

# Getting the Deal Done in the Age of Big Data

## Requests - Part 1

**By Emily Blackburn & Katherine Clemons**

In recent remarks at the Global Antitrust Enforcement Symposium, Assistant Attorney General (“AAG”) Makan Delrahim outlined a number of proposed reforms to the Antitrust Division’s merger review protocol aimed at making the process faster, more transparent, and more in line with modern business realities. One aspect of the Division’s reforms was an increased focus on data: “Data are often the key to getting merger decisions right. Frequently, there is no reason that data cannot be produced substantially earlier than production of the main bulk of documents. We will expect to receive early cooperation on identifying relevant data for our economists to analyze. We will further expect production of useable data substantially before the second request compliance date.”<sup>26</sup>

AAG Delrahim’s speech should come as no surprise to in-house corporate and antitrust counsel. Inside counsel increasingly need to be prepared to guide company executives and employees through the process of making a fast, thorough, strategic data production. Whether you are advising your Board on the antitrust risks of a proposed transaction, responding to a Second Request or CID, or formulating a litigation strategy, data have increasingly become “ground zero” for antitrust analysis and can be the difference between a productive, expedited engagement with the antitrust Agencies and a logistical and analytical morass with no end in sight.<sup>27</sup>

This article is the first in a series that will address: (1) types of data the antitrust agencies will likely request in the merger context and what these requests mean to you; (2) how to use data to your advantage in the merger review process; and (3) suggestions for ordinary-course “best practices” for in-house counsel. This installment will touch on all three topics briefly, but focus primarily on the first, detailing the types of data requests companies are likely to see from antitrust enforcers and establishing commonly used vocabulary in those requests and related negotiations. Future installments of this series on data requests will cover other topics in more detail, and the authors welcome feedback from readers on which aspects of data collection, production, and analysis are of most interest.

### Typical Agency Data Requests

Fortunately for inside and outside counsel, the FTC and DOJ (“Antitrust Agencies” or “Agencies”) Model Second Request provides a template for making sure your data productions are in line with the Division’s expectations. But first, let’s define some of the key terms. The Model Second Request Specification 10(a) asks for “each electronic database” that contains information about relevant products or services. Model Specification 10(b) asks the Company to compile and submit “one or

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<sup>26</sup> Makan Delrahim, Assistant Attorney General, *It Takes Two: Modernizing the Merger Review Process*, Remarks Before the 2018 Global Antitrust Enforcement Symposium (Sep. 25, 2018), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

<sup>27</sup> Though this piece focuses on merger review, the takeaways are equally applicable to companies that may find themselves the target of antitrust litigation.

more Data Sets” from each responsive database. And Model Specification 10(c) requests a “data dictionary” for each data set provided in response to 10(b).<sup>28</sup>

### *Databases*

A database is a collection of data organized into files or tables. Databases come in many flavors, but two important terms are “Enterprise” and “Relational.” Knowing what a database is can help you determine ahead of time which of your company’s systems is likely to be in-scope for an Agency request.

**Enterprise** is a term used to describe the databases used by large organizations to handle huge data collections. While enterprise databases vary significantly, generally speaking they are relational in nature (see below) and robust enough to manage simultaneous queries from large numbers of users without losing performance or data integrity.

**Relational databases** (“RDBs”) store information in terms of “relations”—multiple data sets organized by tables, columns, and records. By establishing a defined relationship between different database tables, users can update, retrieve, search, or organize data using standard queries. Unlike flat databases, RDBs are very good at capturing complex relationships between data entities and enforcing constraints among different data sets.<sup>29</sup> Commonly used Enterprise RDBs include Oracle, SAP, and Microsoft SQL Server.<sup>30</sup>

### *Data sets*

**Data Set** is defined in the Model Second Request as “all or a subset of data held by, or accessible to, the Company in the normal course of business.”<sup>31</sup> It’s important to remember that data sets are only those that are accessible in the “normal course of business.” There is no affirmative obligation to create or prepare new data sets, even if the databases or data sets that the Company keeps in the normal course are not *exactly* what the Agencies are requesting. As inside counsel, you should be prepared to explain (or have businesspeople ready to explain) to outside counsel what data sets are kept in the ordinary course and how those data sets are responsive to the Agency’s Second Request or CID. This is a situation where knowing what is available and what isn’t available, combined with early engagement with the Agencies, can help narrow the scope of a data request and speed compliance.

