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Getting the Deal Done in the Age of Big Data Requests – Part 2

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In the first installment of this Article¹, we discussed the typical U.S. Department of Justice and Federal Trade Commission (Antitrust Agencies or Agencies) data request; defined a few key terms like “database” and “data set;” walked through the types of data that Agencies request in the merger context; and gave some best practices for in-house counsel related to strategic use of data during the merger review process, including compliance with a Second Request.

For this installment, we will take a deeper dive into potential roles for inside counsel and other key company stakeholders. We will also suggest some best practices and frameworks for centralizing the company's database—knowledge that will assist you in understanding, structuring, and managing your company's responses to a request for data. If the goal is to minimize burden and maximize the strategic efficacy of the data that you do produce—what specific steps should you be taking, when, and why.

¹ Part 1 of this Article is available in the previous edition of The Antitrust Counselor.

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Inside Counsel as Data Intermediary

Inside counsel can facilitate effective negotiation of and response to data requests—and provide outside counsel with a means to access critical data early in the process—by acting as an intermediary between the company and those who need to know about the company’s data (e.g., outside counsel, the government). Armed with basic knowledge about key aspects of the company’s data and systems, inside counsel can direct inquiries to the right people and establish systems for organizing and communicating information to ensure a smooth data collection and response process. Inside counsel and key IT personnel can play a critical role in centralizing a company’s knowledge of its data systems by developing a working understanding of:

- **Who** at the company inputs and maintains the data (both business units and individuals);
- **What** systems the company uses to store data and what types of data are captured in what form;
- **Where** data are housed (including location on the system and physical server location);
- **When** the company started maintaining various databases and date ranges of stored data;
- **Why** certain data are tracked (and what they are used for); and
- **How** data are stored, aggregated, reported, and extracted in the ordinary course of business and how they can be exported for production to the Agency.

Of course, each company will have its own unique circumstances affecting the ideal depth and breadth of the data inquiry and how attuned inside counsel should be to database issues. But no matter the circumstances, inside counsel knowing the basics of the company’s data systems at a high level will help facilitate efficient antitrust analysis and responses to Agency data requests. Although gathering the information for such a list can be a daunting task, it is very often the necessary first step in negotiating the scope of a data request with antitrust enforcers. Having at least a basic set of answers to these questions on hand can help speed up the response time and give outside counsel an edge in negotiating a narrower scope for the data request.

Although outside counsel often has primary responsibility for the actual back-and-forth of negotiating a data request with opposing counsel or the Agencies, in-house counsel can play an invaluable role and should seek to remain actively engaged in the process. For instance, in-house counsel can seek to foster a common vocabulary for talking about the company’s data that the company and outside counsel can then employ in negotiations with the Agencies, counsel, economists, and the business. This allows all parties to communicate clearly and effectively about the company’s data. It also helps the company to establish clear internal guidelines for what is (and

what is not) within the scope of the request and avoid misunderstandings. For example, confusion can arise during Agency negotiations or internal discussions as to whether a flat file like an Excel tracker qualifies as a “database” for purposes of a data request. Therefore, it is important to have an understanding of how the company uses programs like Excel and Smartsheet, which generate flat files, to make sure everyone is on the same page about whether these flat files are responsive to a data request. The earlier on in a negotiation that outside counsel can confidently say what information does and does not exist, and how easily it can be extracted, the more likely they will be able to secure favorable modifications to extremely broad data requests resulting in a targeted and less burdensome data collection.

As the government ramps up its focus on early and robust data responses in merger investigations, it will become even more critical for inside counsel to have this type of information readily available before and after a deal is signed. In addition, a good working knowledge of the company’s database systems allows inside counsel to get key data to outside counsel and economists earlier in a deal, giving the company the ability to see issues revealed by the data and address them proactively. Under certain circumstances, early access to key data can allow outside counsel to produce targeted data to the government early enough in the process that a Second Request can be substantially narrowed before it is issued (or even avoided altogether).

Who

Perhaps the most important aspect of company data that counsel should know is who at the company is responsible for putting data into (and maintaining) the various systems that house the key categories of data described in the previous article. Counsel should have a general idea of where the company’s transactional data comes from (e.g., are they manually entered by sales personnel, are they generated as part of an electronic ordering system, etc.), who can make changes to the data and data format, and who in the business “owns” the data. It is also helpful to have the names of a few personnel on both the business and IT sides who are most familiar with the systems of record for each category of data, as each may have key knowledge about the data that the other does not.

On the business side, this can be a person who is responsible for running and creating reports that support the business unit most closely tied to the particular category of data (e.g., the sales and marketing teams for sales transactional data, operations team for production data, the marketing team for competitive intelligence and market data, etc.). Often, companies initially direct outside counsel to high-level executives for information about data systems because those executives are responsible for the business unit and oversee key reporting. But those individuals are not necessarily aware of all of the information available in the system and are instead focused on the data they find most important in their managerial and strategic roles. They also may not have detailed knowledge of which systems are used to store and manipulate which types of data. It can be more efficient to locate the people responsible for creating or manipulating the reports that work their way up to the executives, as such individuals are often familiar with not only the reports that the

business uses in the ordinary course, but also the full extent of data fields and reporting capabilities available on the front end of the data systems. In helping a company respond to a data request as outside counsel, we almost always eventually find our way to the person or people who really know the company systems inside and out, and who can run bespoke reports quickly and easily. But it can take weeks of talking to others in the business who have less visibility into the workings of the company's data systems and asking the same questions a number of times before finding those individuals with in-depth knowledge of the data systems. If inside counsel already knows the identities of, e.g., the "Salesforce guru" or the "Teradata maven," before the company is under time pressure to finalize a data response, the whole process becomes much faster and more efficient.

