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FEDERAL TRADE COMMISSION  
GENERAL MANAGEMENT WORKSHOP

I N D E X

WORKSHOP	PAGE
Merger Best Practice Workshop	4

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
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FEDERAL TRADE COMMISSION

In the Matter of: )  
MARGER BEST PRACTICES WORKSHOP )  
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June 18, 2002

Federal Trade Commission  
55 East Monroe Street  
Suite 1860  
Chicago, Illinois

The above-entitled workshop came on for comments,  
pursuant to notice, at 12:00 noon.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 **STEVEN K. BERNSTEIN, Deputy Assistant Director**

5 **RHETT R. KRULLA, Deputy Assistant Director**

6 600 Pennsylvania Avenue, N.W.

7 Washington, D.C. 20580

8

9 **PETER RICHMAN, Attorney**

601 Pennsylvania Avenue, N.W.9

1           MR. BERNSTEIN: Thank you all for coming here  
2 today. This is the fourth of seven Merger Best Practices  
3 Workshops that the FTC is holding. The purpose of these  
4 workshops is to see if there are some ways that we could  
5 reduce the burden associated with the second request process  
6 while making sure the FTC still gets the information they  
7 need to evaluate the mergers in front of them.

8           My name is Steve Bernstein. I'm the Deputy  
9 Assistant Director for the Mergers 1 Division. With me up  
10 here is Rhett Krulla, Deputy Assistant Director for Mergers

11 2.           MR. KRULLA: Good afternoon.

12           MR. BERNSTEIN: Peter Richman, an attorney from  
13 the Mergers 3 Division.

14           MR. RICHMAN: Good afternoon.

15           MR. BERNSTEIN: Each of these sessions is being  
16 transcribed. So, if you'd like to make some comments,  
17 please first identify yourself and the organization that  
18 you're with and then just go ahead and make your comments.

19           There's a few people that we've asked to come here  
20 specifically who've had some recent experiences with the  
21 second request process. We wanted to get their input and I  
22 thought we'd start off by calling on them and seeing what  
23 they have to say. And after they're done, we'll go ahead  
24 and open it up to everyone else.

25           Mark, do you want to go first?

1                   MR. MCCAREINS: I'm happy to do that. I'm Mark  
2                   McCareins, for the benefit of the transcriber. I'm with the  
3                   law firm of Winston & Strawn. The views I'm about to  
4                   express are not those of my clients, my partners or maybe  
5                   even myself. But Mr. Krulla, the honorable Rhett Krulla,  
6                   that called me a while back and asked if I would participate  
7                   in this forum. And I gladly agreed and put it on my  
8                   calendar.

9                   And didn't think much about it until yesterday I  
10                  was looking at my calendar. And my major event yesterday  
11                  was my Little League play off game at 5:45. I'm a coach.  
12                  So, I'm thinking while I'm coaching what should I say to  
13                  this august group. And we started off the ball game with a  
14                  controversy before the first pitch was even thrown. These  
15                  are ten year olds.

16                  The umpire had one version of how long the  
17                  pitching space should be. The other team's coach had  
                  another version. And I had a third version. So thch Fafsy04.29  
                  whole legal profession for this problem. So, D (arules are)  
                  very specific about what D (apitching distance should b  
                  Yet D ree grown adults with a39 -2anot a e with f



1           So, the later in the game that those request come  
2 and the more detailed those requests are, the harder it is  
3 for us, at least for me, to comply with those in an  
4 efficient manner. And I want to comply. I want to get you  
5 the information. But sometimes, without reference to any  
6 particular client, it may be difficult for the client with  
7 somewhat limited resources and a number of offices spread  
8 all over the country and the electronic issues, to get this  
9 information compiled, reviewed, processed and off to you in  
10 a short window of time.

11           So, from a timing perspective, I just want to make  
12 the casual observation that the more time we have to process  
13 that information the better. And we're all in the same  
14 boat. We're trying to get you the information. And  
15 sometimes, and I've had calls on the 28th and 29th day with  
16 a list of 12 or 15 points. They want follow up. They want  
17 back up. And I'm saying I'm trying to do my best but it's  
18 4:00 o'clock. And it's not a question of trying to  
19 forestall the process. It's just difficult sometimes for  
20 clients to collect that information.

21           The second brief point I wanted to make was  
22 establishing a good line of communication between your  
23 office and ours. I'm a big believer for being pro-active,  
24 being open. Let's get going on things and on occasion it's  
25 been difficult, at least on the deals that I've worked with,

1 to find out who was the decision maker, is that a final  
2 decision? Is that the final request for information? And  
3 again, we're trying to conserve our resources too and  
4 sometimes it's difficult when I get a request and it's  
5 modified later in the day or the next day and I've launched  
6 my client on a project and I find out later in the day or  
7 the next day that things have changed.

8 I think it's very good and I'm all for it to get  
9 whoever's working the file on the phone early, say who I am,  
10 here's my interest. I'm trying to get this deal done. I'd  
11 give you my cell phone number but I think I'm probably the  
12 only working lawyer that doesn't have a cell phone. But  
13 here's how you contact me and let's get this started.

14 I know there's a bit of a cat and mouse game to  
15 determine early on who actually has the file. And I think  
16 you probably have some bigger issues between the agencies  
17 right now and these guidelines, who takes jurisdiction over  
18 what. So, this is probably the lesser of a couple of evils.  
19 But lines of communication I think are important to open  
20 those, to get it on the record early and to try to get those  
21 requests processed as quickly as possible.

22 The last point I wanted to make before I adjourn  
23 is I think maybe to dispel a perception or a myth that the  
24 DOJ or FTC may have that, you know, we've all analyzed these  
25 deals. You spend tons of time, you've got an economist



1 engaged for months and, you know, this is a kind of hide the  
2 ball situation. It's not necessarily a hide the ball  
3 information. You may get requests from clients, you know,  
4 24 hours. Get the Hart Scott done. Let's do your 4C  
5 search, get something in.

6 I may not have the luxury of really having a  
7 really good handle on the market definition when that first  
8 Hart Scott is going in. As a result, and defining relevant  
9 markets is not a precise science either. And it's hard for  
10 us, at least on my end, to predict the types of questions or  
11 the nature of concerns that you're going to have.

12 So, don't be surprised if you make some requests  
13 and we express some chagrin that we hadn't thought about  
14 that. Again, it's difficult from our side to somewhat  
15 predict where your concerns are going to be. I think, at  
16 least on behalf of my clients, we always try to be  
17 responsive. But don't necessarily have a negative view as  
18 to our side of the fence as far as our motivations to stall  
19 the process, hide the ball or whatever. There may be some  
20 logistical issues, timing issues on our end that may impede  
21 our ability to process your request.

22 So, I don't know if that was in anyway responsive  
23 to the request for the topic here today.

24 MR. KRULLA: Yeah, it's very helpful, Mark. Mark  
25 raised several points relating to principally to the initial

1 30 day review period prior to issuance of a second request.  
2 Why don't we stick with that topic for the moment? And does  
3 anybody else have any thoughts on how we can make more  
4 effective use of that initial review period?

5 MS. TAYLOR: Hi, I'm Pam Taylor of Bell, Boyd &  
6 Lloyd in Chicago and I've seen cases where there's been  
7 really effective use of the initial 30 day period, when the  
8 staff is willing to meet with people very early on and  
9 shortly after the Hart Scott is filed. If the parties are  
10 prepared to come in and talk to the staff about what the  
11 issues are, it can be a very effective way of narrowing the  
12 issues or eliminating them entirely.

