
17 Requests!

18 MR. HOFFMAN: I think Peter should definitely have
19 something to say about that one.

20 MR. RICHMAN: I just edit, I don't draft.

21 MR. THOMPSON: The other area where I find that there
22 might still be a real opportunity for major savings is one in
23 which I know you don't have complete control. And John and I
24 went through an experience last year where -- and it's pretty
25 common these days -- you're getting a Second Request that the

1 FTC or DOJ is investigating a merger, and more or less
2 concurrently you're getting a CID from a State AG. And they're
3 investigating the same merger under state law which is probably
4 just about identical. This wasn't in California, this was in a
5 different state that John and I did recently.

6 Now, in that instance, I know that John went to great
7 lengths to minimize the differences between the approaches of
8 the two agencies, and yet it was impossible to eliminate the
9 differences. When you go through documents more or less the
10 same day and one says, "Go back three years," and one says, "Go
11 back five years," and one says,
12 "You've got a 100-mile radius," and one says, "You've got a
13 200-mile radius," and one says, "Here's the format for your
14 electronic data," and one says, "Here's a different format for
15 the electronic data," it's inherently sort of cumbersome.

16 And the clients, I think, tend to lose a little
17 respect for the process when they say, "Why couldn't you guys
18 work it out?" And even when we eventually did work it out on
19 the substance, which we eventually did, the numbering was
20 different. Now, that caused the paralegals all kinds of
21 consternation and I hadn't even thought about that as something
22 to worry about.

23 But if it were possible, and recognizing the states
24 have the right to make their own decisions on what could be
25 substantive in the end, but just on a procedural level, if you

1 could get one point person who would have the power to speak
2 for both, so we didn't have e-mails going back and forth that
3 were inconsistent on the resolution of this or that nicety in
4 the language, and we could just do it once -- I can't believe
5 the states have that strong an interest on these minor
6 procedural details that they couldn't agree to give John their
7 power of attorney or whatever to resolve those minor
8 differences.

9 It would save a lot of time. And there is a way to
10 coordinate that better. That is one area which doesn't seem to
11 be addressed in the reform.

12 MR. RICHMAN: Can I ask a question? Has anybody else
13 had the experience where the state issued a CID that was
14 different in the details, if not substantially different from
15 the FTC Second Request?

16 MR. THOMPSON: Like I said, it's not enough from
17 which to draw a valid sample, obviously.

18 MR. RICHMAN: No, no, I'm not trivializing the issue.
19 I --

20 MR. THUMANN: There is some additional or
21 supplemental that you could, in my experience, accept as --

22 MR. RICHMAN: Right and it's broad. What they want
23 is everything that was given to the FTC. That's the general
24 experience we've had.

25 MR. HOFFMAN: So it might be a little bit

1 logistically easier in terms of that kind of problem.

2 MR. HIBLER: This is Don Hibler. I've found that to
3 be basically livable.

4 MR. HOFFMAN: Okay. Ron, did you have any specific
5 thoughts on Second Requests, negotiating them, modifications to
6 issues?

7 MR. REDCAY: I mean, yeah, actually my hopes were
8 dashed when you said earlier that you weren't here to answer
9 questions about how you negotiate a Second Request, probably
10 most people in this room would like to know what it is you're
11 willing to negotiate away and that is the question that we'd
12 like to have answered. I think it actually would be better to
13 hear from a wide range of people in the room than to have
14 somebody talk generally about the topic.

15 But a couple of observations, and I think that one of
16 the things that people in business, particularly big
17 businesses, would be more interested in is the scope, the
18 breadth and the depth of the search than they are with the
19 particular categories because then you don't really
20 particularly care about the breadth of the language of the
21 scope of a particular request. What you care about is how many
22 places you have to go look and how far down an organization
23 chart do you have to look?

24 And that is one of the things I think people are very
25 interested in -- how you can negotiate limitations on that.

1 And that segues or ties into another thing that I think all
2 practitioners think about when you think about a Second
3 Request. And some of the statute may be beyond your ability to
4 change it, but is that there is a difference between a Second
5 Request and a -- there are many differences. You could write
6 an article on the differences between a Second Request and
7 either a CID or a document request in litigation.

8 But one of the things that is a big difference is the
9 interrelationship between the Second Request process and the
10 ability to certify substantial compliance and the timing of
11 your ability to close the merger. And we've heard all kinds of
12 behavior affecting conduct that might not occur if, in fact,
13 the Second Request was cumulatively an informational thing and
14 it was unrelated, or the completion of it was unrelated, to the
15 timing that goes into the merger because I think a lot of us
16 think that, you know, you give us some leverage that we don't
17 have and we think if you're worried that if we're playing games
18 with what the timing is and it seemed to me it ought to be
19 divorced of as much as one can through private agreement, given
20 the statutory scheme, as you can, so that both sides don't
21 think there's some game playing going on related to your making
22 a broad Second Request so that you have got a lot of time to
23 consider it, an hour of filling things in compliance and trying
24 to negotiate it, maybe you could have a shorter time.

25 I think that is a big concern that I know

1 practitioners talk about. Other than that, let me open it up
2 to people to talk about it.

3 MR. HOFFMAN: Well, let me, just on the timing issue
4 because that is the topic I'd like to hear more about, you
5 know, timing agreements are things that we see many different
6 variants of and there's different ways that you can structure a
7 Second Request in terms of the actual production.

8 You know, one way that some folks have used it is to
9 say, you know, "Okay, here's your second request, but let's
10 just first search only the top 10 -- these 10 people. And
11 we'll take a look at that and if we don't find anything worth
12 investigating, we'll just stop at that point. If we do,
13 though, we may ask you to search the next group of 10 or 20."
14 In other words, it's sort of like a rolling production, but
15 you're actually structuring your searches with agency input.

