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Antitrust Update:

FTC Bureau of Competition Implements New Guidelines for Merger Investigations

On December 12, 2002, the Federal Trade Commission's Bureau of Competition announced the implementation of new guidelines for future merger investigations. (The guidelines appear at <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>.) The guidelines, which relate mostly to FTC Second Requests, emanate from Bureau-sponsored public workshops on best practices in merger review held over the last year. They are a positive first step towards improving the Second Request process, which has been long overdue for reform, but there is substantial room for more work. Indeed, the Bureau has stated that the guidelines are part of an ongoing process to improve the merger review process based on additional study, experience, and public feedback.

The New Guidelines

1. **Second Request Policy Changes and Clarifications.** The guidelines change or clarify Bureau policy concerning several recurring issues in the Second Request process:

- **Inadvertent Production of Privileged Documents.** The Bureau now has adopted a uniform policy of not asserting waiver of privilege or work product protection for documents that parties inadvertently produce, provided they have taken reasonable steps to avoid inadvertent production. Instead, the Bureau will return inadvertently produced materials as soon as their privileged or protected status becomes apparent. The Bureau emphasized, however, that parties must continue to be vigilant in taking measures to avoid inadvertent production to benefit from the Bureau's policy not to assert waiver.
- **Reduced Burden in Categorizing Documents and Preparing Privilege Logs.** The Bureau will no longer require that parties responding to a Second Request categorize documents according to the Second Request's specifications and will allow them to produce documents in the form they are kept in the ordinary course of business. This change is consistent with both the Justice Department Antitrust

Division's practice and the Federal Rules of Civil Procedure. Additionally, the Bureau has made minor changes to reduce somewhat the burden of preparing privilege logs in connection with Second Request responses.

- **Limited Need for Updated Searches.** The Bureau previously required parties to update their document productions by returning to individuals whose files had previously been searched and collecting any new documents that had been created or received since the initial search. Recognizing the burden this places on parties, the Bureau will now require updated searches in more limited circumstances and for fewer individuals.
- **Publication of Administrative Appeals.** The Bureau's administrative process allows a party to appeal to the FTC's General Counsel staff decisions concerning Second Request issues, such as proposed modifications. Under the new guidelines, the General Counsel's office will endeavor to release publicly opinions on appeals (so long as consistent with Hart-Scott-Rodino confidentiality requirements). These materials may provide helpful guidance for parties in construing Second Requests and seeking modifications and begin to build a body of published precedent to bring more predictability, transparency, and consistency to the Second Request process.

2. Production of Electronic Documents. The guidelines devote substantial discussion to issues concerning production of electronic documents, which have played a substantial role in the increasing burden associated with Second Requests in recent years. The guidelines provide little definitive guidance on these issues; rather, the Bureau offers an array of possible approaches. This is an area where the Bureau may develop more specific rules and policies as technology evolves and it gains more experience with production of electronic documents.

- **Form of Production.** The Bureau has indicated a greater willingness to allow merging parties to produce documents in electronic, rather than paper, form. Producing documents in electronic form can be faster and cheaper, partly because it eliminates the need to process multiple boxes of hardcopy documents. The Bureau has outlined several options for production formats that it will accept in particular cases, subject to staff agreement. When parties produce documents in electronic form, they will not be required to supply printed versions of identical documents.
- **Use of Term Searches to Identify Relevant Documents.** The Bureau will consider allowing parties to identify responsive electronic documents through the use of search terms, rather than manually reviewing each document. Given the explosion in electronic documents (which often outnumber hardcopy documents), more frequent use of search terms potentially could reduce significantly the burden and expense associated with some Second Request productions. Whether this potential is realized will depend largely on whether the FTC staff works effectively with parties to establish procedures and search terms that in fact substantially limit the number of responsive documents and refrains from requiring burdensome supplemental productions.

- **Search of Backup Tapes.** The Bureau will less frequently require in its Second Requests that parties search backup tapes of e-mail and other electronic documents. Although this change largely formalizes the current Bureau practice of rarely requiring parties to restore and search documents stored on electronic back-up tapes or narrowly limiting the scope of any such requirement, this formal policy announcement is welcome. Searches of backup tapes are often extraordinarily burdensome and lead to little useful information.

3. Availability of Transcripts. The Bureau will now, absent extraordinary circumstances, allow witnesses to obtain a transcript of testimony given to the Bureau at investigational hearings. This is a notable reform. The Bureau formerly often denied transcripts to witnesses. This change brings the Bureau's policy in alignment with that of the Antitrust Division.

Impact of the Guidelines

The guidelines provide some helpful concrete improvements and bring more clarity and transparency to the merger review process. Over the long term, the guidelines may be of most significance because they indicate that the Bureau will seek creative and flexible solutions to lessening the burden, time, and expense associated with Second Request compliance. The Second Request process is long overdue for reform; it has increasingly placed huge burdens and expense on merging parties. There is great room for further improvements and innovation as the Bureau continues its examination of the merger review process and learns from additional experience, especially with respect to production of electronic documents.

In practice, each Second Request raises distinct issues, and it is impossible for generalized rules to govern all aspects of the process. Whether these guidelines and subsequent Bureau initiatives will substantially decrease the burden and expense associated with Second Requests will therefore be determined largely by how the Bureau applies the guidelines's laudable spirit of flexibility and pragmatism in particular cases.

As the guidelines emphasize, merging parties are well advised to seek prompt and intensive dialogue with FTC staff about possible Second Request modifications that will reduce the burden on the parties, while still providing the Commission with the information it needs. It is often desirable to begin planning for and gathering information necessary for modification discussions in anticipation of a Second Request, so that the parties are ready for negotiations immediately after the Second Request issues. Parties generally are able to obtain the most valuable and timely modifications by approaching the staff with proposed modifications -- such as limitations on personnel whose files must be searched or specifications that must be answered -- backed by specific facts showing that the proposals are consistent with the staff's need for information. To support proposed modifications, parties should be prepared to discuss in detail, among other things, their organizational structure, roles and responsibilities of relevant employees, methods of storing information, and patterns of information flow throughout the company.

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If you have any questions about the Competition Bureau's new guidelines for merger investigations or any other issues concerning US or foreign antitrust/competition law, please contact us at (202) 663-6000.

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