13 It's particularly helpful in cases when, you know,  
14 there really isn't an issue but it looks like there is on  
15 the surface. And there's some explaining, educating that  
16 needs to be done to get the staff up to speed on the issues  
17 and clarify that there really isn't a problem there. It's  
18 also very effective in large transactions where there are  
19 issues because you can eliminate questions that arise  
20 initially and they turn out not to be a problem upon further  
21 investigation. You can get them off them the table early  
22 and get them out of the way before the second request  
23 issues. And that can be very effective also.

24 MR. BERNSTEIN: Thank you, Pam. Any other  
25 thoughts?

1           MR. KEILER: Louis Keiler with Sonnenschein law  
2 firm. I would agree. One problem I know is a common  
3 problem and the recent protocol to divide responsibility  
4 between the two agencies which are designed to solve that is  
5 deciding which of the two agencies is going to handle the  
6 transaction. So, who do you go and see?

7           And since we're not going to have the apparent --  
8 division of responsibilities, I suggest that the agencies  
9 commit to a much shorter period to resolve between  
10 themselves which of the two agencies is going to handle the  
11 transaction. So, that, say, no later than a week after the  
12 initial filing, you know who to go in and see.

13           MR. BERNSTEIN: Thank you.

14           MR. DUBROW: I'm John Dubrow from McDermott, Will  
15 & Emery. Just following up on what Mark said in terms of  
16 early interaction. It's obviously crucial to the staff, but  
17 I found in some cases that getting up to senior management  
18 really quickly, where senior management pushes themselves  
19 down very quickly as basically eliminating what would have  
20 been a very lengthy second request.

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1 but, you know, when you have a case where there's a  
2 dispositive issue, which we had there, we were able to  
3 bring, basically bringing in so things weren't getting  
4 filtered so much and, you know, ultimately we were able to  
5 cut it off in 30 days rather than having three months worth  
6 of investigation on something that didn't really merit it.

7 MR. KRULLA: What can we do during the initial 30  
8 day period to better tailor the second request if we're  
9 going to issue one to the issues at hand and to make it,  
10 make the second request, data request compatible with how  
11 the company keeps their records? Suggestions have been  
12 raised in prior forums about communication during that  
13 initial period between the IT Department of this company,  
14 the reporting company and the agency's IT people regarding  
15 what kind of data is normally retained by the company and  
16 the extent to which that might facilitate us fashioning our  
17 questions with an eye toward the data that actually exists  
18 as opposed to the data we can hypothesis. Any thoughts on  
19 that?

20 MR. BRUCE: Greg Bruce, R. Shermer. We have  
21 worked with several --

22 COURT REPORTER: Excuse me --

23 MR. BRUCE: Greg Bruce with R. Shermer. We've  
24 worked with various respondents a number of different times.  
25 And one of the things that they've talked about is just

1 having you guys meet with their managers. It's bringing in  
2 the business people beyond just the attorneys and sitting  
3 down so it goes beyond the IT folks. It's sitting down with  
4 all of the various management. And as such, that allows you  
5 guys to get a good feel for how they run the business,  
6 what's going on and then that allows them to better target  
7 whatever information.

8 MR. KRULLA: Thank you.

9 MR. BERNSTEIN: Have any of you come in before the  
10 waiting period even starts on certain transactions  
11 recognizing that there might be some significant issues?  
12 Has anyone tried that and if so, was the experience  
13 positive? Negative?

14 MR. KEILER: We tried it once and never tried it  
15 again because we went in and saw the wrong people. We  
16 worked with one agency and the other agency wound up getting  
17 clearance.

18 MR. BERNSTEIN: Again, for the record can you  
19 state your name?

20 MR. KEILER: Oh, Louis Keiler with the  
21 Sonnenschein firm.

22 MR. BERNSTEIN: Thank you. John?

23 MR. DUBROW: Jon Dubrow with McDermott again.  
24 We've had some matters, including with your shop, Steve,  
25 where we had major transactions that we knew were going to

1 get looked at. We spoke with FTC and DOJ and said, please  
2 work it out. Tell us who gets clearance. When you get  
3 clearance, tell us and we'll come and start working with  
4 you.

5 With that we've been able to take, spend the up  
6 front time taking things that really shouldn't be part of an  
7 investigation and get them off the table first. And then,  
8 you know, at an appropriate time start preparing the clock.  
9 We have been effective and I don't think we've eliminated  
10 second requests by doing that. But we've probably narrowed  
11 the scope of it. Sometimes it works against you. But if  
12 you can do that, you can help yourself.

13 MR. BERNSTEIN: The other question I wanted to  
14 ask, and this is following up on something that Mark had  
15 said. The request we make during the initial waiting period  
16 for information, how consistent are those requests? It  
17 seems to me that there's a general set of information that  
18 we often ask for like recent strategic plans, competitive  
19 assessments, list of customers and things like that. Are  
20 any of you seeing something different, more unusual requests  
21 coming in during the initial period?

22 MR. MCCAREINS: This is Mark McCareins. Many of  
23 the requests I've had in that time period are more market  
24 related for industry type information, competitive files,  
25 things that maybe a 4C document might have triggered the

1 question. And again, if you've got a couple of days to pull  
2 that together and you can go back to your business people  
3 and your VP in charge of Sales and Marketing and they've got  
4 some sort of competitive file that may not be available to  
5 you on the Internet or whatever, you know, we can help and  
6 have done so. But it's also usually the business plans and  
7 strategies that might be the next level of documents after  
8 the 4C's.

9 MR. BERNSTEIN: Do you think there might be any  
10 benefit to us putting together a model excess letter that we  
11 could put out on the Internet so at least the general stuff  
12 that we consistently ask for in investigations would be out  
13 there for people to incorporate into their planning and then  
14 some of the more specific things would be things that would  
15 still come up but at least that would be more limited?

16 MR. MCCAREINS: I think for the bulk of the people  
17 in this room, maybe all of us, I think as part of our anti-  
18 trust counseling and planning, we probably already requested  
19 those documents and tried to get access to them in our  
20 evaluation period. But for some others who may not do this  
21 as frequently, that might not be a bad thing to do, to have  
22 a template that people can look at as they're making their  
23 Hart Scott filing, the type of information that your office  
24 might reasonably expect if there is an issue.

25 MR. RAVEN: Marc Raven from Sidley Austin. I

- 1 think Mark McCareins is correct that we in this room tend to
- 2 know what kinds of things we're most likely to be asked for.



1 document? And if you set up a template, it may be held to a  
2 higher standard than is necessary.

3 MR. BERNSTEIN: Thanks, Jim.

4 MR. KRULLA: Go ahead.

5 MR. BAKER: Steve Baker. One of the questions; I  
6 had a call last night from a practitioner who had a request,  
7 who said that there seemed to be at least a perception that  
8 the second request was broader at the FTC than the Justice  
9 Department now and that it's easier to narrow them and  
10 negotiate it at Justice Department. I don't know if that's  
11 true or not but, I mean, obviously to the extent it is.

12 MR. KRULLA: Sometimes at the end of the 30 day  
13 review period, we come to the point where we determine that  
14 there are unresolved issues and further information or  
15 documents are required. We issue a supplemental request for  
16 information in many of those instances. Any thoughts on how  
17 we can make those supplemental requests more effective in  
18 terms of getting us the information and the documents we  
19 need to analyze the acquisition? Understand what's going on  
20 while minimizing the burden and expense and delay to the  
21 parties of the transaction?