On the IT side, it is always a good idea to know the identity of the best IT person for a particular category of data. This often depends a great deal on how the company organizes its IT support function. The best person may be the IT person assigned to support the business unit relevant to a particular data category (e.g., the sales team) or the IT person assigned to manage the system of record for a particular data category (e.g., an SAP database administrator). Knowing the identities of the IT personnel closest to each type of data and involving them in discussions about data with outside counsel and the business helps ensure that data are being accessed and extracted in the most efficient manner. Involving relevant IT personnel also helps ensure that counsel's representations to the requesting party or government about the existence or nonexistence of a particular type of data are accurate. The IT person may have information about how the data are stored or accessed on the back end of the systems that is not available to the business. For example, a business person may say the company does not track a particular type of data at the level of granularity specified in a data request because it is not available to them in any of the reports to which they have access; the IT person with responsibility for the database in question, however, may say the opposite. The IT person may also be able to present additional technological options for searching, reporting, extracting, and aggregating key data that the business simply does not know exists. This can significantly increase the efficiency of the data collection process and minimize the time required to get the data into a format most helpful to counsel's or economists' analysis or required by the data request.

What, where, when, why, and how

The more knowledge the company has centralized about its data systems—including the systems it uses to store different types of data; in what form data are stored; the location and dates of the data; how the data are used; and how they can be pulled—the better inside counsel will be able to quickly facilitate the transfer of key information to outside counsel and economists. This information can also be essential to convincing antitrust enforcers to narrow the scope of broad database requests. To the extent possible, the company should have a list of database systems (including both storage and reporting systems) currently and recently in use, annotated to indicate which systems are the systems of record for key categories of data. Understanding the official system of record for each type of data can help avoid

having to run redundant data extracts in multiple systems or having to explain inconsistencies between the system of record and another system that stores unofficial data of a similar type.

For transactional data, often Oracle, SAP, or another enterprise resource planning (ERP) platform is the system of record (though there may be several other systems that access, manipulate, or generate key transactional data points). The company may also have a separate system of record for official financials that pulls transactional data from the main ERP database, but reflects adjustments necessary to aggregate data accurately. It is important for inside and outside counsel, economists, and the government or opposing counsel to be aware of the distinction between raw, unaudited transactional data and official financial records. Cost data may be maintained in an entirely separate system from pricing and sales data, and maintained by different business units even if stored in the same system. Thus, the company should know information about each system of record for all types of data that fall into the broader category of “transactional data.”

Bid data or win/loss data may also be kept in the ERP system or a customer relationship management (CRM) platform, such as Salesforce.com. Bid data and win/loss data may be kept in multiple databases (e.g., bid-specific offer and contract information in an RFP tracking system or ERP system, and win/loss data in a competitive intelligence database). Alternatively, there may be no “system of record” for win/loss data, as the data are maintained manually in a spreadsheet or only tracked at an aggregate level in periodic sales reporting. Because win/loss data can be critical to antitrust market and competitive analysis, any company engaged in regular M&A activity should be aware of how the company tracks wins and losses and should consider it to be a key data category.

Customer relationship data may be maintained in a CRM platform or may not be kept in a centralized database at all. Basic information, such as customer name, shipping address, and payment terms, may be maintained in an ERP system, while more substantive customer relationship information and competitive intelligence are maintained in a separate CRM system. As with win/loss data, it is important for inside counsel to understand how and where the company maintains customer relationship information.

For each database or reporting system used by the company for any of these types of information, it is helpful to have a list of available fields that the company actually uses, along with a description of what types of data are in each field and the required format for entries in the field, if any. Sometimes, this information already exists in the files of the IT personnel responsible for maintaining the system, in the form of system “data dictionaries” or “data maps,” or in the files of the business unit(s) that input the particular category of data, in the form of training manuals. Ideally, the list of database systems would also include information that answers the following questions:

- Who or what business unit/department is responsible for populating and managing each database?
- Who in IT is responsible for maintaining and administering the database?
- Who can enter and edit information in each database and what technological restrictions on editing data exist?
- What types of data retention and storage protocols are used for the database?
- Where are the data actually stored (physical server location), and by whom (company, third-party server, in the cloud)?
- What reports does each key database produce? Who receives those reports? What do they do with the reports?
- How long has the system been in use? What is the date range of data maintained in the system?
- If the system was put in place only recently, what was the legacy system for the category of data? Was data ported over from the old system to the new system? What is the status of the company's ability to access legacy data?
- Is the company able to extract the data directly, or does a third party need to be involved?

Even having a partial or high-level understanding of the answers to these questions, and periodically updating that understanding, can help the company provide quick and accurate answers about the company's data systems to outside counsel and the government or opposing counsel. Inside counsel do not need to become company data experts in order to ensure that the process of negotiating and responding to a data request runs smoothly. But inside counsel can help dramatically improve the speed, accuracy, and efficacy of the company's responses to a data request by knowing who the key IT and business personnel are that can answer the what, why, when, where, and how questions about the company's data and database systems, and by helping establish processes among those key personnel to track important information about company data.

In future installments, we will explore some of the specific challenges that arise in finding, collecting, and producing certain types of data that are increasingly becoming more important to competition analysis. We will also explore ways to address those challenges while avoiding undue cost and burden. Readers are invited to submit feedback to the editors of this publication on data-related issues they would like to read more about.



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If you are interested in writing an article for the next edition of *The Antitrust Counselor*, please email Mary.Lehner@freshfields.com or seth.wiener@arnoldporter.com for more details.

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