16 Now the down-side to that is that, in the worse case
17 scenario, you're going to have a substantially extended period
18 before you can certify and I've heard some mixed things about
19 that. I mean, some people in the private bar take the position
20 that their hope and dream is to never certify, you know, in
21 that they will either determine that the deal was okay and
22 they're going to -- maybe something needs to be resolved, or
23 maybe they can just get the investigation closed.

24 Or they're going to find out that the agency is going
25 to challenge the deal, at which point they drop it anyway and

1 they're not going to ever certify. On the other hand, some
2 people say, "Our goal when we walk in the door is to certify on
3 the earliest day possible so that the timing shoe is on the
4 other foot and we're very, as a result, reluctant to enter into
5 these kinds of structured or phased searches because that
6 extends our period."

7 And I don't know if there's any sense out there of
8 which approach you all take or what is the preferable approach,
9 or is this something that varies case by case, or by the
10 philosophy of the lawyer? But if anybody wants to address that
11 issue or timing in any of its forms, I'd certainly like to hear
12 some more about that.

13 MR. REDCAY: Well, that is one of the concerns I
14 think that we have and it does vary from client to client, deal
15 to deal, and probably lawyer to lawyer. But in those kinds of
16 negotiations where you're deferring some production, in the
17 back of your mind is that concern that we've got that by
18 deferring this mail, putting yourself in a position where you
19 can't certify in a timely basis, and I guess one of the things
20 you have to think about are the ways that one can not have a
21 deferral but rather have -- what's the best way one can have
22 some agreements of -- people realize they only have to go this
23 deep or you only have to go to a place and it's not a deferral,
24 it's off the table. That's a good example of the situation
25 where the timing aspect is a constant overhang to the

1 negotiation and the production of --

2 MR. HOFFMAN: Well, let me -- I think it's almost
3 universally the case that we'll do drastic organizational chart
4 cuts, you know, if people come in, particularly really early,
5 and I would say preferably in the first 30 days, with org
6 charts and start showing us or talking to us about who we ought
7 to be interested in and why, but let's assume that we'll do
8 that.

9 You know, separate and apart from that, let's assume
10 we take a company and we're going to be willing to limit it to
11 40 people that you will have to search. Does it make sense
12 from your perspective to say, "But even out of those 40, you
13 may never have to search them all? Let's just do the first 10
14 and you get us their stuff in two weeks. And then we'll decide
15 if we want to go beyond that." Or does that introduce so much
16 uncertainty into the timing that it's just not worth it?

17 MR. THUMANN: Henry Thumann. It's just hard to give
18 an answer to that.

19 MR. HIBLER: It's not going to be very often that we
20 will know the answer to that question early on in my
21 experience.

22 MR. SHER: The one thing that is important, though,
23 is for staff to be receptive to the idea that we can do a high
24 level cut and if the high level cut, you know, if you don't
25 produce any documents that suggest there is going to be any

1 problem in the market post-merger, then that will be the end of
2 the investigation.

3 I know my question is hard on your side to be able to
4 make that type of commitment, but if there was a general
5 feeling among the private bar that if we did a quick production
6 of the top 15 people of high level executives and we're
7 confident that there are no documents in there that are going
8 to suggest that this merger is going to be a problem, that that
9 will be the end of the investigation.

10 If it's the type of situation where you are using the
11 rolling production as a way to be able to get more time and,
12 you know, you have a fairly good inkling that, at the end of
13 the production the first 15 people that you're going to ask for
14 the remaining 25, then there's no point then doing a rolling
15 production.

16 So as long as the government is receptive and truly
17 receptive to the idea that a rolling production is going to be
18 something that could satisfy your concerns, then I think it's a
19 very good idea.

20 MR. HOFFMAN: I mean, the one downside to that, I
21 guess, is if you look at it from our side, you know, the
22 incentive you're suggesting is somewhat unilateral and, you
23 know, the way I've seen this work to some extent is where what
24 the particular shop the staff have told the parties is, "Look,
25 we're going to look at these first 10 or first 15, or whatever,

1 and we think it's highly likely that at the end of that we'll
2 be able to say either we're likely to sue you, you know, so if
3 we want to continue with the transaction, let's proceed down
4 the route of getting more information, but you need to know
5 that we're probably going to be thinking of litigation at that
6 point. Or we're likely to say forget it, we've closed."

7 If it looks like there is a pretty high likelihood
8 that one outcome or the other will be, if not determined,
9 hopefully determined or probably determined at the end, it
10 might be the best situation where you can really do that. But
11 it does require the parties to put some timing on certainty in
12 early on in the transaction. Anything else on timing? Or
13 anything else on modifying or negotiating the Second Requests?
14 I've got a couple of other ideas I can throw out there, but I
15 wanted to throw it open.

16 MR. REDCAY: Let me pick up on your comment -- this
17 is Ron Redcay again -- and I think those two words, the "C"
18 word, candor and communication, is always seen in discussions
19 of the Second Request. There are candid communications and
20 there are two-way streets. That is, I think, the most
21 important thing both you and we can do to make this process
22 work better.

23 If we actually knew candidly what your competition
24 theories were and what you thought the problems might be, how
25 serious you thought they might be, and we similarly were

1 candidly telling you these are the places where you're likely
2 to find whether there is something to what you're thinking
3 about, if both sides have that, then I think the system could
4 work pretty well.

5 But if you don't, I mean, if it's something like
6 Marty's example where they wouldn't even meet with them until
7 the Second Request issued, if that is going to permeate the
8 process, then this kind of thing is not going to work at all
9 and the parties are just simply going to revert to that basic
10 game playing that I talked about at the beginning.

