

Best Practices for Merger Investigations Bureau of Competition - August 2015

Since the Commission published the Reforms to the Merger Review Process in 2006,¹ several aspects of the merger review process have evolved. First, we learned that parties rarely invoked the Merger Process Reforms. Second, firms now rely more extensively on the “withdraw and refile” process in connection with the initial review period of Hart-Scott-Rodino filings. Firms have also become much more sophisticated in the use of electronic discovery and search techniques. These developments and others led the Bureau of Competition to review the Bureau’s merger investigation practices. Our review identified practices that promote efficiency and balance the burden of merger investigations with the need for thoroughness. Based on this review, the following guidance provides best practice recommendations for improving the merger review process.

These guidelines address early voluntary submission of information, withdraws and refiles, timing agreements, negotiating Second Requests, and common presumptions.

1. Early Voluntary Submission of Information

Providing information to staff early is a common best practice. Parties can produce information in addition to the HSR filing during the initial waiting period or even before the filing is made. This information may resolve staff’s questions about the transaction during the investigation’s preliminary phase, which may obviate the need for a Second Request. Or, the early submission of key information may allow staff to tailor the Second Request and thus reduce the burden of production.

Certain key information is always helpful and staff will almost certainly request it. Preparing and gathering the following documents and information in anticipation of an HSR filing or of a voluntary access letter may expedite the merger review process.

- a. Strategic and marketing plans for the previous two years. On a case-by-case basis, staff may request these plans further back than two years in order to capture a pivotal business development or historic event. Often this is to identify natural experiments to investigate how competition works in the industry.
- b. A list of all currently manufactured, marketed, or sold products and products in development.
- c. A list of top 10 customers (and suppliers if relevant) with contact information for customers of overlapping products.
- d. A list of top competitors with contact information for competitors who provide overlapping products.

¹ DEBORAH PLATT MAJORAS, CHAIRMAN, FEDERAL TRADE COMMISSION, REFORMS TO THE MERGER REVIEW PROCESS (2006), *available at* <https://www.ftc.gov/sites/default/files/attachments/mergers/mergerreviewprocess.pdf>.

- e. Market share information for overlapping products.
- f. A list of the types of reports the company prepares on a regular basis.
- g. Information you believe will assist staff in assessing the proposed merger and the markets involved.

Beyond these materials, in certain circumstances, it may be beneficial for parties to provide some additional documents in the initial waiting period, including:

- a. An organization chart. If your client does not have one, this may be a document you want to prepare. An organization chart helps staff identify potential document custodians or candidates for interviews.
- b. A data map. Data maps can be helpful in identifying the types of data your client creates and stores and the relationships between the client's different data sets.

2. Effective Use of Withdraw and Refile

At times, near the end of an initial review period, open issues may remain that could be resolved with relative ease with certain information or a bit more time. In certain cases, merging parties give staff more time by withdraw their HSR filing and refile. This procedure resets the HSR timing provisions without the need to pay an additional filing fee.² Historically, additional time during the initial HSR waiting period appears to reduce the likelihood that a Second Request will issue and increases the likelihood that any Second Request issued will be narrower in scope. Of course, a withdraw and refile will not be effective in avoiding a Second Request in an investigation that requires substantial review. For more information on the withdraw and refile process, read our blog post, [Running Time](#), and a [tip sheet](#) put together by the Premerger Notification Office.

3. Negotiating the Second Request

Staff will negotiate a Second Request in good faith through meaningful discussions “to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought.”³ Second Request negotiations have proven to be important in reducing the burden for both sides while still allowing staff to obtain the necessary information to evaluate a proposed transaction. Under the FTC Rules of Practice § 2.20, after a Second Request is issued, staff should initiate a discussion addressing the competitive issues raised by the

² See 16 C.F.R. § 803.12. Written notice is required to initiate a withdraw and refile. Withdraw and refile is available only if the proposed transaction has not changed and the refile notice is received within two business days after withdrawal. Only the acquiring person (A-side) can withdraw and refile to restart the HSR timing. The acquired company (B-side) is not required to update its filing. After one withdraw/refile, another withdraw/refile would require a new filing fee (and would not have to be refiled within two days.) Thereafter, another withdraw/refile would be available within two days without a filing fee.