22 MS. TAYLOR: Hi, I'm Pam Taylor again from Bell,  
23 Boyd & Lloyd. I'd just like to address the issue of back up  
24 e-mails, which I'm sure you all have experience with. I'd  
25 just like to propose we stop asking for those. And I have a

1 couple of reasons for that, my radical proposition. But one  
2 is both a burden and fairness issue.

3 I worked on a transaction once where one side had  
4 two years of backup tapes. The other side had 30 days. And  
5 the company that had 30 days said, you know, we'll give you  
6 30 days but after that you're out of luck. And the burden  
7 on the company that had two years backup was enormous. So,  
8 it seems that just out of fairness and in an attempt to  
9 reduce burden, it would be a good idea to eliminate that  
10 request.

11 Secondly, I just think as a matter of practice  
12 I've seen that when people get an important e-mail, they  
13 either hit the print button and put it in a file or they  
14 keep it in their in box, in which case it would be on their  
15 hard drive and you'd easily be able to get it in a simple  
16 request for production. People delete things that aren't  
17 important and they go in the back-up files and then  
18 ultimately they get disposed of some day.

19 So I think that the likelihood that you're  
20 actually going to get documents that are going to be helpful  
21 to you for back up e-mail tapes is really minuscule in  
22 comparison to the burden on parties who have to produce  
23 them.

24 MS. SULLIVAN: Lisa Sullivan, I'm with Howrey,  
25 Simon, Arnold & White. I'm actually filling in today for

1 Joel Chefitz, who you asked to come. I would follow up on  
2 that point of we agree completely with that. The FTC seems  
3 to have recently taken the attitude, with respect to e-mail  
4 archive, that the burden is more on the company to prove  
5 that there is zero possibility that there won't be any  
6 relevant document in e-mail archives before the FTC is  
7 willing to agree to eliminate the scope of e-mail archives.

8 And, again, to reiterate another point you just  
9 made, the expense and the burden on the company is generally  
10 quite huge. Even when using a document recovery company,  
11 the cost runs into tens of thousands of dollars and often  
12 takes several months for companies to tell us that they  
13 can't perform the restoration.

14 So, I think even if not eliminating all together  
15 the e-mail archive requirement, there needs to be some  
16 flexibility within the FTC staff to determine whether there  
17 will be anything available in e-mail and to weigh the burden  
18 and time against what benefit the FTC will get out of  
19 requiring an e-mail search.

20 MR. RICHMAN: Just one question. When you're  
21 talking about eliminating the burden, are you saying we're  
22 just not going to search it or we're not going to ask you to  
23 retain it in case we want it searched?

1 request seems like it would be likely, that the FTC contact  
2 attorneys for the parties and suggest that at that point the  
3 IT Department start preserving the e-mails or put the  
4 company on notice that certain e-mails may be producible at  
5 a later date. And at that point the company can start  
6 creating a collection of e-mails that you can search later.  
7 But requiring someone to go back two years, I do think is  
8 burdensome and should be eliminated.

9 MR. RICHMAN: Just in terms of the number of deals  
10 that you all see, how often have we actually asked somebody  
11 to go back and search back up tapes?

12 MS. SULLIVAN: I've had one with Mr. Krulla  
13 recently. The companies actually wound up calling off the  
14 deal where the FTC was insistent that e-mail archives be  
15 searched going back a number of years.

16 MS. TAYLOR: Pam Taylor. I just want to speak to  
17 that point again. I'm sorry. I have just seen a broad  
18 variety of practices. I don't think there's uniformity. I  
19 think some staff will say just give us what's on your hard  
20 drive right now. And others are consistent on going back.  
21 And there's just not a uniformity of practice. And I think  
22 it would helpful.

23 MR. KRULLA: What happens to high level  
24 confidential e-mails that are for eyes only that go to  
25 senior managers and are not to be duplicated? After those

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1 stuff. I don't know what it looks like, but there may be  
2 helpful documents that we haven't been able to find yet.

3           So, I'm in a pursuit for these documents as much  
4 as you are. Now, at some point in time, then the client  
5 steps in and says, are you crazy? You know, this is going  
6 to cost \$150,000 and five million man hours and our  
7 computers will shut down. We can't do that. Now, that's,

1 comments on that. One is, I think the kinds of e-mails that  
2 you're referring to are ones that are going to be generated  
3 sometimes before the Hart Scott is filed.

4 So, you know, if they're sent, deleted, they're  
5 presumably gone. And I don't think there's really much you  
6 can do to help parties to keep those. The other thing to  
7 recognize about back ups is that you're not necessarily  
8 going to capture that e-mail message, particularly if, you  
9 know, if the parties intend to handle it or a party intends  
10 to handle it in a way that means it's not going to lie  
11 around, you're not necessarily going to capture it on a back  
12 up tape.

13 If it's sent on day one, received on day one and  
13

313 13g, if 32.25 Tj -32.25 Owe' -24 TDit's sent on day one, 8

1 reviewing the stuff that's live is, I would say, not just  
2 necessarily in the tens of thousands but it can be in the  
3 hundreds of thousands of dollars.

4 MR. KRULLA: Yeah, we're always looking for these  
5 documents that are intended not to be preserved. That would  
6 be the equivalent of a confidential face to face statement  
7 between high level executives. I recall prior to the days  
8 of e-mail, I was on a discovery search going through  
9 documents. And I found a document, a memorandum that said,  
10 after you read this memorandum, destroy it. And below that  
11 handwritten it said, done, and the initials.

12 So, while companies may conscientiously implement  
13 procedures to eliminate the record of memos like that that  
14 now often take the form of e-mail, one of the challenges we  
15 face in conducting our investigations is to figure out how  
16 most cost effectively, cost effectively for the companies,  
17 and most expeditiously for the staff, how to get a glimpse  
18 of that because as you noted, these kind of documents are  
19 things that are typically generated prior to the HSR filing,  
20 often prior to the time when the company is expecting to  
21 make an HSR filing because after that period there may be  
22 greater sanitization of the files.

23 So, one of the questions we could explore is how  
24 can companies to the extent they maintain back ups of e-  
25 mails, if they anticipate that they're going to be doing HSR



1 filings in the future, how can they preserve material in a  
2 manner that will minimize the burden and expense on the  
3 companies in complying with a government request for  
4 information or documents, if that request comes in?

5 Any thoughts on that?

6 MR. ROBERTSON: Robbie Robertson, Kirkland &  
7 Ellis, -- for now anyway. But --

8 MR. KRULLA: Welcome to the FTC.

9 MR. ROBERTSON: Thank you. But I've had the same  
10 problem. Not just merger cases but in conduct cases. And  
11 it is extraordinarily expensive to search e-mails,  
12 especially if you're going back to back up tapes. You can't  
13 change the way companies do business in terms of keeping  
14 back ups. What happens is it's done by accident because  
15 over the last ten years, most big companies have changed  
16 their systems three or four times. They do keep the tapes,  
17 generally. They don't know what else to do with them.

18 But then trying to find a set of documents and  
19 trying to weed out the privileged documents and weed out the  
20 documents that you may think are highly sensitive is very  
21 expensive. And a typical case, if it's a large company,  
22 which I've been working for on a lot of these cases, you can  
23 be talking about 800, \$900,000 of expense, not lawyer's  
24 time. And at the end of the day you find there's not much  
25 there.

1           And what you find that really is helpful, this  
2           stuff is currently on I Drives or in some other form when  
3           you actually get your hands on it. But you'd like to see  
4           that stuff. And e-mails, a lot of time people will keep  
5           them in other places. And a lot of large companies, they're  
6           all on shared drives and things like that where they tend to  
7           park these documents.