11 MR. RICHMAN: On that point, we have had in place a
12 policy, a five-day rule, where five days after issuance, you
13 can call for a meeting and we have to meet with you on the
14 staff level to explain what our theories in case are at that
15 point. I've had no one take me up on that. And I offer it
16 because generally if we're issuing a second request in this
17 resource-intensive world, we have a reason. But I don't get a
18 lot of push back and I'm wondering if there is something flawed
19 about that process and that it creates a block somewhere in
20 this candor and communication we're looking for -- because I
21 can't figure out why, as private attorneys, you wouldn't want
22 to come in and say, "Okay, what have you got?" And I --

23 MR. REDCAY: I can't either.

24 MR. RICHMAN: So you all take advantage of this?

25 MR. REDCAY: Yeah, of course.

1 MR. THOMPSON: One of the other things that might be
2 either formalized or explained in advance more often is it
3 seems like there is a way in which data is, for lack of a
4 better word, dumped on you, is always an issue. It seems like
5 there are always questions that seem they're taken literally to
6 require the data to be put in some format that the client
7 stated, "We can't do that."

8 And my best luck is just having the experts, the data
9 people, talk to your data people, and the lawyers kind of stand
10 aside even though it smells like malpractice, unless you're
11 really confident. But if there was something spelled out about
12 how you would recommend that be done and what protections there
13 might be in such an issue where you don't have quite the
14 malpractice fear about letting the data people talk to your
15 people with minimal lawyer involvement. Like I say, I've done
16 it and you sort of take the chance.

17 MR. HOFFMAN: Is there something we could put into
18 the model Second Request or somewhere else that would help with
19 that problem? Because that is a suggestion we've heard from
20 quite a few people that, you know, there are these fundamental
21 disconnects on data which are exacerbated by the fact that the
22 parties negotiating them, the lawyers on both sides rarely
23 understand what they're talking about. So if they are
24 constantly going back to their data people and by the time the
25 translations go up and down and back and forth, no one knows

1 what they're doing. So getting the data people together seems
2 like a great idea. But I hadn't heard before about this
3 particular aspect of the problems with it. But that is
4 certainly something we could think about trying to do
5 something. More on Second Requests? Data issues? Any other
6 problems or thoughts on data?

7 MS. SCHECHTER: Translation.

8 MR. HOFFMAN: Translation. Go ahead. Introduce
9 yourself.

10 MS. SCHECHTER: I'm Minda Schechter, I represent
11 foreign companies. And a Second Request for translations ends
12 the deal. It's just too burdensome. And I was just wondering,
13 if you mentioned that, I wonder if you had anything.

14 MR. HOFFMAN: Well, let me outline for you sort of
15 the pro's and con's. I mean, on the one hand, we don't have
16 the resources or the ability to engage in wholesale translation
17 of foreign language documents, particularly today where major
18 companies are located all over the world and might have
19 documents in literally any language. And it frankly is not
20 possible for us to review transactions where if we didn't have
21 the ability to shift that cost to the parties, it's impossible
22 for us to review transactions. So it would be a real problem.

23 On the other hand, you know, I can certainly see the
24 problem where if you're a foreign company and you have a huge
25 number of documents and translations are really expensive. The

1 model Second Request and the various guidelines on practice in
2 this area suggest some ways around that. There are a lot of
3 things parties can do.

4 I've seen this come up recently and this is one of
5 the issues that's actually now been twice appealed to the
6 General Counsel constituting two of the two appeals to the
7 General Counsel's office; some other issues came up in both of
8 those, but this was the common theme. But there's a lot of
9 things you can do in terms of proposing summaries of documents,
10 getting together to meet with the agencies outlining who, what
11 kinds of documents relevant to U.S. markets or U.S. consumers
12 will be found where and what might be done to translate those.

13 I mean, it's a lot of things you can propose. Have
14 you tried to explore those sorts of things? Or is that
15 something we should provide some more formal guidance on?

16 MS. SCHECHTER: Yeah. In my experience, the requests
17 were still too broad to translate. Like we have the soft
18 summary and so forth, but the part -- I mean, we have to know
19 it all in the documents, so we have to get it translated to
20 know. But if the summaries were still perhaps a little less
21 work, you know, if your Second Request is comprehensive for a
22 foreign language company, but it's just so burdensome. It's an
23 interesting phenomenon because you're dealing with a lock of
24 merger by requesting a translation of it.

25 MR. HOFFMAN: I wouldn't say that that's an okay

1 outcome. I mean, I don't think the agency would take that
2 position. But we have to be able to review deals. And if we
3 get a deal where the vast bulk of the significant documents are
4 in a foreign language, it really puts a significant
5 institutional strain on us.

6 In other words, we simply do not have the capability
7 to do mass wholesale translation of documents produced to us in
8 any language, let alone multiple languages. I mean, I would
9 love to hear suggestions on the ultimate mechanisms we could
10 employ to reduce the burden in that because I think it's a
11 really real burden. And the fact that our two appeals to
12 General Counsel both involve that issue suggests that this is a
13 real problem.

14 MS. SCHECHTER: But you do have some other agency
15 guidelines or whatever acceptable --

16 MR. HOFFMAN: The main ones that I'm aware of and I
17 think Peter, John, or Norris could probably speak to this
18 better than I could, but the ones I'm aware of are first of all
19 coming in and explaining to the staff, you know, kind of who,
20 what and where, sort of a modified version of the org chart
21 reviews where you explain what it is and what kind of documents
22 and which people in the foreign offices, including foreign
23 headquarters, are likely to have documents relevant to the
24 issues that we'd be interested in, and on which particular
25 topics and which specifications, for example, might now have

1 any relevance to documents that would be maintained abroad or
2 in a foreign language, or if they were, you know, as a needle
3 in a haystack thing that likely is low, that would be
4 significant.

5 People will listen to that and then, if you can
6 narrow the scope down using summaries, overviews, that sort of
7 thing, you know, the cost of having a translator quickly review
8 things and give me an oral summary is much lower than doing a
9 full scale formal written translation. So if you can employ
10 sort of a series of these kinds of mechanisms, I think you can
11 reduce costs. But I don't have a magic bullet answer to this
12 problem. I would be interested in hearing.

