



FTC Eases Burden of Merger Review Process

Any company responding to a Request for Additional Information (“Second Request”) in connection with a transaction knows the process is extremely burdensome, expensive, and time-consuming—taking two to three months or longer just to respond to the agencies’ document and data requests. Full compliance with a Second Request typically involves searching the hard copy and electronic files of an average of 100 employees and providing large volumes of data. The prevalence of electronic documents has exacerbated the difficulties of the process. In a step to ease some of that burden, Federal Trade Commission (“FTC”) Chairman Deborah Platt Majoras last week announced reforms to the agency’s merger review process.¹ The reforms apply to all HSR filings submitted on or after February 17, 2006.

While the effectiveness of these measures will depend on the actual implementation of these reforms by the staff, we believe they are an encouraging step in the right direction. Indeed, they incorporate many of the measures we have been urging the Commission and the Department of Justice to adopt. We understand that the DOJ is similarly working on its own set of reforms, but no timetable has been set for their release.

The key reforms are described below.

CUSTODIAN PRESUMPTION

The FTC will not require a party to search the files of more than 35 custodians (plus their administrative staff’s and central files) if the party agrees to:

- 1) provide staff with the organization charts specified in the second request or provide equivalent materials;
- 2) make at least one of its employees available to describe the responsibilities of those employees of the party who have knowledge about the (a) transaction, (b) relevant market or services, and (c) other issues identified in the second request;

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Washington, DC
+1 202.942.5000

New York
+1 212.715.1000

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 517 6600

Los Angeles
+1 213.243.4000

San Francisco
+1 415.356.3099

Northern Virginia
+1 703.720.7000

Denver
+1 303.863.1000

This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

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¹ The entire announcement is attached and can be found at www.ftc.gov/opa/2006/02/merger_process.htm.

- 3) provide (within seven business days) brief written descriptions of the responsibilities of a limited number of employees reasonably designated by staff after the initial meeting;
- 4) make available at least one employee who is knowledgeable about how the party collects, maintains, and uses the types of data specified in the second request, and the databases and other software used by the party to store and analyze the data;
- 5) produce the materials responsive to the second request 30 days before formally certifying substantial compliance with the second request or agree to a mutually acceptable “rolling” production or other form of timing agreement; and
- 6) agree to propose a joint scheduling order with at least a 60-day discovery period if the FTC challenges the transaction in an adjudicative forum.

Once the party has provided staff with the information that is reasonably necessary to designate the search group, staff will promptly notify the party of the identities of the 35 or fewer employees.² The presumption that only 35 file-owners will be searched can be overcome only by a decision by the Director of the Bureau of Competition, after a meeting with the parties, that additional individuals’ files must be searched.

While the procedure sets forth a number of conditions, in practice we have typically recommended many of the very things now required for a party to take advantage of the process reforms: provision of organization charts, on-going discussions about individuals’ responsibilities, and the provision of additional time to consider the matter. Thus, we believe that in virtually all cases it will make sense for companies to avail themselves of the process to limit the search to 35 individuals.

TWO-YEAR RELEVANT TIME PERIOD

The presumptive “relevant time period” for which documents must be produced has been reduced from a three-year period to a two-year period.³ The two-year relevant time period presumption does not, however, apply to requests for data. Further, staff may enlarge the relevant time period when it is reasonably likely that a longer relevant time period is necessary for the FTC to analyze a transaction’s competitive effects.

² The files of an employee includes all hard copy and electronic files of all persons responsible for maintaining the files of the employee, including the employee’s personal assistants, secretaries or persons with the same or similar responsibilities. The restriction on the number of employees in a party’s search group, however, does not apply to requests for information contained in “corporate” or “central” files.

EMPIRICAL DATA

Under the new procedures, staff and the party are to engage in early and ongoing communications regarding the types and volume of data that are necessary to analyze a transaction. First, staff will inform the party about the competitive effects theories under consideration and the types of empirical analyses that may prove useful. In addition, the party is strongly encouraged to provide staff with the following: (1) a written description of how the party collects, maintains, and uses the types of data that are responsive to the second request; (2) a proposal to limit the data request and data samples to support the proposal; and (3) access to the employees of the party who are knowledgeable about how the party collects, maintains and uses the types of data specified in the second request. A party will be entitled to meet or confer with a Director or a Deputy Director from the Bureau of

³ They have also modified the date through which documents must be produced. The new “relevant time period” is two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party certified that it has substantially complied with the second request. When the 35-custodian process is used and the parties must agree to 30 day advance production period, the presumptive relevant time period will be from two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party produces the materials responsive to the second request. This helps avoid the last-minute scramble that ensued when documents had to be produced if they existed 14 days before the parties completed their response.

Competition and from the Bureau of Economics if the party believes that staff has not sufficiently limited the data requests.

There is no precise process reform envisioned in the area of data requests, and in many ways the “reforms” simply mirror “best practice” elements that the Commission’s Bureau of Economics has announced before. That being said, the reinforcement of the notion that the parties and the staff should begin a dialogue early in the process regarding competitive theories and how data might be used to test them is certainly welcome.

PARTIAL PRIVILEGE LOG

The FTC has modified the instruction found in the Model Second Request that requires a party to produce a log of all responsive documents and information withheld pursuant to a claim of privilege. The new Second Request instructions allow a party to produce only a partial privilege log containing the name of the custodian from whom responsive documents are withheld and the total number of documents being withheld for all of the custodians in the party’s search group. However, within five business days after receipt of the partial log, staff may identify in writing five individuals or ten percent of the total number of custodians searched, whichever is greater, for which the party will be required to produce a complete log containing authors, addresses, recipients, date

and description of the document in order to certify compliance with the second request. The FTC also retains the right to require a party to produce a complete log for all custodians in appropriate circumstances. This process will greatly reduce the work that must be done before certifying substantial compliance with the second request and thereby reduce the time it takes companies to respond to second requests.

OTHER REFORMS

Several additional reforms, although not as significant as those described above, will also help reduce the burden of Second Request compliance. These include:

- a process by which the parties can discuss with staff the use of de-duplication software or services when producing materials in response to a second request;
- a requirement that only two particular days of back-up tapes need be saved;
- a limitation on the types of agents and representatives that the party is required to identify;
- a requirement that staff carefully consider the scope of information about each of the parties’ facilities that it really needs; and
- an exclusion from the scope of search of categories of documents that are unlikely to further the FTC’s antitrust analysis—in particular, tax and other types of

regulatory documents that do not concern the potential competitive impact of the transaction.

In all, we are encouraged by these process reforms and are hopeful they will make a real difference in the burden of responding to second requests.

If you would like additional information, please contact your Arnold & Porter attorney or:

Bill Baer
202.942.5936
William.Baer@aporter.com

Deborah Feinstein
202.942.5015
Deborah.Feinstein@aporter.com

Jonathan Gleklen
202.942.5454
Jonathan.Gleklen@aporter.com