### *Data dictionary*

A **data dictionary** is exactly what it sounds like: a way for someone unfamiliar with the database to understand the relevant terms, fields, codes, and other information. Data dictionaries help the

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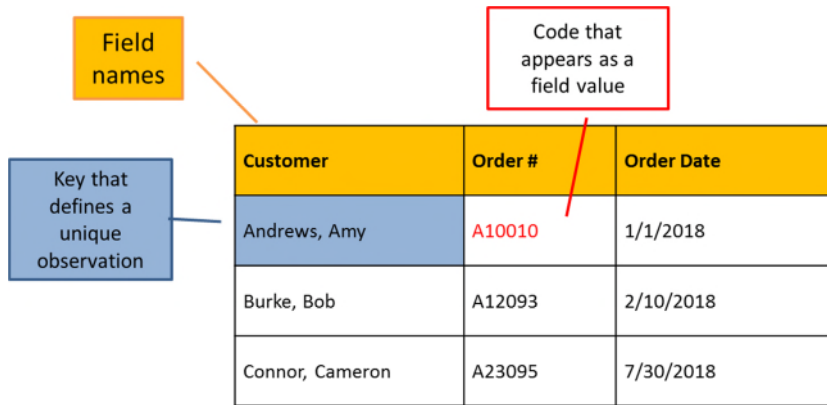
<sup>28</sup> See Premerger Notification Office, Model Request for Additional Information and Documentary Material (Second Request) (Aug. 2015), available at <https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf>. [Hereinafter “Model Second Request”].

<sup>29</sup> Imagine a bicycle shop’s relational database ordering system. The RDB consists of three tables: a Customer table that identifies each customer by unique ID, an Orders table that records each order placed by each customer, and a Bikes table that identifies each make and model with a unique SKU. When an order is placed, the RDB must access all three tables—without physically joining them on the same hard drive or even in the same country—to ensure that it is fulfilled accurately.

<sup>30</sup> By contrast, **flat** databases are simple systems in which each piece of data or record is represented as an entry in a single table structure. The table structure can be read directly or by using various types of software applications, but each flat database is an “island” and does not connect to any other database. A Microsoft Excel spreadsheet is the most familiar example of a simple flat database.

<sup>31</sup> See Model Second Request, at Definition D.5.

Agency’s lawyers and economists to understand and parse responsive databases and data sets. Model Specification 10(c) includes the minimum requirements for a data dictionary, which include (i) a list of field names and a definition for each field, (ii) the meaning of each code that appears as a field value, and (iii) the primary key in the data set that defines a unique observation. Below is a diagram showing where each element in a Data Dictionary can be found with respect to a simple flat database in which each unique customer is tracked by name. Here, the “field names” are Customer, Order #, and Order Date, the “codes that appear as a field values” are system-generated random alphanumeric order numbers following the standard format [letter][#####], and the “key that defines a unique observation” is the customer’s name following the standard format [Last],[First].



*Unpacking the “Data Specs”*

A typical Agency data request includes several “data specs,” each of which is described in more detail below.

“**Transactional data**” is a record of all the sales a company makes. Transactional data typically include, *inter alia*, a company’s prices, costs, margins, sales volumes, discounting practices, and the financial performance of products or product lines. As such, transactional data related to relevant products/services is often the focus of Agency economic analysis and is usually the single most important data production a company can make. As you can see from Specification 2 of the Model Second Request, the Agencies typically ask for transaction-level data at the most “granular” or “disaggregated” level possible. Ideally, that means each individual sale is recorded separately.<sup>32</sup> Transactional data are most commonly kept in relational databases like a general ledger (“GL”), sub-ledger, or a commercial enterprise database like Oracle Enterprise Resource Planning (“ERP”). A typical transaction-level data pull would include as many of the following data items as possible (plus any sales-related data points unique to the particular industry that would ordinarily be tracked on a transaction-by-transaction basis):

- Transaction ID
- Product Name
- SKU/part number
- Quantity
- Price
- Cost
- Discounts (reduction in price)
- Rebates (money back after purchase)
- Margin
- Customer Name
- Customer Contact Information
- Ship-from Location
- Ship-to Location
- Order Date
- Ship Date
- Delivery Date

<sup>32</sup> See Model Second Request, at Specification 2.