13 MS. SCHECHTER: But is that on a case-by-case basis
14 of particular transaction, the attorney and government would
15 decide which names issue acceptance summaries and so forth?
16 And there is no -- (inaudible)? Maybe each attorney in the
17 government would make a decision on what particular transaction
18 or particular company -- (inaudible).

19 MR. HOFFMAN: The short answer to that question is
20 yes. Peter?

21 Mr. RICHMAN: But if it's part of the standard
22 negotiation practice, I mean, there's two scenarios that can
23 come up. One is where the party is headquartered in a foreign
24 country that has a language other than English. The other is
25 where it is a subsidiary, and I've never met the first issue.

1 And the second issue, I've had people come back to me and say
2 it is a modification, like a subsidizing modification.

3 Here is what the sub does, here is who they
4 communicate to, and here is the high level communication
5 document that goes into the strategic planning or the
6 competition arm or the sales arm of this transaction. Do you
7 really want it? And with very few exceptions, I've gotten high
8 level strategic documents and when you have them search, very
9 limited search that way, rather than a broad-based search from
10 foreign headquarters and try to work it out that way. But
11 usually the negotiations -- it's usually an understanding of
12 how the company works and who the people report to, and then
13 you try to narrow it down.

14 MR. HOFFMAN: Let me say institutionally and to some
15 extent, especially if you don't do this kind of stuff where
16 there is a whole lot, our internal practices might be a little
17 bit okay, but it is not just the first staff attorney that you
18 work with. That is who you do your initial negotiation with,
19 but there is a lead attorney on the investigation, then there
20 is the director or deputy assistant director of the shop, and
21 you can talk to those people. You can also talk, again
22 informally, to the Bureau. And the Bureau of Competition has -
23 - or at the Bureau Director level has gotten directly involved
24 in cases where the negotiation process broke down. And often
25 it is simply because the parties just have lost the ability to

1 communicate. And sometimes having somebody else come in can
2 help.

3 And then ultimately there is the appeal of the
4 General Counsel's office. And that's an extremely expedited
5 process and it's basically about a five-day turn-around or so.
6 It's a quick letter and then -- believe me, I've worked on
7 writing one of these briefs -- it's a really really really
8 short brief. It's hard to say a lot in it, but you can get
9 your point in, you come in with your argument, and General
10 Counsel will decide it.

11 You know, if you have an issue where you just have an
12 insufferable burden and you're not making any headway, I'd
13 encourage you to get a piece of that. I think the staff will
14 try really hard and, I think, succeed in not holding that
15 against you. They recognize that sometimes people just can't
16 resolve these issues and that's why we have this appeal to a
17 neutral party. Any more on modifications, translations? Any
18 other thoughts on translation or any other issues? Peter, do
19 you want to talk about or lead us into electronic documents?

20 MR. RICHMAN: As companies have moved to more and
21 more paperless operations, we have found increasingly that a
22 number of issues keep coming up and I've broken them down into
23 four and anybody help on any of these issues because they're
24 both substance and burden issues for us. Number 1 is e-mail
25 and data format attachments, which I'm sort of blending

1 together because I think that's the most accessible electronic
2 information.

3 Number 2 is native format spreadsheet database files
4 and ownership and control of those. There are ways to track
5 who the last person was, who the initial author was who touched
6 a document. But the relevance is high. Our reliance on them
7 is not as sound as we might wish it to be because we don't know
8 who owns the stuff that we're getting. From the private
9 party's perspective, what keeps coming back to me is there is
10 no way for you to track it once we've got it because you can't
11 Bates stamp an Excel file.

12 If we actually can and we come up with some novel way
13 of doing that, but they involve long discovery depositions,
14 "Did you write it? Did this come from your file?" And it's a
15 waste of a lot of your clients' money and everyone's time.

16 The third issue that keeps coming up is shared server
17 space where companies don't have good document tracking
18 policies imposed on the employees and you may have an entire
19 Department or division sharing a server drive. And everyone is
20 certain about their own sub-directories but anybody can use
21 anybody's -- anything anybody else wrote. And then you run
22 into software that is actually meant to have people share files
23 and jointly develop electronic production.

24 And finally Archives. Of all of the above, how do we
25 get what we need? How do we know whether we need any of it?

1 And how is it kept? And in this post-Year 2000 world, how do
2 we know what burden we're actually imposing when we're asking
3 somebody to re-create a legacy system in order to get data that
4 wasn't migrated forward? That is my sorted list. Adam, did
5 you want to talk to any of this?

6 MR. BENDELL: Yeah, though I'm going to add to it. I
7 have been the President of SV Technology. We help companies
8 and law firms cope with large civil discovery and Second
9 Requests and special electronic media, so that's where we're
10 coming from, the logistical problems of doing that. And I
11 thought I'd pick up a few different problems, Peter.

12 One is the standard definitions of a couple of
13 anachronistic things that I'd love to see you folks give some
14 attention to. The first one is the spec that calls for the
15 description of the document retention policy of the company,
16 which calls for an identification of all automated information
17 systems used by the company. Imagine trying to do that
18 literally in a technology company, that these things always get
19 negotiated, but it's not even, I think, a useful starting
20 point, rather than those that might contain responsive
21 documents, for example.

22 And the second one is in the privileged section of
23 the definitions, there is language that asks the Respondent to
24 identify encryption method for any e-mail that was sent via the
25 Internet -- this one is not always in there, there are

1 variations. But I think that is a reference to a now
2 thoroughly discredited idea that the lawyer waives attorney-
3 client privilege if he sends an e-mail, if he sends an e-mail
4 to his or her client via the Internet that is not encrypted.