8           So, I think that at some point there needs to be  
9           some better sophistication both on the FTC side and also on  
10          the lawyer's side for both in house and in law firms to  
11          figure out how to do this because you don't want to spend a  
12          million dollars chasing something that's not there. You  
13          could have spent a little bit less time and a lot less money  
14          finding something you really want to look at.

15          And I think part of it is a lack of understanding,  
16          at least from my part when I first got into these big cases,  
17          and knowing how much it does cost and how expensive it  
18          really is. And how you have to do it mechanically. Nobody  
19          that I've dealt with at the FTC really understood it either.  
20          And we had to get some of the technical people inside the  
21          FTC to talk about, can we just give you the tape? Well, no,  
22          we don't know what to do with the tape. No, we don't have a  
23          machine that can even read it. That kind of problem.

24          I think that there could be a little bit more done  
25          to develop a way to systematize getting at these older

1 documents or older e-mails and not spend so much money doing  
2 it.

3 MR. KRULLA: How can we use sampling techniques to  
4 minimize the burden? If there's a cost estimate of a  
5 million dollars or x million dollars, the next question I  
6 would raise is, well, how many tapes are we talking about  
7 and can the company identify the departments or  
8 organizations or the persons or the time periods covered by  
9 those tapes? With that information, can we reduce the  
10 burden on the companies while focusing in on, through  
11 sampling, focusing on those back ups that may be most likely  
12 to yield useful information?

13 Any thoughts on that?

14 MS. SULLIVAN: Again, Lisa Sullivan from Howrey.  
15 I think that in certain circumstances you can but it does  
16 require the FTC to have experienced IT people communicating  
17 with the IT people at the client. Some companies will store  
18 their e-mail archives on a person by person basis or

1 entire week or for an entire month. So, it is possible but  
2 it's going to vary from company to company. And the FTC  
3 needs to think cognizant of that.

4 MR. BERNSTEIN: And I think that's probably why,  
5 Pam, you're not seeing the consistency from case to case is  
6 because so often we try to balance what the company needs to  
7 go through to get us the information we want versus the  
8 value of that information. And for certain companies, as  
9 you mentioned, they may, it may be easy to search for a year  
10 but impossible to search for three years. And we try to do  
11 our best to understand that and then make appropriate  
12 modifications.

13 MR. RAVEN: Marc Raven from Sidley. The other  
14 comment I want to make is that I think it can be a mistake  
15 in many instances to start out a merger investigation with  
16 the assumption that it's a conduct investigation and  
17 therefore you're looking through old or deleted e-mails for  
18 some sort of a smoking gun. These cases, you know, more  
19 often than not, are going to be decided on economic facts or  
20 at least they should be. And that's not the kind of stuff  
21 that people are going to go through and sanitize. That's  
22 going to be, you know, the current business documents that  
23 are still going to be live on the systems.

24 So, I think, you know, you have to approach the  
25 problem from the right perspective to begin with and not

1     assume that, you know, every merging party has something,  
2     you know, buried in a deleted e-mail somewhere.

3             MR. BERNSTEIN:   Yeah, Mark, that's a point we've  
4     heard.

5             MR. ROBERTSON:   Robbie Robertson, again.  I think  
6     e-mails are where all the good and bad documents are.  I  
7     love e-mails.  The hard part is getting to it.  And I think  
8     that one thing, what I'm talking about is not that you  
9     shouldn't look at e-mails.  You need to look at them.  But I  
10    think there's a lack of understanding as to how you do it  
11    mechanically.

12            I didn't understand it.  I had to go to an outside  
13    company to have them explain it to me when I had three  
14    different e-mail systems and all these different computer  
15    things, how do you actually search it?  How do you come up  
16    with the search terms that lead to something less than 400  
17    boxes of e-mails?

18            When we went through a process like that recently  
19    and did the search terms, we tried to negotiate it between  
20    the lawyers.  We came up with great terms.  The FTC lawyers  
21    came up with great terms.  But we really didn't understand  
22    the process that well because we're not the ones who are  
23    actually doing the work.  We came up with what we thought  
24    were good search terms and we still ended up with 400 boxes  
25    of e-mails.  And it wasn't that helpful.

1           So there has to be, I think, a better technical  
2 understanding of how to get to the documents that you really  
3 want.

4           MR. HUEBNER: Pete Huebner with Applied Discovery.  
5 To Mr. Robertson's point; the key here, I think, is you want  
6 to be efficient. If you could find a process that keeps  
7 your documents electronic throughout the review process,  
8 then you can apply automated search facilities. So, in your  
9 case, instead of getting 400 boxes, by keeping those  
10 documents always electronic for review process, you can  
11 apply your key word searches throughout the entire process.  
12 You're not necessarily shuffling through paper.

13           The other advantage to that, that type of a  
14 process where everything's kept electronic, is all the set  
15 up is up front that converts these electronic documents into  
16 paper is removed. So a lot of your timing issues, in terms  
17 of deadlines and how you're going to get to the actual start  
18 of the review can be eliminated by, again, keeping the  
19 documents in their original forms, which is electronic.

20           MR. DUBROW: This is John Dubrow. Even if you do  
21 that, you don't have 400 boxes but you still have the same  
22 amount of stuff that somebody's got to sit in front of a  
23 computer screen --

24           MR. MCCAREINS: Review still has to take place,  
25 absolutely.

1           MR. DUBROW: Which is really where the burden  
2 lies. I mean, we can get copiers that cost money. But you  
3 can copy a box of documents for a couple of hundred bucks  
4 when you can just pay \$5,000 --

5           MR. HUEBNER: But by doing key word searches, his  
6 original process was to crawl through all the raw data and  
7 look for items that everybody agreed was going to, you know,  
8 take off the table or we were going to be concerned about.  
9 By continuing to apply that search capability you can,  
10 instead of necessarily read through every document, you can  
11 go right to the documents that have those critical key  
12 words. Look at those first and determine if these are  
13 relevant to the situation at hand.

14           Review will always have to take place. I mean,  
you can't, you can't avoid it. You're right.

1           MR. RAVEN:  Marc Raven.  This again goes to the  
2  burden when you have to go to multiple layers, you know,  
3  repetitive back ups and so forth.  There are some types of  
4  files that are difficult or impossible to word search.  And  
5  we ran into that situation recently where we had, you know,  
6  a very good system where we're trying to find certain types  
7  of documents by looking for key words.

8           But because we were trying to err on the side of -  
9  - we still had a lot to review.  And even then, when you are  
10 looking for certain, looking at certain types of files such  
11 as image files or spreadsheets, which can, you know, be  
12 numerous, word searching is problematic.

13          MR. ROBERTSON:  I was going to say, my example of  
14 400 boxes, that was nine percent of the document set.  So we  
15 did the first search.  The problem is we didn't really  
16 understand how to do the search to get stuff that is  
17 relevant.  And that's an area where I think we could use  
18 more expertise with lawyers here but also with the FTC,  
19 because nobody really understood how to get out what you  
20 really wanted to get.

21          MR. KRULLA:  For the record that was Robbie  
22 Robertson.

23          MR. ROBERTSON:  Robbie Robertson.

24          MR. BERNSTEIN:  Steve, did you want to add  
25 something?



1           MR. BAKER: Yeah, one of the questions people seem  
2 to be kind of asking is how many cases you've asked for  
3 these kind of details and of the ones we do ask for, how  
4 often do they end up being valuable to your investigations?  
5 I don't know if you guys are free to answer that. If you  
6 can, it would probably help people understand kind of what  
7 we're doing.