³ FTC Rules of Practice 16 C.F.R. § 2.4.

transaction and the most effective way to obtain information and documents relating to the competitive issues raised. The most productive meetings are those in which staff clearly communicates the competitive issues raised by the transaction and the information that will be required to explore the issues.

The merging parties can contribute to these negotiations best by explaining the organizational and decision-making structure of the parties' businesses as well as where, how, and by whom relevant information is kept. Employees or counsel familiar with company's operations, data, storage, and document retention policies should participate in the meeting. Parties can further maximize the productivity of the meeting by providing organizational charts in advance and being prepared to discuss the duties and responsibilities of the individuals with relevant documents or information. Understanding the location of pertinent information may allow staff to narrow document custodian lists. Equally important in the most successful meetings is conveying to staff the structure and content of central files, corporate files, and databases. A search of these files will be required regardless of the particular custodians excluded from further searches. Negotiating the Second Request rarely involved a one-time event, and subsequent meetings are common. Our review of previous investigations suggests that an early, substantive discussion on issues, custodians, data, and documents leads to less costly, more focused Second Requests, which in turn leads to faster compliance and review.

Document Custodians

The appropriate number of document custodians to search in an investigation varies widely by transaction and party. Accordingly, we have not imposed an absolute limit on the number of custodians a party must search in response to a Second Request. The Commission's 2006 Merger Process Reforms established a presumptive limit of 35 custodians if the parties met certain conditions. Although this presumption was rarely triggered, the retrospective survey of merger investigations revealed that since the Reforms were promulgated, most merging parties who submitted responses to the Second Request searched fewer than 35 custodians.

Modifications

The Second Request modification process is iterative and can speed up or slow down the entire merger review. Under most circumstances you can expect staff to respond to a request for modification within two business days. Many times the response will be a substantive answer, but in some instances, the response may be that staff is still considering the modification, needs additional information to respond to your request, or is consulting with the Bureau of Economics. While final modifications will always require a formal letter from staff, parties may expedite the process by emailing staff draft modification language. Finally, modification letters will no longer require the signature of division management.

Search Terms

Parties increasingly use search terms to comply with a Second Request. The company is in the best position to know the types of documents its employees generate and the terminology

used in its particular industry. Staff will not agree that a particular list of search terms is sufficient for the company to certify compliance with a Second Request.

Companies may provide a list of search terms in advance of producing documents and staff may comment on the proposed search terms. Based upon our review of previous merger investigations, we believe that disclosing the search terms to staff in advance of a document production improves the likelihood that the search will be sufficiently comprehensive. Nevertheless, it is ultimately the company's responsibility to gather and produce the necessary documents and information to comply with the Second Request, regardless of the method the company uses to gather and review the documents and information produced.

Quick Look

If staff's anticompetitive theory rests upon a specific issue, or the Second Request includes multiple relevant product markets, a "quick look" on that issue or a subset of relevant products may be sufficient to resolve the anticompetitive concerns without the parties' full compliance with the Second Requests. In a quick look, the parties agree to produce a limited set of core documents and information identified by staff. In exchange, staff agrees to analyze the materials in a short period and then advise the parties of the outcome of the quick look.

The 2006 Merger Process Reforms contemplated formalized, written agreements between staff and the parties to narrow issues and identify information to be submitted by the parties to resolve those issues. The internal review suggests that formal quick look agreements are rare and protracted negotiations of such agreements may distract from the substantive merger investigation. Instead, in many cases, parties and staff together may identify key custodians and/or specifications to be prioritized in the search and production of materials responsive to the Second Request, and engage in substantive discussions about the material produced.

Timing Agreement

Parties should expect staff to request a timing agreement in cases that require substantial review. Timing agreement discussions should begin as early as possible, and may be initiated by staff or the parties, who should work together to form an overall investigational plan. The amount of time staff requires to complete their investigation often depends on the size and scope of the investigation, as well as the parties' demands. For example, a merger investigation involving a large number of product and geographic markets may require more staff time than a case with a more limited scope. Similarly, if parties ask staff to engage in settlement discussions, focus on peripheral markets, review and discuss white papers, or otherwise create staff resource constraints, staff likely will require additional time to complete the investigation.

We hope these guidelines will assist parties in reducing the burden of the merger review process. Although it is most expeditious to resolve issues at the staff level when possible, if at any point in the process significant issues are not being addressed or resolved, the parties should contact Division management and/or the Bureau Director's office.