5 And, I mean, that is just not -- no one has really
6 seriously taken that position for years now. Again, the
7 weaving of this into the privilege log is -- I've never seen it
8 actually done, but it is typically subject to negotiations. In
9 terms of electronic data, it is incredibly -- as Peter said,
10 most of our clients have shifted dramatically in the last five
11 years to electronic storage. We now find that 80 percent of
12 the production from a large company is sourced in electronic
13 data, a very dramatic change from maybe 30 percent five years
14 ago.

15 And that change has worked, but all the implications
16 of that have not worked their way through the system as it
17 were. Many of these productions are still handled by printing
18 out everything that is electronic to paper and then if there is
19 some electronic handling of those documents by the parties
20 representing the company to prepare for production, they're
21 being scanned back into an electronic format and handled in
22 that way, and the print is nutty.

23 And so a pure electronic production has benefits for
24 both private bar and for the government, keeping things in an
25 electronic format. That can go all the way to an electronic

1 production to the government. We recently did a production on
2 behalf of Hewlett Packard in the Compaq merger, which was what
3 is now a very large technology merger, where the production was
4 made to the government in electronic format in a system that we
5 hosted -- the company hosted for the government.

6 And I think, Norris, you were involved in that. And I
7 would be interested in your feedback on how it works from the
8 government's perspective.

9 MR. WASHINGTON: Well, I mean, from our perspective,
10 it worked very nicely. It meant fewer amounts of paper to
11 handle, yet a way of sorting and organizing the data, the
12 structures of the data, based on how you actually produced the
13 information. So in that way, it was very beneficial. I mean,
14 there is a little bit of a learning curve, but really not that
15 high.

16 MR. BENDELL: So I predict that we will see more of
17 this now that we have gotten the precedent of you folks
18 accepting this in very large scale. We have done it in smaller
19 scale situations before, but as the bulk of the production,
20 there are enormous advantages of both size and folks will be
21 able to navigate their halls without banging into all the boxes
22 that typically line them.

23 One issue there that relates to the timing of
24 production if you're negotiating Rolling Production, there are
25 some differences in the characteristics of that if things are

1 being handled electronically. These processes are less
2 flexible than a purely paper-based human process. You have to
3 kind of queue things up. It takes a long time to get stuff in
4 to fill the pipeline with documents that need to be
5 electronically collected or electronically converted, and so
6 forth.

7 Once the pipeline is filled, we can deliver an
8 enormous number of documents on an ongoing basis. But changes
9 in, for example, who we are collecting from are more difficult
10 to accommodate in that process. And so there's kind of the
11 idea of taking people from an org chart sequentially, sort of
12 the first 15, and then we'll look at that for 20 days and
13 decide if we want to go over.

14 It is more difficult than a purely electronic
15 production because it takes time to sort of fill the pipeline
16 and it's easier to just sort of rev the engines and go.

17 In terms of the Native Format issue, we think it more
18 efficient for everyone to convert to some kind of uniform
19 format in files or PDF, rather than trying to produce
20 everything in Native Format, produce to you folks the strange
21 viewers that you might need or applications to look at, odd
22 files.

23 I think it's reasonable for you folks to request
24 specific documents in Native Format if you need them. I think
25 that's a much more expeditious approach than trying to review

1 everything in Native Format. So if you need the actual
2 spreadsheets that we're going to formulate, the result itself
3 isn't self-explanatory --

4 MR. RICHMAN: Let me ask you a question on that.
5 When you say that we should request specific documents you are
6 talking about a specific spreadsheet? Or all Excel
7 spreadsheets?

8 MR. BENDELL: No, specific spreadsheets. In other
9 words, I would contemplate some kind of -- and this is only
10 going to work, I think, in the context of a Rolling Production,
11 but some kind of back and forth where you reserve the right to
12 request the Native Format for specific documents. I'm not
13 referring entire class of documents, but for specification.

14 MR. RICHMAN: And the company can't certify until
15 we're done? I mean, that's the question really that comes up
16 there is, you know, no matter how good a job we all do at
17 winnowing these things down to the documents that are actually
18 -- it's not just relevant, but of importance -- we're not going
19 to get to all of them, even on a Rolling Production, in perhaps
20 the timely fashion that might allow us to say, "Okay, work
21 product aside, give us these 22 spreadsheets." And I've had
22 folks suggest that to me and I come back with, "Then you're
23 willing to not certify until we're done." And the response
24 that I got from the room which is just, "You must be kidding!"

25 So that is something that I would be very interested

1 in understanding how we could speed that process up. I don't
2 want every spreadsheet that a company keeps. I mean, the
3 benefits of a paperless office are lost if you look at it in
4 the entirety of how much data is being kept. I don't want 30
5 drafts of a spreadsheet because somebody doesn't save over the
6 old file. It makes my review hard and it makes your privilege
7 review harder. It just doesn't work out.

8 So do you have any specifics that might make it
9 easier to get to the endpoint that you're suggesting, but make
10 it work within our time frame and our very real need to
11 evaluate the information for making recommendations?

12 MR. BENDELL: I guess I would ask you how often you
13 really need to look at the Native Format. My sense is that it
14 is a fear factor that if you don't have it, you will be
15 hindered in some way; but the number of times you really need
16 it is actually pretty small compared to if you can actually
17 look at the output of the document.

18 MR. RICHMAN: It depends on the investigation and it
19 depends on the industry. You know, where econometric data is
20 important, those files are critical.

21 MR. BENDELL: But that's a very specific band of
22 data. It's not the entire request.

23 MR. RICHMAN: I'm possibly the wrong person to ask.
24 My last four or five cases were made on spreadsheets.

25 MS. LLEWELLYN: Hi. My name is Virginia Llewellyn

1 and I'm with a company called Applied Discovery. I would
2 second everything Adam just said and we actually worked on the
3 other side of the HP/Compaq process, so I think everyone
4 learned a lot from that and learned that electronic production
5 was the way to go, particularly with regard to spreadsheets.