8           MR. RICHMAN: I think we strayed, sorry, Steve. I  
9 think we strayed from the archive issue to electronic files  
10 that are kept in an easily accessible fashion. I'm not  
11 sure, I think we were mixing Pam's original archive issue,  
12 please don't make us go through data tapes, especially if  
13 they're on legacy systems that we have to recreate to just a  
14 general electronic discovery issue. So, if we can separate  
15 those two out, I think it would be most helpful because one  
16 burden is we're asking you to build a system that no longer  
17 exists or recreate a system or have a third party vendor do.  
18 The other is how do we narrow these exceedingly large  
19 electronic document productions, in large parts because  
20 nobody deletes, nobody throws away paper. Well, nobody,  
21 there's nobody who deletes files off their hard drive. And  
22 then, when you go to a LAN-based system, there's absolutely  
23 nobody that ever goes through a LAN-shared space for a group  
24 or for even an individual's files and deletes old files  
25 there because you never know whose they are and who wants

1     them.

2                     So, you know, we've taken what used to be a  
3     horrible process on paper, and technology has expanded the  
4     universe of things we're asking you to search. I think  
5     there's an iterative process that we might be able to get  
6     to. This is in response to Robbie Robertson.

7                     MR. ROBERTSON: Robertson.

8                     MR. RICHMAN: Robertson. Your original point is  
9     if we come up with search terms and it turns out that you  
10    get a lot of junk, as we might say if you were to come to me  
11    and say, "I don't think you want this type of document which  
12    anybody could do. Here's a thousand boxes of it. Give me a  
13    sample, let me look at it."

14                    The same thing, if you do a search electronically,  
15    I think it's possible that if we can agree on the initial  
16    group search terms, give us a sample and we can figure out  
17    relatively quickly or the IT people can what the terms are  
18    that are bringing in the 400 boxes and maybe we can add  
19    another search term to cull out the extraneous information  
20    you don't want to provide, you don't want to review and we  
21    don't want to have to read.

22                    MR. ROBERTSON: Robbie Robertson again. And I  
23    agree with that. I think that we just need to get more  
24    sophisticated about it because all this, just learning how  
25    to do this sometimes is a plus. I mean, years ago I would

1 find a thousand cases to finally find the one I like. And  
2 then, I can get 10 or 12 because I know how to search that.

3 But there's a certain thing about doing searches  
4 on emails that can lead you astray very quickly. Now,  
5 you're looking for a document that has a the word marketed,  
6 that might get you a list on who's going to the grocery  
7 store to any section that has the name marketed for that  
8 particular group of, a respondent, for example. If you're  
9 looking for an acronym, often that will be the name of a  
10 group and wind up with millions of documents. And I think  
11 that there are outside companies that are getting better at  
12 this that we can use that are learning how to do the  
13 searches. So, I think that all this, we're better off  
14 learning how to do the searches in the first place.

15 Now, it would help if it was all electronic and  
16 you guys could look at it in that form, too. But that's a  
17 fight that we all have to go through.

18 MR. McCAREINS: Mark McCareins. Remember that  
19 we're dealing with all these issues on a daily basis, not  
20 with you or DOJ but in private litigation. So, my focus is  
21 what is the federal district judge going to order me to do  
22 or magistrate under the federal rules. And I think most  
23 folks practicing in this area would say that the courts  
24 are a half step or two behind the technology. And you go in  
25 front of our magistrates across the street and we're trying

1 to educate them about the difference and they try to cut the  
2 baby in half and maybe there's a reported FRD decision that  
3 may go up to a district court judge.

4 But there's a huge body of law there that maybe my  
5 humble suggestion is that the best solution is to appoint a  
6 task force on electronic discovery issues within your shop.  
7 And the ABA section on litigation has a multi-volume trader  
8 seller electronic discovery. The ABA anti-trust section is  
9 coming out with a civil discovery handbook later this year  
10 that is about 40 to 50 pages, single-spaced with footnotes,  
11 because I've had it in some of them, on current trends,  
12 issues just like this.

13 So, maybe I'm wrong but you're bar should not be  
14 any higher on what should be produced or what can be  
15 compelled to be produced. That bar shouldn't be any higher  
16 than what the federal judges are doing in a court, on a  
17 daily basis in the federal courts and federal discovery.  
18 So, these issues are not unique to many of us and maybe we  
19 just need to transfer what we're doing in this other room to  
20 you folks. Maybe a task force may help.

21 MR. RAVEN: Marc Raven. One other quick thought  
22 is that while word searching can do you a lot of good in  
23 limiting the volume of documents, sometimes a broader brush  
24 approach is really the only way that you can deal with these  
25 massive volumes. And with that, I mean, for example, in

1 settling for a year shorter time frame than for the paper  
2 documents or deciding that you only need electronic  
3 documents from half or two-thirds of the people whose files  
4 are being produced.

5 I believe it makes a huge difference because again  
6 while you can oversimplify by thinking you word search it,  
7 it pops up and you produce it; of course, it also has to get  
8 read, privilege reviewed and processed. And that is, you  
9 know, time consuming and expensive. It's lawyer time that  
10 adds to the bill, this is not just the cost of using the  
11 vendor.

12 MR. BERNSTEIN: Just to go back to Steve's  
13 question a while back which was whether we're actually  
14 getting anything useful from archive email. And I went  
15 around our division and asked people what their experience  
16 has been, and it's varied but some folks have said that in  
17 some cases, it's been the most critical and most important  
18 material they've gotten. Now, that's not every case, but in  
19 some cases it's been very important. So, that's just one  
20 point I wanted to make.

21 Also, in terms of negotiating issues relating to  
22 electronic documents, whether it be archive emails or just  
23 electronic documents generally, I think one of the reasons  
24 people are reluctant to make cuts, whether it be going on  
25 term searches or cutting back to one year instead of three

1 years, is the fear that they're going to completely miss  
2 something. The wrong word is going to be in the term search  
3 and a whole category of documents isn't going to show up.

4 I think you're more likely to get a modification,  
5 I'm only speaking if you're negotiating with me because I  
6 don't know what others think, but if you create some kind of  
7 safety net. In other words, you say, for these key people,  
8 we're going to search them for the full three years. We're  
9 going to search them, not by key search terms, we're going  
10 to search them completely. But on these, what we consider  
11 less important employees on the organizational chart, give  
us a break0 Tw (38 lepithier cut it back(10),gt(10) Tj 39 -24 TD

1 inadvertently waive something. That's the fear.

2           And if you're dealing with a civil litigant and  
3 you inadvertently produce something, you write them a  
4 letter, say I inadvertently produced something, you get the

1                   MR. BRUCE: I'm Greg Bruce, and I don't want to  
2    sound like a broken record but that actually has come up a



1 constructive suggestions, just to quit whining for a second,  
2 one other thing that I was reminded about with Robbie's  
3 comment about privilege review is that as I think you're,  
4 I'm sure you're all aware that the privilege log that's  
5 required for a second request production is more detailed  
6 than the privilege log that's normally required in  
7 litigation. And it requires something, more investigation  
8 and in any event a lot more time to get down on paper. So  
9 that, you know, again, when you consider the volumes of  
10 electronic documents that clients, particularly  
11 sophisticated companies, tend to have nowadays, you can just  
12 tack that on to all of the other burdens that have already  
13 been identified.

14           And, you know, it's obviously essential, just by  
15 the time doing the privilege from you but you can't forget  
16 about it at the time of the hearing and submitting the law  
17 to, which can then, you know, slow down back into the  
18 process.

