FEDERAL TRADE COMMISSION

In the Matter of:)
MERGER BEST PRACTICES WORKSHOP)
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Thursday, June 27, 2002

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

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

P R O C E E D I N G S

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MERGER BEST PRACTICES WORKSHOP

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

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

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

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

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

would you like to summarize some of the points you've made in your paper?

MR. BALTO: Yes. We want to commend the FTC for going through this process. We think this is a terrific process and a very useful one in creating a dialogue between businesses, private attorneys and the Commission on the second request process.

In order to provide input to this project, Scott and I decided to survey about 20 inhouse counsel that we knew and also some additional private attorneys at high-tech companies who were familiar with the second request process, and we sent them a lengthy e-mail asking them a whole variety of questions and then sort of compiled their ideas into the paper that we submitted. There are copies of it outside and also there are copies of a summary of the paper that are outside.

Generally, from the perspective of high-tech companies, the time and cost of the second request process can be tremendously burdensome and oftentimes the cost or delay itself can squelch otherwise pro-competitive or competitively neutral deals.

There was also a general impression that we heard over and over again that in dealing with attorneys at both agencies that there were sort of -- there were expectations that high-tech companies would keep documents or produce the

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

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

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

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

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

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

MR. COWIE: Just to interrupt briefly. I understood you to say, David, that when these high-tech companies communicate at all it tends to be electronically by e-mail, right?

MR. BALTO: Right.

MR. COWIE: They don't keep old-fashioned paper files?

MR. BALTO: That's correct.

MR. COWIE: So, does it seem sensible then to press hard on getting discovery of their electronic records?

MR. BALTO: No, I think that is correct. I mean, I think what we're talking about is can the Commission and the Division be more flexible about where you draw the line. I think there needs to be more of a dialogue about how burdensome very broad requests are and how costly and how likely it is by searching the e-mails of lower level employees you're likely to get useful information.

Two elements of document production we think are particularly costly are the need to keep back-up tapes. We give an example of a second request and how costly the need to keep back-up tapes were in our paper. And second, the continuing obligation to update production. Under the

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

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

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

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

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

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

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

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

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

do you think has it right?

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

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

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

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

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

like a lawsuit in the sense that your interests are different than ours are and the question is how we can come closer together and eliminate things that are really, really worthless for both sides.

To that end, I think it's a good idea to make greater use of business people coming in, even when it's a non-deposition setting, and informally talk about the business and about the issues and about the overlaps candidly. A businessman or woman will always do that better than counsel will, and so, I like to bring people in in the first 30 days with the objective of explaining what's really not on the table here because there's no problems and hopefully, in a credible fashion, narrowly their request by product area or product line or division or whatever so then when the request comes it's properly narrowed.

I think, also, there is different willingness among various people in the Commission, even during the second request period, to listen to business people in a non-deposition setting, and I think there ought to be greater use made of that because it's -- not that somebody is going to come in and lie, it's just a more -- you know, when you've got a written transcript and the witness has got to play by the rules -- we all know what we're talking about -- and the defense counsel. It's not lying, but it's certainly not being helpful either.

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

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

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

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

And I'm saying that if you got your best people to sit down and think about specs and think about whether you've really got anything productive, from the government's point of view, it might be helpful in eliminating some of these things that we don't want to produce and you really don't want to read.

I think, from a client's point of view, one of the things that's an issue is that, you know, if you don't get it produced by such and such a time, then you have to go and re-search it, you relook at it again for up-to-date. I think you ought to think about whether -- hopefully no O'Melveny & Myers' client will ever write a bad document in the last 40 days of the investigation.

But I think you ought to think about, you know, just sit back dispassionately without us in the room and just talk about whether that's really, really necessary and really ever leads to anything because it is really a pain and it really causes problems with clients who really can't understand why they're not done once and for all.

In terms of arranging documents by spec, why isn't it, I would ask, okay for you, so long as you have an organization chart, and easier for us, clearly, to do it by files. In other words, you know, you can find the marketing documents, if I give you an honest organization chart and it says Cowie and Bernstein are the marketing VPs, well then you

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

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

One final point, and this is not -- I'm sorry, I want to raise this issue because it leads to a point. On the transcripts, not giving them up until the end -- and those of you will know even when I was in government I had a question about this policy, but I -- look, I don't need these transcripts to prepare my witnesses. I can take notes and I can make sure that I'm doing my job, that's not the point. They don't -- you know, they make it easier, but I can make that happen and if I can't make it happen, I shouldn't be charging the rates I'm charging. But I can't.