6 The real benefit of going to a format like PDF vs.
7 Native is a couple of things. First of all, you mentioned the
8 issue of Bates numbering and having trouble with Native files,
9 you can't apply a Bates number. You can solve that problem,
10 obviously, when you convert to something like PDF. The other
11 thing that can be done in the conversion process, or the
12 display process, when the original file type is converted to a
13 PDF file, all of the metadata or data behind the spreadsheets
14 can be saved and conserved and displayed in some format, side
15 by side with that PDF file.

16 So the most common things that people are interested
17 in in spreadsheets are formulas that are associated with the
18 numbers that you see displayed with words that just print, any
19 comments in the fields, that sort of thing. All of that
20 information can be exposed, preserved, displayed in the PDF
21 process if that is required in a particular case.

22 If you don't think you're going to have a serious
23 issue with that kind of information, you can process them
24 quickly without all of that amount of data. But if you know
25 it's going to be a problem, you can request that up front. And

1 as Adam said -- (inaudible) -- if the electronic production is
2 putting up with specifications of the production in advance so
3 you know how to move forward very quickly and efficiently.

4 And then you can process that data in half the time
5 and half the cost of making a paper production. It's just
6 simply I think in most cases a matter of knowing what you need
7 to ask for.

8 MR. RICHMAN: Is the conversion of Native format
9 files to PDF, whether or not you I guess are including the
10 metadata, cheaper than just copying it and handing it over?

11 MS. LLEWELLYN: Absolutely. We have had a number of
12 conversations with Rich Corbett of our New York Office and I
13 think we have provided actually substantial documentation about
14 some of the differences in producing in paper vs. producing
15 electronic format in terms of the cost and the timing --

16 MR. RICHMAN: Yeah, I'm not doubting that it saves
17 money to produce an electronic format for TIF files. I mean,
18 especially if there are multiple states involved and those
19 states want their own copies. I mean, you know, copy over some
20 CD's or, as you did over the Internet. I mean, it saves even
21 more money. I'm asking for the Native Format Excel
22 spreadsheet, or I'm giving more kudos to Microsoft, spreadsheet
23 files or database files, rather than just copying those onto a
24 CD and sending us the CD of data.

25 I mean, it seems you're adding a step to the process

1 that goes even beyond my nightmare which is somebody just
2 hitting print on a spreadsheet and me just getting whatever was
3 designated on the format of the originally kept file. So my
4 question is converting an Excel spreadsheet to a PDF file,
5 saving the metadata, and then giving us that -- what's the cost
6 difference compared to just copying the original file?

7 MS. LLEWELLYN: Well, I think the real crux of that
8 issue lies in the fact that that conversion is an automated
9 process and it's a process that the technology has been
10 leveraged to do that very quickly. So while we think about it
11 as an extra step because you started with an original file, and
12 then you're doing something between, the real cost savings is
13 in the turnaround time, being able to process that information
14 electronically versus dealing with a printer and a copy vendor
15 and whoever else may be involved, and a Bates number and
16 somebody sort of tracking the mechanism.

17 I mean, the time that is saved in not just
18 transmitting the information to the Commission, but also the
19 time that is saved on the reviewer's side is information that
20 can be searched and accessed electronically instead of
21 requiring a manual review.

22 MR. BENDELL: Two more points, one in which I would
23 have expected to hear before now, and that is the requirement
24 to sort by specification number. That which your colleagues at
25 the Department of Justice did not have, that is a major

1 impediment to efficiency and I can't imagine that what you get
2 is very helpful to you because the judgment calls that are made
3 in putting documents in very broad specifications vary so much
4 from lawyer to lawyer that even with the best intentions, it is
5 hard to do it well.

6 It also requires that every single document go
7 through a page by page review, particularly in the electronic
8 world. That is not really necessary. It's the requirement to
9 do this, to organize documents and specification that's driving
10 that. And that is the key part of the expense of responding to
11 large Second Requests. So I would urge you to consider the
12 value you get from it given the burden it imposes on a company.

13 And then the second thing is just to chime in on the
14 whole Archive Tape issue. Archived Tapes are made -- data
15 tapes are made for disaster recovery purpose, not to aid in
16 civil discovery. Firms are taking snapshots of their mail
17 servers on a regular basis in order to restore them if there is
18 an earthquake or other problem, and the idea that we can go in
19 easily and find all the e-mail of Mr. Smith on a certain date
20 is just not so.

21 I won't take the time to walk through what's involved
22 in actually responding literally to a definition of documents
23 that's in the standard -- in the model request. But it's
24 extremely burdensome. That's not to say that in particular
25 circumstances we can't go after targeted -- that's if you have

1 a particular concern. But as a blanket approach, I think it's
2 wholly on record.

3 MR. SHER: I think that's very important to keep that
4 in mind when you're considering -- Scott Sher -- it's very
5 important to keep that in mind when you're considering the
6 sheer cost of doing that. It's extraordinary to require a
7 company to put back-up tapes back onto a server and then to --
8 I guess back-up tapes generally are done by month or by year or
9 by a certain time period, rather than by custodian -- and to
10 require the restoration of an entire back-up tape onto a
11 server.

12 It's just very, very expensive and adds an incredible
13 amount of time to the process. But the main problem with
14 sorting by specification is that I've never heard from the
15 agencies nor from the FTC that they were concerned with how we
16 ultimately decided to sort by specification and because the
17 categories are so broad, you're really not getting any
18 meaningful sorting.

19 But what you are doing is you're taking quite a bit
20 of lawyer time to require the sorting by specification and
21 you're getting no added benefit to the agency. I've never
22 heard anybody say, "Well, this is more responsive...", you
23 know, from the government saying, "This is more responsive to
24 spec 2 than spec 13." So it's really ultimately the party
25 sorting is self-serving and it doesn't really get the

1 government anything in the end.

