



DOJ STREAMLINES MERGER REVIEW PROCESS

Following on the FTC's reform to the merger review process announced early last year¹, the Antitrust Division of the Department of Justice (the "Antitrust Division") has amended its 2001 Merger Review Process Initiative to further streamline the process. The 2001 Merger Review Process Initiative was aimed at ensuring that Antitrust Division staff identified the critical legal, factual and economic issues quickly in order to facilitate a more efficient and focused investigation. The Antitrust Division believes the Initiative has been a success—reducing the average merger investigation time from 93 days to 57 days (including investigations that did not lead to a Second Request) and reducing the average duration of Second Request investigations to 134 days, nearly a 50% reduction.

The amendments just announced are aimed at significantly reducing the duration and cost of merger investigations, primarily by reducing the number of file-owners that need to be searched from the typical hundred or more to a targeted list of 30 employees—in return for certain concessions by the parties.

We believe that recognition of the burden of Second Request compliance is an important step for the Antitrust Division. These reforms incorporate many of the measures we had been urging the FTC and the Antitrust Division to adopt. The effectiveness of these measures will, however, depend on the actual implementation of these reforms by the staff. We have some concerns that the open-endedness of the concessions the parties must give to take advantage of some of these reforms will undermine the Division's laudable goals.

The key reforms are described below.

CUSTODIAN PRESUMPTION

Except in particularly complex matters, parties may avail themselves of a

¹ See February 2006 Client Advisory: FTC Eases Burden of Merger Review Process; at [http://www.arnoldporter.com/pubs/files/Arnold&PorterAdvisory-FTCEasesBurdenofMergerReviewProcess\(0206\).pdf](http://www.arnoldporter.com/pubs/files/Arnold&PorterAdvisory-FTCEasesBurdenofMergerReviewProcess(0206).pdf).

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“Process & Timing Agreement” option. This option would provide that parties that meet the requirements need search no more than 30 individuals for documents responsive to the Second Request unless the Section Chief approved a number higher than 30.² The parties will be given an opportunity to meet with the Section Chief before he approves a number higher than 30 and thereafter will have an opportunity to discuss the decision to authorize a broader search with the responsible Deputy Assistant Attorney General. It is difficult to determine how well this process will work in practice. There are no criteria set for when a Section Chief may approve a broader search or standards established as to when the Deputy may overrule such a decision. In order to qualify, the parties must agree to do the following:

- Voluntarily produce key materials of the sort often produced during the first 30 days of the waiting period (such as business plans and top customer lists);

² Staff would be allowed to add a total of five custodians to each party’s search list with the approval of the appropriate Section Chief, but the addition would not affect the date on which the parties are deemed to be in substantial compliance with the Second Request provided that the parties produced the responsive documents within 15 business days of any such request. In addition, if parties relied on documents from an individual not on the search list, they will be required to conduct a thorough search of that individual’s files.

- Provide staff with organization charts and make available personnel who can explain the organizational structure and employees’ job responsibilities;
- Make available IT personnel to explain the electronic data and storage systems;
- Make available personnel who can explain databases and other sorts of data that may contain information responsive to the Second Request;
- Enter into a merger review Process & Timing Agreement.

The Process & Timing Agreement may include, among other things:

- Commitments for rolling production of the Second Request response;
- Dates for depositions of the parties’ executives (which may be conditioned on receipt of certain documents in advance);
- Dates for the *mutual* exchange of economic data³;
- Dates for substantive meetings of economists;
- Dates by which the parties will submit white papers, empirical analyses and the like;

³ This suggests that the Antitrust Division will share with the parties their economic analysis, which would be a desirable step towards ensuring openness in the investigation process.

- Dates for staff to make recommendations and dates for parties to meet with senior staff;
- Date before which the parties commit they will not close the transaction;
- Provisions to provide the Division with sufficient time for post-complaint discovery.