What this does is it causes a credibility issue with the clients because what the FTC and the DOJ -- and I'm sure the SEC and everybody else, it's not just, you know -- is the clients really don't like you guys and you go to your client who says he can play golf with Senator Lott any time he wants and you tell him that you can't even get a

transcript of his deposition. I mean, that's -- you know, it's just not good, all right?

And they wonder whether this is a kangaroo thing or some kind of a star chamber or something. And it's just not helpful because there's many times in which I can see the way out of this is to cut a deal with you guys and you can see the way out of it. But the clients get so mad -- and I'm not talking about anything personal, it's just all the documents that have to be produced, all the way they have to be organized and then this little thing where I can't even get a transcript where they've been done to the DOJ and everywhere else and have gotten a transcript every place they've ever been, and then you say, you know, we really ought to cut a deal with these guys, it's -- even though that's the right thing to do from your point of view, it just makes it harder.

And so, all I'm saying is that I understand that -- believe me, I understand that you guys are always going to need more documents than we want to produce, we're never going to be able to get completely together, and I realize the importance that you have to have all your documents ready to go in court the first day. I mean, that's absolutely true. But where we can cut things down to reduce the burden, I think, helps because it enables a more constructive dialogue between both sides at the end of the day which, in

many cases, everybody -- you know, all the lawyers know has to happen, but sometimes it just takes a while to get there.

One other point, and I don't even know if this is possible under the ethics laws, under the Federal Government laws, under the malpractice policies of the companies, but what if Rhett Krulla could go to work for a law firm handling a second request, for just one second request and work on it, you know, where there's no conflict issue or anything else. Just do it.

What if Steve Bernstein could do that? What if Cowie -- you know what I'm saying? Just see what it looks like from the other side. And I guarantee you from somebody who was outside and went in, the way that I'm thinking of this, it sure opened my eyes as to the problems that you have and what the reality is there. And I have no idea whether you could ever do that, but I've got a feeling that that would be an interesting experience, and Krulla can be on my team any day of the week.

Anyway, that's just my thoughts. And I never write anything down, so I don't have. . . .

MR. BERNSTEIN: Thanks a lot, Rich. Next, why don't we turn to Jon Dubrow.

MR. DUBROW: Thanks. Picking up on the theme that Rich had raised, I think that we don't want to have this process be viewed as kind of Washington run-amuck, and

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

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

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

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

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

Some suggestions are -- and I don't know how practical they are, but, you know, advanced clearance. In some transactions, we've withheld filing and just said, please work it out between FTC, DOJ and call us, let us know who has clearance and then we'll start working with that agency before we file and advance the process that way. So, to the extent that that can happen, that's obviously good.

Clearance battles and delay are obviously something -- it's another thing that doesn't really resonate with companies. Like I have two agencies that I have to deal with and they can't sort it out between themselves, that creates a big problem for the uncertainty. And I guess just a basic question right now that I have is if we can get some clarity around what the clearance process is. You know, we went through the issues this winter and spring, but right now, it kind of has gone back into a black box somewhat. So, any clarification on that would be helpful.

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

And so, the more you can say this isn't just me telling you this because I've done it before, this is the agency saying, these are the kind of things we're going to ask for. We get it faster. That means we can get it to you faster and make better use of the 30 days.

Another suggestion is in some -- not in all cases, but in some cases, senior management at the AD level can be extremely helpful even within the first 30 days because you may have an issue that if you can deal with it, you know, entry, something like that, you can knock the case out and avoid a second request entirely. And if we can do that by spending a few days with somebody and getting them up to speed earlier rather than later, it can really advance a lot of interest and save resources for both sides.

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

Also, the premerger office policy of 48 hours, I think the policy is still if you withdraw and refile within 48 hours, you can do so without paying the filing fee. Well, that kind of puts parties in a position of having to make a choice of, well, I'd really like to spend some time working with the agency and spending a couple weeks getting them comfortable before I refile and start the clock again. But if I do that, I'd have to pay -- I know I'm going to have to pay $280,000 again. It doesn't seem to really make sense or add value and I don't know why there's a reason why we couldn't change that policy.

As to the second request itself, I don't believe there's -- I don't really have anything more to add from what Rich and David have said, so I'll just close my remarks with that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

facilitate coordinated review in multi-jurisdictional transactions.

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

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

Canada is consistent with U.S. practice, Germany is consistent with U.S. practice, but many jurisdictions are not, at the EU level and at the member states level.

There's also perhaps a more significant disconnect at the back end. The second request process or in EU, the phase two proceedings in the EU, of course, if they go to a second request phase two there's a four-month hard stop. They must decide within four months. U.S. practice, we have the rolling 30-day extension under the second request process. In that respect, I think, at least, the business community, international and U.S. business community think that the EU has it right.

In terms of going back to David Balto's point on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COWIE: Any other comments on international issues?

(No response.)

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

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

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

from their perspective.

So, I guess I would welcome any -- and it's also been unclear to me, quite frankly, when it is appropriate for the agency to be pushing you to do that. Certainly, I've had conversations with agency staff people where they're strongly encouraging me to pull and refile and holding the carrot of avoiding a second request out in front of me and the club of issuing one if I don't do it in the other hand. And guidelines on how that's supposed to work, I think, would be important, as well as some sense as to whether the suggestion that we do so, if it is, in fact, made, is made in good faith in the sense that there is a real substantial likelihood of avoiding a second request.

I guess secondly, on the procedural transparencies side, the staff folks have always played it very close to the vest as to whether you're going to get a second request, even in the last -- you know, number 28 and number 29 -- day number 28 and number 29, I know the second request has to go through various procedural steps at the agency. But it seems to me that, at least at the very end of the process, there's no great harm in a staff person at least acknowledging that a second request has been recommended because that obviously -- it enhances credibility with the client, Rich's point, but it also allows better preparation, and also signals to the client that this is a dialogue, an ongoing dialogue between

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

Identification of the substantive problem areas, I think sometimes there's -- because of the litigation context of the review, there's a tendency not to want to show your cards. On our side, we view you as both the judge and the jury and also opposing counsel, all three things, because you have that unique role where we have to please you and fight against you at the same time.

Generally speaking, at least I know from my own perspective, I want to answer your questions as best I can, and I think it would be, in my view, in your best interests to identify, even not holding you to anything, but just saying, you know, these are the three areas we're having the most concern about. Some staff people do it, others don't.

I echo the point on transcripts. I won't go into that again.

I guess the final thing on procedural transparency would be the quick look process which got a lot of play a few years ago. You don't hear much about it anymore. I think it's a very useful thing. But, again, the client is in the dilemma, should we go through the quick look process because it may avoid more burden and expense down the road, or is this just a delay? And very often, I don't know how to respond to that. My usual instinct is just to respond to the

second request.

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

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

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

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

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

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

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

MR. KOVNER: Right.

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

MR. KOVNER: Well, maybe the response then can be tailored to specific kinds of e-mails. If e-mails are being used for sales call reports or even strategic planning purposes, then those e-mails could be produced. What is burdensome from our end is for those companies that actually

keep mountains and mountains of e-mails, e-mails about, you know, do you want to have lunch on Tuesday, that's the bulk of the e-mails, but you got to read each and every one. And it's a -- other than there are some funny e-mails along the way, it's an incredibly burdensome process.

MR. WINTERSCHEID: And saying that companies communicate electronically, I mean, still, the substance of the communication is not necessarily, in many instances, simply the e-mail communication. I mean, it's a PowerPoint, it's a document of some sort. And those documents will be picked up -- for example, the call reports would be picked up, whether electronic or hard copy in the main request, to the extent the call reports are requested.

I think it is really just the general routine e-mail traffic, the chat, that really creates the unbelievable burden.

MR. BALTO: Plus, you know, e-mails, as you know, are copied to everybody. It's so simple to copy it to everybody. And if we're talking about a paper production rather than the kind of electronic production envisioned in Bob Cook's paper, that means we're making copies and copies of the same thing over and over again.

MR. COWIE: Does anyone have experience in private litigation on how e-mail is treated? Would you routinely walk away from back-up tapes as too burdensome?

MR. PARKER: No.

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

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

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

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

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

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

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

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

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

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

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

MR. PARKER: Subject, subject matters.

MR. BERNSTEIN: So, search terms?

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

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

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

it.

And just to be clear on e-mails, I guess I'm not -- Mike was suggesting that they're not useful in litigation. They are useful in litigation, there's no question. I guess what I'm suggesting is at the front end of the agency's analysis, I think they have a much lower usefulness and the strat plans, the data, the pricing data, the quantity data, all that kind of stuff, the depositions, all much more useful than just the e-mail traffic. And if there's a way to delay the production of e-mails until the agency has come to a point where they think litigation is at least reasonably likely, that obviously would reduce a lot of burden in the day-to-day merger review that we have to go through.

MR. BERNSTEIN: I'm surprised we haven't heard the term "quick look" come up more often because generally, from my side, I always go into an investigation thinking, is there some way we could get the answer here without having the parties substantially comply with the second request. I was just wondering what views everyone has towards the quick look process, whether they're using it and whether they've found that that's useful?

MR. PARKER: I think you live in terror of advising a client to do a quick look and then it doesn't work out and then the clock is ticking. You've got so many -- you can only keep the deal together for so long that -- and then

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

MR. SIMONS: Some lawyers seem to do it a lot more than others, like if you listen to Tom Leary, he will say that in the transactions that he handled while he was in private practice, I don't know, 20, 30, 40, whatever it was, he only complied with a second request once.

I know in my old firm, very frequently, they wouldn't comply ever either, but they would resolve it before then and that tended to make the process much less adversarial. There was no, you know, kind of timing pressure. So, I was just kind of curious -- and maybe this is peculiar to individual lawyers and it might be peculiar to, you know, the person on the other side of the table you're dealing with also. If others have thoughts on that, that would be really useful here.

MR. WINTERSCHEID: Are those deals still pending?

MR. SIMONS: No, no.

MR. BALTO: There's a difference, though, between not complying and a quick look. A quick look assumes there

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

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

MR. SIMONS: Yeah, there are definitely outside counsel who have that view and in every circumstance their strategy will be, we need to comply and we need to do it fast to put pressure on the agency. So, there are definitely people who do that. But there are some people who almost never do that.

MR. WINTERSCHEID: I don't think there's a one size fits all necessarily. I think it goes back to some of John's comments and other comments as well. It depends on the nature of the dialogue leading up to the second request. I mean, if the issue has been narrowly defined and discussed and that's really the only issue, it's much different than if you don't have any real sense of, you know, what the range of issues might be, and it hasn't really been precisely defined.

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

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

MR. BALTO: Well, one thing that's helpful for our dealing with clients is for you to go and tell the public when it actually works, in a speech or your annual report or whatever, so that we have something to certainly suggest to our clients, this is a process that can succeed.

MR. KOVNER: Yeah, I think --

MR. SIMONS: Some kind of data, too, that would be presumably helpful so that what we had here are the number of times a quick look was tried and here's what the result was and here's the number of times we had pull and refile and here's what the results were.

MR. KOVNER: Yes, something to give the client some assurance that -- at least comfort -- assurance is too strong a word.

MR. SIMONS: Right.

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

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

MR. PARKER: Yep.

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

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

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

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

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

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

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

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

initially and -- you know, it's a little bit like planning a D-Day invasion to do a second request response from a very large company and you've got to have a process that has a multitude of steps, and you've got to start at step one and you've got to start right away.

So, by the time you've negotiated something, you're already at step 49 and you've lost the window of opportunity to take away the burden. So, there's a choice at day one to do the search or to go down the negotiating process, and if you go down the negotiating process and don't do that search, you run a real risk a month later when you've got to then go back and do that. That's the problem.

MR. WINTERSCHEID: Or delay D-Day, which is also not a good result.

MR. KOVNER: Right, right.

MR. BALTO: I just want to say one general thing about timing. You know, it would just be useful, I think, for you to internally measure timing and set up your own internal goals about how long investigations take or how long steps of investigations take. It would be useful just to report that to us because we have to advise our clients what the likelihood is, you know, of how long an investigation will take.

Let me also add one thing about clearance, at least from the high-tech perspective, we mourn the day the

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

MR. SIMONS: We would agree with that. In fact, this was like a personal thing for me because when I first got to the agency, literally the first day, I found out that you guys have left me about five matters that had been pending for like a year and the staff animosity over here versus the folks down the street was so intense -- it took me a while to figure this out. But it was so intense that there was no way that we were just going to work this out.

And so, it got pretty hairy and we thought we had a good fix, but basically we're kind of pretty much back to where we were with some slight improvements. But the real efficiency was that allocation list, which we don't have anymore. In fact, we've basically been instructed to fight for media mergers and other things which we are doing. So, we tried. But we're trying to do what we can within the framework that we're given, so it's not completely a lost cause, but it's kind of difficult.

MR. BALTO: They were pending for so long because Rich told us how to hoodwink DOJ and once he left, we forgot

how to.

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

MR. PARKER: Rich isn't saying anything.

(Laughter).

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

All right. Anything else?

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

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

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

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

We wind up issuing a second request, but we -- in those instances, we've been pretty far down the path so that in relatively short order and with, I think, an acceptance of good faith on both sides, we've been able to short circuit substantial compliance.

The guidelines I've operated under for many years, under several Bureau directors, is we do not encourage companies to withdraw and refile in order to gain time. We don't do that for tactical advantage.

We don't do that where we perceive that, well, if they did not withdraw and refile, we'll just let the clock run out and do nothing, but maybe we can snooker them into giving us more time to put a second request together. We don't need the additional time to do a second request. We have these models. We have word processors. We have electronic communication with the Chairman's office. And while a second request is issued by the Chairman, we often have significant input in drafting that second request. So, we're able to do that fairly quickly.

We also have been instructed to not encourage withdrawing and refiling unless we believe that we have a

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

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

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

Where we encourage companies to withdraw and

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

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

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

where we'll try to do it within a certain period of time before you go ahead and start just complying or any other ideas you have?

MR. KOVNER: Some negotiations -- some limitations are easier than others in terms of being able to delay the search. An agreement that we don't need to search all of the field offices in Nebraska, Ohio, Texas, Oklahoma and South Dakota, that's something -- that can take a little time. That's all right because we just delay going out there.

MR. SIMONS: Right.

MR. KOVNER: But other limitations, for example, the scope of the second request in terms of how far back it goes and the breadth in terms of the subject matters, that from the very first office, the first file we have to search, we have to know whether we have to go back to '97 or whether it's '99.

MR. SIMONS: Right.

MR. KOVNER: And we have to know what the subject matter is. So, that kind of stuff -- maybe for those types of topics, there can be a front-loaded process where, in a week or 10 days, we could get resolution. That might be reasonable.

MR. SIMONS: Okay. That's a good suggestion.

MR. KRULLA: I think from a staff perspective, when we talk about the scope of the second request

modification, one of the things we need to have a sense of in deciding what we can give up is where is the matter going. I talked about the quick look, the withdraw and refile. If a matter looks like we can resolve the issues and close out the file with some focused, perhaps high level documents, some strategic plans, et cetera, it makes much more sense.

From our perspective, it's much more economical for the companies to expeditiously get us upfront those materials as opposed to talk about an absolute permanent modification of the second request because in the event we need to go to court, things that we don't need to close out the file, we will need.

A second scenario between a matter where the Commission sends us into court or a matter where we can close out the file is where we can identify a focused anti-trust concern, identify what the problem is with the transaction. This is often a complex transaction where there may be many markets, many files that potentially would have to be searched, but if we can focus in on understanding what the competitive concern is and what an appropriate solution to that concern is, then the information we need, rather than being the material we need to show the Commission that we're ready to go to court is the Commission to demonstrate to our management -- the information and documents to demonstrate to our management, to the Commission, that we have identified

the problem, that it's a legitimate problem and that the proposed fix fixes the problem.

Again, there's a much more expeditious path, as Commissioner Leary suggested in his writings, a much more expeditious path to get to that rather than going through a process of, okay, let's modify the request. And I see the process of prioritizing what we need to get first and talking to the companies about how they can get those materials to us without complicating the search process, without having to go back to the well again, the same files.

If we can prioritize file locations and say, okay, give us a production, a total production from these three people and certify that you've given us a comprehensive production from their high level files and then we'll look at that and examine that and we'll get back to you expeditiously with where we go from there. I think that can be a very constructive process in the kind of educational process that Commissioner Leary described and that we're involved in in a pre-litigation mode of trying to determine, is there an anti-trust concern, can it be fixed, and if not, what do we need to do about it.

MR. BALTO: Can anybody suggest to me why there can't be a time limit on these negotiations? I mean, what would be wrong if you just sort of said you've got to have these negotiations done by week three?

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

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

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

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

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

Yes, Rich?

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

MR. SIMONS: Yeah.

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

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

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

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

MR. COWIE: Any other comments?

(No response.)

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

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

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

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

DOCKET/FILE NUMBER: P019503

CASE TITLE: MERGER BEST PRACTICES WORKSHOP

HEARING DATE: JUNE 27, 2002

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

the best of my knowledge and belief.

DATED:

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SONIA GONZALEZ

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

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

_____

SARA J. VANCE