2 MR. RICHMAN: Anything else on electronic data?

3 MR. THOMPSON: Just one question really. On the
4 initial filing of the HSR, have you folks made a decision
5 whether it's routinely acceptable to send those documents that
6 are filed with regulatory agencies by link rather than -- I did
7 that a few months ago and they told me it was a pilot project
8 and they would decide whether that would be routinely
9 acceptable. I never heard whether that --

10 MR. RICHMAN: You mean for the SEC files?

11 MR. THOMPSON: Yeah. I mean there was one highly
12 regulated market where we had just a lot of volume. And we
13 said, how about sending it by link? He said okay.

14 MR. HOFFMAN: I think we're going to make that
15 routinely acceptable. If there's a project on that going on
16 right now, I don't know what the exact status of that is, but I
17 believe that that's where it is going to end up -- and it may
18 be pretty soon.

19 MR. RICHMAN: Anything else?

20 MR. BENDELL: One other thought. The de-duping of
21 electronic files is much more scientific than the removal of
22 duplicate in paper. If there are better indicia, they can be
23 done in a more automated way. Have you found any resistance in
24 negotiating that? It seems like it would be of mutual benefit
25 in many circumstances. It does require that you have a known

1 set of custodians from whom you are collecting the e-mail. To
2 unwind it is very problematic.

3 MR. HOFFMAN: Let me say one word about that. The
4 model Second Request does not require the production of
5 duplicate documents. So technically, you don't need any
6 modification to de-dupe the file.

7 MR. BENDELL: You're interpreting that as sort of if
8 two people have an e-mail, the fact that it was in one person's
9 file, it doesn't need to be produced twice?

10 MR. HOFFMAN: Correct. Non-identical copies need to
11 be produced, but not identical copies.

12 MR. BENDELL: And the fact that I'm the recipient on
13 one line and you're the recipient on another, you don't
14 interpret as a different copy?

15 MR. HOFFMAN: No.

16 MR. BENDELL: That's not uniformly --

17 MR. HOFFMAN: I know, but every time that's been
18 called to the Bureau's attention, our position on that has been
19 -- and this has been an issue of some recent relevance -- but
20 every time that issue has been brought to the Bureau's
21 attention, our uniform position is that the mere fact that a
22 document has gotten to a different person's file does not make
23 it a non-identical copy.

24 MR. RICHMAN: But going along with that is a
25 presumption that everybody on the recipient and cc list

1 received that document, opened it, and read it. So, I mean,
2 the argument comes down the road when we drag the vice
3 president of sales in for an investigational hearing and don't
4 show her an e-mail because it was in her files and it's not
5 ambiguous and there's no real reason. And then we end up at a
6 Commissioner's office and we're recommending, and, we hear that
7 person never received that e-mail and staff never asked that
8 question. So, you know, the reason, at the staff level, we
9 wanted to make sure that we had that trail was so that we could
10 use it in discovery, if we needed to, and if we went down the
11 road to a trial.

12 MR. HOFFMAN: Peter's point is an excellent point.
13 You know, historically, it was so much more expensive to remove
14 duplicates than to just produce them that people produced them
15 and you didn't have this problem where they may suddenly
16 disappear. You know, you don't get them associated with a
17 person. And instead of having them in the file, we've replaced
18 that now with having the To/From, CC list and just assuming
19 they've all seen it. But again, people saying they did or
20 didn't read e-mails are going to have much less resonance with
21 us than with what the e-mail actually says, 1) -- and the same
22 is true with other documents -- and 2) again, the second
23 request does not call for the production of identical copies
24 and the mere distribution doesn't change it. It's the content
25 that we care about. It's a two-edged sword.

1 MR. RICHMAN: Norris?

2 MR. WASHINGTON: Well, I guess I need to address the
3 topic or bring up the topic of access to transcripts and Third
4 Party Discovery. I noticed over the years that in dealing with
5 outside counsel, one of the big irritants that seems to occur
6 is when they ask us to turn over their investigational hearing
7 transcripts and we say, "Well, we really can't. We have it as
8 a matter of policy that we don't turn them over."

9 And I noted over the years that the policy has
10 changed and I realize that this has been an issue that has been
11 brought up many times. And Scott Sher is going to be at least
12 one person who is going to address this type of issue.

13 MR. SHER: Well, I consider the first issue, access
14 to transcripts, as almost a throw-away and an easy area that
15 the agencies could reform the process. So we've actually seen
16 -- and Norris, the last one that we did with you -- we get
17 access now to that deposition transcript and we've gotten
18 access to investigation hearing transcripts and it's really the
19 only result that seems to make any sense. You know, in a
20 process that should really be transparent and investigatory,
21 rather than litigation oriented, it only makes sense to give
22 parties access to comments that they had made.

23 If your goal is ultimately to be able to allow the
24 parties to expand on or clear up any points that were made
25 during the hearing, that had come up. And they don't have

1 access to the transcripts of those depositions or hearings. It
2 just doesn't really make any sense. And I think that's one --
3 Marty was talking about the low hanging fruit that had been
4 picked with recent reform, and I think we can completely fix
5 that problem very easily by making deposition transcripts, as a
6 matter of course, available to the parties.

7 And, again, I think it's more of a procedure that you
8 have to change rather than substance because I have seen in the
9 last several investigations that we've done that we've actually
10 gotten access to our transcripts. It really does facilitate
11 the process. We can clear up any points that were made during
12 the hearing. You're also ultimately going to invite more
13 papers and briefs explaining why we said something that we had
14 said or clarified things.

15 But really, in the end, it's going to enable us to
16 clear up any ambiguities that were raised during those hearings
17 or depositions. Did you want me to move on to Access to Third
18 Party?