19           MR. MUTCHNIK: This is Jim Mutchnik. I have a  
20 comment. I think the fact that we've been talking about  
21 this for a half hour may be indicative of the fact we come  
22 to you to try to negotiate these issues. It may take a  
23 month or two months to work out the rules where we may be  
24 better served in making the calls that Marc was discussing  
25 under the federal rules about, should we be entitled to

1 this, and just make your decision and produce and assume  
2 that's good enough until you tell us it's not. And I just  
3 question the utility of the thing. Not today, of course.  
4 I'm sure --

5 MS. SULLIVAN: Lisa Sullivan, and I'll comment  
6 just on Mr. Mutchnik's comments. One thing that we would  
7 find helpful is a little more clarity or information on the  
8 appeals process. We've been, I've had the experience where  
9 I've been told you would either have to comply with X  
10 instruction, whether that be email archives or something  
11 else, or else there's an appeals process. But you can't  
12 just produce and say sue us.

13 If there were published opinions on what went  
14 through in the appeals process or if the FTC would explain  
15 past decisions that had been made in the appeals process  
16 appealing different instructions, then it would give a lot  
17 of guidance to the companies to know whether we can go ahead  
18 and just produce without searching email archives. Or go  
19 ahead and produce without complying with instruction X, Y or  
20 Z.

21 But the companies are operating essentially in a  
22 void when they're told, well, you can go ahead and certify  
23 compliance but you're not in compliance with our rules and  
24 you're supposed to go through the FTC's appeals process, not  
25 certify compliance.

1           MR. BERNSTEIN: And that is a suggestion we've  
2 heard a couple of times to make that process more  
3 transparent and make those decisions public. And that's  
4 something we are considering right now.

5           MR. RAVEN: Just to add to that, Marc Raven here,  
6 what's a good analogy is the pre-merger office now has its  
7 informal opinions online which is greatly helpful. And you  
8 can search them and come up with, you know, half a dozen  
9 examples to give you some instruction that's, information  
10 that's been floating around that's just a little easier to  
11 get your hands on.

12           MR. BERNSTEIN: Has anyone been through the appeal  
13 process at DOJ, and any thoughts on whether that works  
14 better or worse than our current process?

15           MR. McCAREINS: A short rebuttal, I mean,  
16 ultimately the test is substantial compliance, and what does  
17 that mean? I mean, that's like the reasonable man test, you  
know. There's a (9) Tj rmat26375 r -2 jusood anaflj -3sal, I mea

1 if I'm not. But if you've got those lines of communication  
2 open and, I think you can convince them that you're making a  
3 good faith reasonable effort and you're all trying to speed  
4 this process up. I mean, I personally have never gotten to  
5 that point where somebody just said, you know, well, the  
6 deal is going to create or we're fighting over one of these,  
7 what I would call hyper-technical discovery issues.

8           When the record has been made on both sides as to  
9 what you want and why you can't do it, that we shouldn't  
10 even involve the appeals process. Frankly, I don't want to  
11 use the time in the appeals process. We got so much other  
12 stuff going on on whether that's an expedited appeal, when I  
13 can get a ruling in 36 hours which I'm sure I can't or I go  
14 up on Justice and it takes me a little bit of time. I don't  
15 want to lose the time. I'd rather make a decision, make the  
16 production, make a judgment call and go forward. And maybe  
17 that's just me.

18           MR. KRULLA: Now, there is a middle ground  
19 approach that we've developed between what's required by the  
20 literal terms of the second request and what the responding  
21 companies may be inclined to produce or may be comfortable  
22 producing within the time they have available. And that's  
23 to negotiate modifications to the second request.

24           Does anybody have thoughts on how that process has  
25 worked and how we can improve that process?

1                   MS. SULLIVAN: Lisa Sullivan again. For the most  
2 part, the modification process, in my experience, has been  
3 very good. However, the essential problem that I've

1 the authority to modify?

2 MR. MUTCHNIK: This is Jim Mutchnik. Yes, and  
3 it's my experience with modifications that it's a lot of  
4 work with very little gain. What you're blocking with is,  
5 well, we understand your position, and move forward at your  
6 own risk and then we certify substantial compliance. And in  
7 fact, very few staff attorneys go I agree during compliance  
8 that's usually preserving their right to challenge you  
9 under this sort -- So, I question the utility of full-blown  
10 negotiations to the extent that it's --

11 MR. BERNSTEIN: We talked about, a lot about the  
12 email issue, are there other specific areas involving  
13 modifications or things in the second request that are  
14 particularly troubling? Is translation a big problem? Data  
15 specs? Anything out there that sticks out as one of the  
16 areas where you are running into trouble?

17 MR. RICHMAN: Somebody's got to be upset about  
18 data specs.

19 MR. DUBROW: This is John Dubrow. It's not really  
20 a big issue but the spec-ing requirement seems to add a  
21 burden that I think doesn't really add much value. I think  
22 the DOJ standard second request doesn't include it any  
23 longer, you know, why do you need Mr. Smith's file program  
24 in three different specs. It just adds time and file  
25 folders.

1           MR. RAVEN: Marc Raven. I'll second that and also  
2 question whether at the end of the day you really get much  
3 benefit when you, you know, parties typically have the  
4 responsibility to decide what spec improves the document.  
5 And you know, frankly, I think it invites mischief whereas  
6 if you just ask people to produce documents that's been kept  
7 in the normal course of business, you know, that's what  
8 you're going to get and you get all these people's files to  
9 look at for particular issues.

10           MR. KRULLA: Any suggestions for how staff can  
11 ascertain whether the companies have produced what we've  
12 asked for under a particular specification if the production  
13 is not identified by spec?

14           MR. DUBROW: John Dubrow. I mean, I think that's,  
15 stands with the, you know, parties' efforts to certify  
16 compliance. You can't certify compliance if you haven't, if  
17 you come up with a list of people, you put them on a search  
18 list and say, well, we searched for adding whether or not  
19 that person, in moving the document to spec need, I don't  
20 think it has any additional value. Well, mind you, it  
21 doesn't add any additional value, just maybe it's pertinent  
22 for somebody to certify if you're saying I've looked for all  
23 documents that responds to that spec or as that's modified.

24           MR. KRULLA: What about as we move from a HSR  
25 supplemental request production to litigation? What

1 latitude do you believe that defendant should have to pull  
2 out documents and use those in the defense that are on their  
3 face responsive to the second request? And, either (a)  
4 companies failed to produce in response to the second  
5 request, or (b) negotiated out of production because, for  
6 example, it would be too burdensome to locate those  
7 documents.

8           What comfort can the Commission staff have in  
9 preparing a case that if we go to litigation, the defendants  
10 are not going to confront us with the very documents that  
11 they've asked us to negotiate out of the investigation?

12           MR. McCAREINS: Mark McCareins. I have an answer.  
13 Again, under the federal rules, in using the private  
14 litigation analogy, your process is much like a preliminary  
15 injunction where there's expedited discovery and we move  
16 heaven and earth in a 60-day period to try to do expedited  
17 discovery and you may not get everything. Not that there's  
18 any bad faith, but you've got other things to do. You've  
19 got briefing, you got witnesses, you got experts, and you  
20 got a preliminary PI hearing set 60 days out.

21           Depending on the outcome of that PI hearing, you  
22 have a full-blown trial on the merits. The fact that  
23 additional documents are discovered after that first wave,  
24 I've never seen anybody preclude it from introducing those  
25 documents at the permanent injunction hearing and trial on



1 the merits because they weren't produced by either side of  
2 the PI hearing. It's an argument that I might keep in the  
3 back of my hat when somebody does that to me, but I've never  
4 seen that successfully used. So, I mean, maybe the analogy  
5 isn't perfect but it's still, I think it's apt to what  
6 happens in the second waiting period.