Most of the steps required to qualify for the 30 file-owner option are similar to steps we advise clients to take today in responding to Second Requests and are similar to those required by the FTC if parties wish to take advantage of the FTC’s presumption that only 35 custodians need to be searched.

The requirement to enter into a Process & Timing Agreement *at the time of issuance of the Second Request* is, however, somewhat unusual. It is at odds with current practice of most parties, which is to enter into such an agreement further along in the investigation when the issues and likely timing may be more clear.

The DOJ requirement to enter into a Process & Timing Agreement also differs dramatically from the FTC’s requirement that the parties simply delay certification of compliance with the Second Request by 30 days and 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. Because parties in most Second Request investigations give the FTC an additional 30 days to consider the transaction, we believe that in virtually all cases it makes sense for companies to avail themselves of the FTC process to limit the search to 35 individuals.

It is less clear just how well the new Antitrust Division procedure will work. Entering into a timing agreement of the type required by the Antitrust Division can be complicated and time-consuming. We are concerned that if parties cannot quickly enter into an agreement that gives them the certainty of the 30 file-owner presumption that they will be forced into full compliance simply because they cannot enter into a suitable Process & Timing Agreement. We believe that whether it makes sense for parties to avail themselves of the Antitrust Division's Merger Review Process Initiative will depend on the facts of the merger and how the Antitrust Division staff implements the Initiative in practice. If the company is small and not more than 30 individuals would likely be searched in any event, it may not be worth entering into a Process & Timing Agreement for a minor reduction in the scope of search. If the parties attempt to enter into a Process & Timing Agreement but make little progress towards something they view as reasonable, they may not want to take advantage

of the reforms. But DOJ often insists on some sort of timing agreement even today before it will entertain substantive discussions, so such an agreement may be inevitable; in that case, the parties may as well attempt to get the benefit of reducing the burden of the Second Request.

SECOND REQUEST MODIFICATIONS

The Division's reforms include revisions to the "Model Second Request." This new Model incorporates limitations staff has already been using. This new Model will be the basis for Second Requests even where parties do not take advantage of the Process & Timing Agreement option. The more significant modifications are:

- Two-year relevant time period. The presumption will be that only two years of documents and only three years of data will normally be required. (The document time period is the same as for the FTC; the FTC has no presumption on the time period for data requests.)
- Second sweep for responsive documents. The new Model Second Request eliminates the requirement of a "second sweep" for responsive documents, except for documents relating to the transaction and efficiencies (for which all documents created more than 30 days prior to compliance must be produced). While this

modification will reduce the extent to which the file search must be updated in some cases, if the Second Request is completed more than 90 calendar days after issuance, the entire second request will be deemed continuing in nature, requiring the production of all responsive documents created more than 30 days prior to certification. This latter requirement puts a significant premium on responding to a Second Request on an expedited timetable. (Note that the FTC does not require compliance within 90 days to take advantage of its limitation on the "second sweep" requirement.)

- Back-Up Tapes: Division staff may limit the back-up tapes that must be preserved in lieu of searching all of them. (Note that the FTC has indicated that only two back-up tapes need be saved, and they need not be searched unless there is an indication that documents cannot otherwise be found in the parties' files.)
- Production of Electronic Documents: The Model Second Request now requires that electronic documents be produced in electronic form.
- Privilege Logs: Documents solely between counsel (including in-house counsel) may be omitted

from the log. (Note that the FTC requires only that a party produce a log containing the name of the file owner and the number of documents withheld from which it may ask for a partial privilege log.)

In all, we are encouraged by the Antitrust Division's recognition of the burdens of the Second Request process, although the Division's reforms remain somewhat open-ended and thus may depend too critically on how an individual staff lawyer chooses to implement them. Close supervision by Section Chiefs and the Antitrust Division's Front Office will be needed to ensure that a consistent approach is taken. We believe that these reforms give us an opportunity to work with you and the Division to reduce the time and burden of Second Requests.

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