19 MR. HOFFMAN: Yes.

20 MR. SHER: We see several issues with Access to Third
21 Party information. One is parties getting access to the nature
22 of complaints from third parties. We see the third party
23 corporate citizens who are given a CID or a call from the
24 government, and then the people who affirmatively go to the
25 agencies and complain. I think each one is a different area.

1 As far as parties' access to Third Party Information,
2 I think it would be very helpful if the agencies were upfront
3 and communicated from the get go, not necessarily obviously who
4 has raised complaints, but the nature of any complaints that
5 you might have received. Because you know that a lot of
6 complaints that you receive are from a particular standpoint
7 where people have particular agendas when they are bringing up
8 complaints.

9 So what we would encourage and what we find as being
10 most helpful is, without revealing the source, obviously, it's
11 crucial to keep the process open for third parties to come and
12 complain. But to tell us what type of information you have
13 received from these third parties that we might be able to
14 present the fuller picture, or at least we know where you're
15 coming from in your investigation.

16 It would be extraordinarily helpful if we had that
17 information up front and right away, that we might be able to
18 completely discount information as it had been brought by a
19 third party or explain why that particular viewpoint has been
20 presented. And we can also rebut any information we've been
21 presented.

22 The bulk of the problem, though, is the Third Parties
23 who are being affirmatively requested for information from the
24 government. And I don't know if you're necessarily aware, but
25 even in a simple inquiry, a Third Party, a good corporate

1 citizen who receives an inquiry from the government, and it
2 costs \$50-100,000 in legal fees for that person to respond.
3 It's very expensive. They have to be prepped.

4 To the extent that they're turning over documents,
5 those documents have to be reviewed by their attorneys. It's
6 just the nature and course. So we would just encourage the
7 agencies to rely more on live interviews. When I've
8 represented Third Parties and there have been live interviews,
9 you know, we find that you can get most if not all of the
10 information that you need without actually having to rely on a
11 document request, or a CID, or a deposition.

12 You get what you need and what you want to help
13 further your case and, at the same time, parties are not being
14 over-burdened with what we've seen is basically just a re-
15 written second request in an extreme circumstance as a CID.
16 And for a Third Party, that's extraordinarily burdensome when
17 they're not materially -- you know, they do not choose to be
18 involved in the merger and they might not feel that they are
19 materially affected by the merger.

20 MR. HOFFMAN: Let me ask you a question about that.
21 One of the things that we have done a lot recently is when we
22 have been working on transactions, and these are particularly
23 transactions that seemed problematic, likely to go to
24 litigation. We have been trying to shorten the Third Party
25 discovery process by going straight to deposition and document

1 requests, but very, very targeted.

2 We're talking like three request lines in the item
3 asking for very specific things and very quick depositions.
4 Part of the two is a Justice problem. But I wonder if that in
5 any way -- does that exacerbate the problem that you're
6 pointing at? Or is it a partial solution, although not as good
7 as the live interviews? I mean, I have to tell you that our
8 analytical bias is we give a little more credit internally to
9 deposition transcripts than interview notes.

10 MR. SHER: Well, I guess you would have to ask
11 whether or not this is a case that you are seriously going to
12 challenge. If it's less than a handful of cases a year that
13 you plan on challenging, well, of course, you're going to at
14 least need some sort of documentary evidence or a deposition
15 from some third parties.

16 Maybe if you have an industry where there are
17 hundreds of customers and several competitors, you clearly
18 don't need to request that level of information from each of
19 the Third Parties. In those cases where you are seriously
20 considering litigation, I would agree that a targeted
21 documentary evidence request or a deposition probably is
22 helpful.

23 But they are very few and far between cases where you
24 actually are getting to the point where you are going to be
25 litigating the case. And I would rely first on -- because we

1 represent quite a number of Third Parties, and generally people
2 are fairly receptive to an hour interview or an hour and a half
3 interview, as long as you're not coming back every week with
4 another hour, another hour and a half interview to satisfy any
5 type of informational demands that you might have rather than
6 requiring people to go through -- any document request is
7 burdensome for a party that is not going to be benefiting from
8 the transaction in the end. So to the extent that that can be
9 put off, the better.

10 MR. HOFFMAN: Anyone else with any comments? We're
11 coming close to the end of the time we've got, but I'd like to
12 have the floor open if anyone wants to say anything, yell at
13 us, you know, constructive suggestions are of course preferred.
14 Well, with that, I guess I will close this.

15 Let me thank all of you very much for coming and
16 particularly to everyone who worked ahead of time getting some
17 thoughts together for us and everyone who contributed today.
18 This is extremely useful for us. I do want to stress we are
19 going to accept written comments from now for quite some time.

20 I'm not sure when we're going to wrap this up. We
21 have a couple more workshops scheduled. So my guess is it's
22 not in the indefinite future before we hope to do some things
23 here. But there's a little bit of time, so if people think
24 about anything that we discussed today, or if anything comes to
25 mind, anyone else in their respective firms or organizations

1 that have things you want us to know, please get them to us.
2 The hopeful outcome of this is that we will make some changes
3 in the way we do some things.

4 Obviously, we're getting a lot of input and feedback
5 on a lot of points and we have to sit down and assimilate it
6 all. But it's been extremely helpful and we've heard a lot of
7 consistent themes and some things that varied from place to
8 place. So we want to take it all into account and try to make
9 this process work as well as it can for everybody. Thanks very
10 much.

11 **(Whereupon, the discussion was adjourned.)**

12
13 **C E R T I F I C A T I O N O F R E P O R T E R**

14
15 DOCKET/FILE NUMBER: P019503
16 CASE TITLE: MERGER BEST PRACTICES WORKSHOP
17 HEARING DATE: JUNE 25, 2002

18
19 I HEREBY CERTIFY that the transcript contained herein is a
20 full and accurate transcript of the notes taken by me at the
21 hearing on the above cause before the FEDERAL TRADE COMMISSION
22 to the best of my knowledge and belief.

23

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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 transcript for accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE