

# Antitrust and Competition

## FTC Announces New Guidelines for Second Requests

The Federal Trade Commission (FTC) has announced new guidelines (Guidelines) for its staff to follow during “second requests” issued under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The long-promised Guidelines are intended to “lower the costs of merger investigations for the FTC and the parties by reducing the volume of materials that parties must produce to respond to a second request” while enabling the FTC staff to “identify rapidly the relevant substantive issues and focus more quickly on the relevant documents and data.”

Second requests are part of the process specified by the HSR Act for the review of certain large transactions. For transactions that are reportable under the Act (generally valued over \$56.7 million), the parties must file a notice with the Department of Justice Antitrust Division (DOJ) and the FTC. The filing triggers an initial 30-day waiting period during which one of the two agencies investigates the competitive consequences of the transaction. If at the end of the 30-day period the investigating agency determines that there may be reason to believe the transaction could cause harm to competition, it may issue a second request—essentially a massive subpoena for documents and data—which prevents the parties from closing the transaction until 30 days after they have substantially complied with that request.

Second requests are rare; they are issued in less than five percent of all transactions reported under the HSR Act. For the parties to transactions that receive second requests, however, the process can be a traumatic and burdensome ordeal. It is not unusual for parties to spend months producing hundreds of thousands of pages of documents along with gigabytes of data in the course of complying with a second request, often at a cost of well over \$1 million.

Particularly since the advent of email and electronic document storage, there have been growing complaints about the cost, both monetary and otherwise, of complying with second requests. How to tailor to present realities a second request process that was developed at a much

different time has been a pervasive issue. Further, some of the demands in second requests were clearly aimed to support post-challenge litigation, even though far fewer than 10 percent of second requests result in a litigated court challenge. The agencies have also become disenchanted with the process because they often find themselves flooded with huge volumes of electronic documents, particularly email, that were difficult to manage and added little, if anything, to their investigation. On the other hand, the agencies also need to be sure that they have made every possible effort to investigate thoroughly the competitive issues raised by the transaction and have obtained, or will be able to obtain in sufficient time, the information necessary to prove their allegations in court if they challenge the deal.

The FTC’s new Guidelines clearly reflect these competing concerns; the agency focuses on reducing the volume of materials it receives and directing its efforts to those sources most likely to have relevant information. It also shows a willingness to defer some discovery that used to be part of the second request process, like a detailed privilege log, to a post-challenge pre-trial phase. To be assured that it will, in fact, be able to get materials necessary for trial should it need them, the FTC has tied some of its reforms to the willingness of the parties to commit to timing agreements that would assure the FTC of receiving necessary evidence in a sufficiently lengthy pre-trial period.

Specifically, the Guidelines establish the following procedures for FTC second requests:

**First**, a party normally will not be required to search the files of more than 35 employees to respond to a second request if that party agrees to: (a) provide the FTC with organization charts and, upon request, written descriptions of its employees’ responsibilities; (b) make one or more of its employees available for an **in person** meeting and later follow-up calls to discuss the transaction, the relevant products and the company’s data; (c) wait at least 60 days after substantially complying with the second request before closing the transaction, or utilize

a “rolling” production schedule acceptable to the FTC staff; and (d) a discovery schedule of at least 60 days if the FTC challenges the transaction in an adjudicative forum.

**Second**, a party will normally not be required to search for and produce documents generated more than two years before the FTC issued the Second Request. In the past, the FTC’s second requests usually required the parties to produce documents up to three years old.

**Third**, to control the cost and complexity of data productions, the staff will inform the party about the competitive effects theories under consideration and the types of empirical analysis that may prove useful in the investigation. If the party believes that the staff’s request for data is too broad, it will be entitled to meet with a Director or a Deputy Director of the Bureau of Competition and of the Bureau of Economics.

**Fourth**, normally a party will be required to produce documents contained on backup tapes only when responsive documents are not available through more accessible sources. When parties are required to produce such documents, the scope of backup tapes they must review will be substantially limited.

**Fifth**, a party will be able to substantially comply with a second request by initially producing a “partial privilege log” for all of the custodians that were searched, in combination with a complete log for a subset (usually five) of those custodians.

The FTC’s Second Request Guidelines are a commendable attempt to address formally some of the components of the second request process that have contributed most heavily to

the burdens of FTC reviews. It is important to note, however, that nothing in these Guidelines is truly new; in many ways the FTC’s Second Request Guidelines formalize practices that much of the FTC staff has already accepted in recent years for purposes of negotiating modifications to second requests. Thus, although the increased transparency of the FTC is welcome, it is not clear whether the new procedures will significantly differ from existing practice. Because each investigation is unique, it will continue to be imperative that parties work cooperatively with the FTC staff on ways to limit the burden of a particular second request while still providing the staff what it needs to review the transaction thoroughly. There are also aspects of the process that create some uncertainty: for example, will the timing agreements entered into be enforceable in federal court when the FTC seeks an order blocking a transaction? Will the time and effort necessary to prepare a challenge to an agency data request really justify making that challenge in most cases (an existing appeals process on second request burden has been seldom used)? How will the relief on searching of backup tapes relate to increasingly common corporate document retention policies that result in frequent over-writing?

Finally, it is interesting and important to note that the DOJ did not join the FTC in issuing these guidelines and it is expected that the DOJ will issue its own guidelines shortly. It is thus likely that the second request process could vary materially depending on the investigating agency.

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