If this level of granularity is not available—as is often the case, particularly for companies that have lumpy project-based sales or operate in a services market where a customer may receive the relevant service under a long-term agreement, it is important to engage with the Agency early on to explain exactly what “transactional” data are available and how the available data relates to the competitive concerns at issue.

Two more common Second Request specifications ask for data sets related to **win/loss reports** and **customer relationships**.<sup>33</sup> The typical “bid spec” will ask for a variety of detailed documents and data regarding the company’s bids in response to Requests for Proposals (“RFPs”) or Requests for Quotes (“RFQ”).<sup>34</sup> Win/loss data are good evidence for market definition and the intensity of competition between the merging parties and among the parties and their competitors. As in-house counsel, it is important to be aware of whether your company tracks win/loss information in a Customer Relationship Management (“CRM”) database such as Salesforce.com, or whether it is organized in another fashion.

The antitrust agencies use data about customer relationships (also commonly found in CRM databases like Salesforce) to identify customers whose views on the transaction may be relevant to analyzing the competitive effects. It is important, therefore, for inside and outside counsel to timely identify key customers who may support the transaction, as well as any customers who may complain. This can help outside counsel and product managers or executives to prepare and enact an outreach strategy to address customer concerns and mitigate the impact of complaining customers.

If your company does use a CRM database to capture win/loss and/or customer relationship information, it is also important to understand what kinds of information are captured in such a CRM database (e.g., competing bidders) and the consistency and thoroughness with which the business may enter this information into the CRM database. Knowing how reliable the CRM database is not only informs your own analysis and advocacy, but also allows you to anticipate and prevent the agency’s reliance on possibly inconsistent or unreliable data.

### Using Data in the Merger Review Process

It is important for inside and outside counsel to think about data early on: waiting until after signing or filing to start gathering and thinking about data can put the company at a disadvantage, not only in terms of being behind the eight ball in responding to an agency request and developing an antitrust strategy, but also in terms of missed opportunities to evaluate the deal structure and antitrust enforcement prospects before investing substantial time and money on due diligence. Diving into data analysis earlier in the process (or better yet, having a good working knowledge of what the company’s data show on an ongoing basis) can be tremendously beneficial from a business and legal standpoint. Start thinking about how to use data to the company’s advantage from the early stages of deal negotiation, before ink meets paper and before deciding whether and how to engage in costly due diligence.

Data analysis plays a key role in assessing the antitrust risk raised by a contemplated merger, even in the very early stages of a deal. Company sales data, win/loss data, and customer data, combined with third party market data, can provide antitrust counsel and consulting economists with information relevant to the product and geographic markets that agencies are likely to define when reviewing a merger. The data may suggest market dynamics and competitive dynamics that

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<sup>33</sup> See Model Second Request, at Specifications 10(b)(iv) and 10(b)(vii).

<sup>34</sup> See Model Second Request, at Specification 24.

undermine a company's procompetitive rationale for a deal, or they may bolster that rationale. Knowing the "story" revealed by your company's data can help you to advise the Board and other key decision-makers of potential M&A targets that might attract more (or less) scrutiny from antitrust agencies. Armed with this knowledge, the company can choose acquisition targets that present less deal risk, structure deal agreements that shift antitrust risk to the other party, or begin developing strategy for navigating a lengthy merger review process in riskier deals.

It can also be helpful in strategic deals to know what the other side's competitive data show and to analyze how the data from both companies come together. Counsel that is aware of the importance of competition data can include antitrust-specific data requests in routine, pre-signing due diligence requests and fold thorough antitrust risk analysis into this process. Although exchanging detailed information about sensitive sales and competition with another industry participant can raise antitrust compliance concerns, a company can work with outside counsel to set up a simple "clean team" process that will ensure competitively sensitive data are only provided to appropriate individuals.

Once a deal is signed, counsel should take a closer look at data that will be at issue in a merger analysis and get a head start on preparing responses to routine data requests, particularly for complex deals that are likely to receive more than a cursory look from the antitrust enforcers. With the recent agency focus on faster, more robust data productions, getting out in front of any issues with data (both substantive and procedural) as early as possible is critical to expediting the merger review process and increasing chances of clearance.

The Agencies know that "ordinary course" data are often not in the exact format they want, so perfection is not the goal. But outside counsel needs to be prepared to explain exactly what is and what is not available and how available data will help answer the Agency's questions. A company that is tuned in to what the data show and has an idea of what the agencies will be concerned about may be able to head off a Second Request, or narrow a Second Request's scope, with a timely voluntary production of focused data that goes directly to Agency concerns. This can shorten the review timeline and may reduce its cost. But doing so requires inside and outside counsel to be familiar with key data before the Agency issues a broad request. Before or concurrent with filing a premerger notification, work with outside counsel to identify key data items, coordinate with outside counsel and businesspeople to assemble a data team, and, if working with economists, ask what data they expect to need for any analyses they will conduct.

### Complying with a Second Request

Don't wait to get the Second Request before you begin identifying and preparing data sets that will be relevant. In some cases, where the parties have already begun data discussions, it may be possible to engage with the Agency before the Second Request is issued to discuss scope of data production—including any modifications to the Second Request—to avoid surprises and streamline the process. Depending on the products and services at issue—and assuming Staff has taken a transparent posture in terms of identifying competitive concerns—it may be a winning strategy to assist outside counsel in reaching out to Staff with a written or verbal "proposal" for your company's data production that identifies data to be produced in response to each Specification and explains why each of the data sets, databases, or reports is relevant and comprehensive with respect to the Agency's concerns.

If the antitrust approval strategy includes written legal or economic submissions, it is equally important to understand your data and the "story" they tell (affirmative and negative) before making a data production to the Agency. As early as possible, endeavor to get your outside economists and outside counsel the same data you propose to provide to the Agency. Economists can serve as a "red team" to help anticipate questions about your company's data and may be able to suggest

affirmative advocacy pieces leveraging the data you already have with minimal additional burden on employees. This exercise can also pay dividends with respect to legal white papers, where it is critical that antitrust counsel understand how your data support your legal advocacy and how they undercut it.

### Best Practices for In-House Counsel

Any company that might engage in large or strategic M&A transactions should be prepared to dive quickly and fully into transactional, customer relationship, and financial data early in the investigation or litigation process. Waiting until after receiving a data request to start getting a handle on the company's data can put the company at significant strategic disadvantage and can create a compliance risk as agencies push for faster and more complete data productions. In order to avoid these risks, inside counsel can adopt certain ongoing best practices before a deal is ever contemplated.

Creating a list of company data systems and knowing the “five Ws and H” (who, what, where, when, why, and how) about the company's antitrust-critical data will significantly streamline the process when a data request comes in and make data more available for the business and antitrust counsel to analyze transactions earlier in the process. Companies' awareness of their data practices is often decentralized, making it difficult to respond to a data request efficiently and fully enough to allow the company to certify the response as complete with a high degree of confidence. Instead, there is often a mad scramble to centralize knowledge of a company's database systems with the help of outside counsel preparing the response to the request. But working to centralize at least some of the knowledge *before* the request ever comes in is frequently a better strategy.

For instance, in the early stages of a deal, a company may want to limit the number of people with knowledge of the proposed transaction. This is perfectly understandable but can unfortunately create a barrier to getting necessary data to outside counsel and economists for preliminary antitrust analysis because the deal team may not have enough knowledge of the company's data systems to pull key reports. But bringing in lower-level personnel who are more familiar with the data creates a risk that news of the potential deal will leak before the company is ready to announce. One potential solution is to designate a point person in the legal department and another in IT who are familiar at a high level with the company's data systems, have access to those systems, and are authorized to know about company M&A activity at the very early stages of a contemplated deal. These point people can liaise with outside counsel to provide an accurate picture of what data are available to support preliminary deal analysis and streamline access to the data both before and after an official request comes in.

In the next installment of this newsletter, the authors will take a deep dive into potential roles for inside counsel and other key company stakeholders related to the “5 Ws and H.”



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