7 MR. KRULLA: Well, if a responsive document is  
8 found after the certification, it's produced as part of the  
9 defense evidence. Should that be grounds for the agency to  
10 bounce the production and say, well, it turns out you were

1 MR. KRULLA: All right, let's say it's responsive.

2 MR. McCAREINS: And it's not negotiated out?

3 MR. KRULLA: Right.

4 MR. McCAREINS: I still take the position that  
5 what we're talking about here is substantial compliance and  
6 we're producing literally tens of thousands of documents,  
7 and the fact that I didn't produce one document doesn't mean  
8 you should decertify substantial compliance. I don't --

9 MR. DUBROW: This is John Dubrow. I strongly  
10 agree with that. We are, as Mark said, having to turn over  
11 a vast amount of documents. To the extent that the process  
12 takes on a life of its own and becomes, you know, I think  
13 that's wrong for the result that that gets you which is  
14 what's the substance of the transaction?

15 I've had different experiences with different  
16 jobs, different agencies. You know, you find some of those  
17 documents sometimes. But if the person calls you up and  
18 says, you know, there's a document referred to and I can't  
19 find it, there's two approaches to that. One is I got to  
20 bounce you, and the other is which just leads to, well,  
21 fight about whether it's responsive or whether it exists or  
22 you say, look, you know, I'll get this thing. You know,  
23 I'll give it to you tomorrow, if it exists. And in part,  
24 it's, you know, who you're dealing with and trying to get to  
25 the right result in the process.



1 the second request has already been complied with, or in the  
2 case of civil litigation, after you've done all your  
3 production, you find something. It does question its  
4 authenticity and I think that you want to go and make that  
5 argument, that maybe the authenticity is questionable, but  
6 it may be an honest mistake.

7 There are other remedies that the FTC has, of  
8 course. You can say that there wasn't compliance with the  
9 second request. You can change the, you know, take your  
10 clock out and start over again, that happened on at a case  
11 some of us know about. Not that -- was involved but we've  
12 had that happen to us. There are remedies that the  
13 government has, that civil claimants don't have.

14 But I think that the issue ought to be fairness  
15 and being able to make sure that the government, like any  
16 other party, in any case is not prejudiced. So, if you have  
17 it, you ought to turn it over right away. If that does  
18 happen and the depositions haven't yet started, if you're  
19 having depositions or a hearing that hasn't yet started and  
20 you're not prejudicing something, then any government agency  
21 should be accommodating. But I also think it goes both  
22 ways. That's my personal view.

23 MR. MUTCHNIK: This is Jim Mutchnik. While we are  
24 on the topic of hiding or pulling things out of your pocket,  
25 I was wondering why the FTC was taking a position not to



1 making you wait until the end of the depositions before they  
2 hand them over?

3 MR. MUTCHNIK: Oh, well after the end of the  
4 depositions and heading towards a heap of trouble, so you're  
5 unable to use the stuff as your, before you're heading to  
6 trouble, you try to use it affirmatively with management,  
7 getting a sense of where management was thinking based on  
8 all of the evidence of having those shared between both  
9 sides.

10 MR. BERNSTEIN: Okay, thanks.

11 MR. ROBERTSON: Robbie Robertson again. And I've



1 Not from the person who just spoke. From anyone else?

2 MR. BERNSTEIN: Going back to the backup emails,  
3 in your civil litigation, what has your experience been in  
4 terms of those backup emails? Have you found useful  
5 information there or have you found that not to be useful?  
6 Have you continued to ask for it in your civil litigation?

7 MR. McCAREINS: Mark McCareins. A lot of it just  
8 depends on the case and the amount of resources that our  
9 clients can spend on those cases. If I've got a three-  
10 million-dollar case and I go to the client and say it's  
11 going to cost \$600,000 dollars to kind of flush out this  
12 issue, they're going to fire me and get another law firm.  
13 If I've got -- company case and we've got resources to do  
14 it, then we'll make the effort.

15 So, a lot of it is a sliding scale, but recently,  
16 in the Third Circuit, in the price fixing case, we used a  
17 sampling solution which worked out well. And the  
18 independent consultants come in and talk to each other and  
19 the sample is devised and the client goes out and responds  
20 to the sample. I mean, I haven't seen it as being a big  
21 deal. And ultimately, you know the court is going to ask as  
22 the mediator and is going to balance the burdens. And so,  
23 if one side or the other takes a too aggressive position,  
24 it's not going to fly with an industry, so the sampling  
25 issue is I think --



1           MR. MUTCHNIK: I have a, this is Mutchnik again, I  
2 have a miscellaneous question. Have you been studying or  
3 have any statistics to make available about the number of  
4 companies that file and then pulled and refiled? On whether  
5 that's on the rise or steady? Particular trends  
6 information?

7           MR. KRULLA: In my experience, it's a phenomenon,  
8 I think, that started in the 1990's. I don't recall seeing  
9 it prior to that.

10          MR. McCAREINS: You're dating yourself.

11          MR. KRULLA: I think it's increasingly being used.  
12 I think in the beginning, companies were very wary that, oh,  
13 this is a trick by the staff to get more time. We have  
14 these model second requests. We have word processors. We  
15 were able to turn around the second requests very quickly.  
16 Ultimately, it's up to the chairman whether to issue it, but  
17 staff sometimes have input in drafting it for the chairman.

18                 So, we don't usually need the extra time in order  
19 to get our act together. We have been instructed by  
20 successive bureau directors, successive management, that we  
21 are not to encourage companies to withdraw and refile unless

1           Our mind is never closed. Our feet are not cast  
2     in cement. So, it's hard to say, look, no matter what you  
3     do, I'm going to issue a second request or I'm going to ask  
4     the chairman to issue one in 30 days. I can't say that.  
5     But we will provide our best candid assessment as to whether  
6     we think it might be in the company's interest to withdraw  
7     and refile.

8           I don't know that we have any actual statistics on  
9     how many of those withdrawals wind up in a second request.  
10    I think more often than not, a second request is not issued  
11    when that additional period is extended. I think if you  
12    took out of all HSR filings, the ones that withdrew and  
13    refiled, the number of second requests that issue out of the  
14    total universe as a percent would be a lower number than the  
15    number of second requests that issue out of the ones that  
16    withdrew and refiled. That's, I suspect, because the ones  
17    that withdrew and refiled recognized that there is, at least  
18    on the face of it, outstanding questions that need to be  
19    addressed.

20           So, you're going to see a higher fraction than the  
21    few percent out of the total universe that gets second  
22    request. But I think more often than not, our experience,  
23    certainly my experience has been that when companies  
24    withdraw and refile, more often than not we can eliminate  
25    the problem in 30 days.



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1 think that in a case where you could help resolve the issue  
2 without having to trigger another time period, at least the  
3 parties can agree to do that, I think makes sense.

4 Jim and I have had cases where that has happened,  
5 where we've gotten to that point, the second request did  
6 come down and actually the deal was off. And we felt we  
7 could have gotten the deal through. And that one's a bad  
8 result, I think, for the economy, a bad result for the  
9 process.

10 MR. BERNSTEIN: Jim, to try to answer your  
11 question dealing with whether there is a trend, I have not  
12 seen any statistics but my guess is that when the clearance  
13 process is working well, there is not as many pull and  
14 refiles. When the clearance process isn't working well,  
15 there tends to be more because the experience I've had has  
16 been that most of the pull and refiles have come about  
17 because we didn't have enough time to investigate up front.

18 And while, again, I can't give you statistics on  
19 how those have turned out, I can tell you in every one of my  
20 cases where it was pulled, had it not been pulled, there  
21 would have been a second request. Because if you had told  
22 me, Steve, I'm thinking of pulling and refiling, and there  
23 wasn't going to be a second request I would have told you,  
24 don't do that, there's not going to be a second request, let  
25 the waiting period run. So, to the extent that helps answer

1 your question.

2 MR. RICHMAN: And just one other thing to add on  
3 that is, I've had recent experience with a couple of  
4 situations where the pull and refile decision came from the  
5 parties. And in full knowledge that a second request was  
6 going to issue, but to give us a little more time to take  
7 out of any potential responsibility the burden of searching  
8 for markets that we were ultimately able to dispense with  
9 and, you know, on the order of half the delivery of ultimate  
10 documents.

11 So, I mean, there is, occasionally, I think this  
12 came up in the lines of communication. It just takes too  
13 long to get us the information when we have, on some of  
14 these cases, potentially thousands of overlaps to get those  
15 out of the way. And those, especially in an electronic  
16 property, it takes you a long time to get the people who  
17 understand it to us and then there is a learning curve for  
18 us, even in industries that we know about, just to make sure  
19 that we're not missing the boat. And if we can cut out  
20 divisions or we can cut out countries, I'd rather do that  
21 before the issuance of the second request because then we  
22 don't have to negotiate.

23 MR. BERNSTEIN: Steve.

24 MR. BAKER: I've got a question for you guys.  
25 You've been hearing from them on everything and I'm sure

1 there are some things that a private counsel do to you guys  
2 during the course of the mergers that drive you nuts, that,  
3 you know, maybe have given you a bad feeling or makes you  
4 really be on guard with a lot of other people where the same  
5 issue doesn't come in. Have each of you got something in  
6 particular that's kind of a pet peeve that you'd like to see  
7 people avoid that you think that doesn't advance the process  
8 that could be --

9 MR. KRULLA: Well, I think in initiating  
10 negotiations on modifications to a second request, it's  
11 important for counsel to have done their homework, to come  
12 in with organization charts, to have some familiarity with  
13 what the production involves, where relevant documents are  
14 likely to reside, how the data is kept. I've had instances  
15 where counsel, as soon as they get the second request, say,  
16 okay, I want to come in, I want to negotiate, I want  
17 modifications, and they don't have a clue as to what's  
18 involved in complying with the request or why they need the  
19 modifications other than that they believe they're entitled  
20 to them.

21 So, I think there's a lot more credibility with  
22 staff and staff are going to be more sensitive to the  
23 concerns if counsel for the parties have done their  
24 homework, made an assessment as to who's got the documents,  
25 what the flow of documents is, who are the people

1 responsible for organizations. When they come in even with  
2 org charts and they say, well, we want to exclude these  
3 people, I say, well, what do they do? Oh, I don't know.  
4 Well, they should have at least done enough homework so they  
5 can explain to me why those people should be excluded.

6 MR. BERNSTEIN: That's probably the biggest  
7 problem that I see. Very often at that first meeting after  
8 the second request issues, opposing counsel comes in and  
9 they say, now, tell us what you really want. Well, you  
10 know, the second request just issued two days ago, that's  
11 what the Commission asked for. The more you can come in and  
12 give us concrete suggestions, bring samples and bring the  
13 org chart. The quickest place to make real cuts is just  
14 bring in the org chart because I think that's the area that  
15 people are most comfortable with.

16 So, that's usually the most productive area. And  
17 I think it's important to focus on those areas where you  
18 know we can have productive negotiations at the beginning.  
19 But the more homework you do, the better off we are.

20 And also, going back to the initial waiting  
21 period, again, there are certain types of information we're  
22 always going to ask for if there's an overlap in the case, a  
23 significant overlap. That's the customer list, the recent  
24 strategic plans, recent business plans, things like that.  
25 And we're asking that, it's totally voluntary, we're asking





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1 we've identified the problem in other markets, and that the  
2 fix cures the problem, then the exercise of going through  
3 the full production of the second request or modifying the  
4 request to get to that end is mooted.

5           And, I think, the problem I've seen are counsel  
6 who don't want to get to the issues, don't want to get to  
7 the merits, they just want to get to compliance. They want  
8 to start the clock, put the gun to our heads, defy us to  
9 bring a case, rather than working with us in, through the  
10 second request process to educate us on where is the  
11 problem, where is there not a problem, and how can the  
12 problem evaporate or be fixed.

13           So, I think, early on, that's constructive. In my  
14 experience, frequently that process doesn't begin to happen  
15 as a matter of tactic by the defense counsel until after  
16 they've started the clock. They say, first, we want to go  
17 through this million-dollar production, and now we'll sit  
18 down and confront what's been staring us in the face all  
19 along, that there's an anti-trust problem and that needs to  
20 be fixed.

21           MR. BERNSTEIN: Just to follow up on that. Over  
22 the past three years in our division, very few matters have  
23 even resulted in substantial compliance, regardless of which  
24 way they came out. So, there are ways to do it and I just  
25 encourage you to come talk to us early and try to be

1 cooperative about it.

2 MR. KEILER: Yes, I was just going to comment on  
3 the last point based on -- I would suggest it would be  
4 helpful, but I know it's not the staff's position, or bureau  
5 director or in the case of the Justice Department,  
6 management of the anti-trust agreement. I've been through  
7 that process in two different situations where we did not,  
8 in fact, go through a substantial compliance. It was either  
9 we thought we would answer the problem or we thought we had  
10 a fix. And the process went on interminably because there  
11 was no clock on it.

12 MR. KRULLA: Is that FTC or DOJ?

13 MR. KEILAR: One was with the FTC and one was with  
14 DOJ.

15 MR. RICHMAN: Just one point, and this was, very  
16 quickly, I mean, it was something that Greg brought up and  
17 Mark, you actually started with which is communication. At  
18 the outset of negotiations for a second request, bring in  
19 the one person in the company that actually knows what the  
20 boxes on the org charts mean, and the person who knows  
21 whether the person in that seat has been there for longer  
22 than three weeks, whether their position predates the  
23 announcement of the merger. I mean, there's, the bulk of  
24 the burden is by cutting out the bodies. I mean, if you  
25 don't have to search the people at all, then, we're not

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1 have open discussions on our end. And I think that that's  
2 going to be 90 percent of the burden, the truly unnecessary  
3 burden and can be discussed fairly quickly.

4 MR. BERNSTEIN: Well, we're already past 1:30, so  
5 I want to wrap this up. But I think, Steve, did you want to  
6 add something?

7 MR. BAKER: I just have one question. Obviously  
8 people have been talking about second request as a process  
9 for years and years and years and years, the model second  
10 request, and I guess a lot of people here have done this for  
11 a long time. Has any of the stuff gotten better? Is there  
12 anything the FTC has implemented in recent years  
13 particularly that's improved the process? Maybe not.

14 MR. DUBROW: John Dubrow. Okay. To continue the  
15 tribute here that there used to be an index requirement that  
16 actually made you close out every document. And it was  
17 pretty useless, but they've made that pretty simple now  
18 where you can say this range belongs to this and this  
19 demand. That spec-ing issue, but you don't have to do index  
20 right now. So, there were some things like that that have  
21 made things more simple.

22 MR. BERNSTEIN: I also want to add that we're  
23 accepting written submissions, so if there is something that  
24 you didn't have a chance to discuss here that you want to  
25 put in writing, you can submit that to one of us and we'll

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accuracy, spelling, hyphenation, punctuation 150 format. Tj 15 -9 T 9R3

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