

Empirical Analysis of 2006 Merger Process Reforms Bureau of Competition - August 2015

Second Requests are essential to the merger review process as they provide the FTC access to business documents and data from the merging parties that discuss how they compete in the product and geographic markets impacted by the merger. This information helps explain how the industry works, and how key executives analyze, respond, and react to their competitors and customers. By reviewing this information, along with other evidence gained during the investigation, the agency can more effectively assess whether a proposed transaction is likely to result in anticompetitive effects and, ultimately, whether to challenge the transaction.

While Second Requests provide vital information to the agency, they also impose significant costs and delays on the merging parties. Companies' increased use of electronic means of capturing and storing information, as well as the agency's need for detailed data necessary to undertake modern economic analysis, can add to those costs and delays. With all of this in mind, former Chairman Majoras requested a study, and ultimately announced specific changes to the FTC's review process in her February 16, 2006 Reforms to the Merger Review Process.¹ The 2006 Reforms established presumptions that the FTC would: (1) limit the number of employees required to provide information in response to a Second Request, provided the party complies with specified conditions; (2) reduce the time period for which a party must provide documents in response to the Second Request; (3) allow a party to preserve far fewer backup tapes and produce documents on those tapes only when responsive documents are not available through more accessible sources; and (4) significantly reduce the amount of information parties must submit regarding documents they consider to be privileged. In her announcement, Chairman Majoras noted that the 2006 Reforms were not the conclusion of the Commission's work in addressing the merger review process at the Commission or concerns about Second Requests.

Since then, the volume of documents and data companies keep in the ordinary course of business has continued to grow. As such, the Commission has been collecting increasing amounts of information from merging parties. Despite the opportunity presented in the 2006 Reforms to limit the amount of information produced, it appeared that few companies took advantage of the opportunity. To understand what has occurred on a systematic level, the Bureau of Competition assembled a Merger Process Reform Task Force in 2014 to examine how Second Requests have been crafted, and how parties have responded to them since the 2006

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>.

Reforms. The Task Force examined whether and how FTC staff and parties addressed the concerns expressed in the Reforms in actual investigations.

As part of this review, we designed an empirical survey of merger investigations at the FTC from fiscal year 2006 (Fall 2005) to fiscal year 2013. We generated a list of investigations from the agency's internal operations database. We developed a written questionnaire for FTC staff requesting details on the timing and outcome of the investigation, size of transaction, size of overlap, and the scope and nature of the response, among other details. We sent the questionnaire to the shop responsible for each investigation. Ultimately, we received responses for 162 merger investigations in which a Second Request issued, a consent agreement providing remedies was signed, and/or the FTC filed for a preliminary injunction in District Court. By year, the Task Force was able to locate complete information about the parties' compliance for the following number of cases:

Fiscal Year	Number of Cases Reviewed
2006	27
2007	20
2008	17
2009	21
2010	22
2011	20
2012	17
2013	18

We learned several things from our study. First, we learned that parties rarely agreed to all of the specified conditions² outlined in the 2006 Reforms, even though the FTC would limit the number of search custodians to 35 in exchange for such agreement. Anecdotally, the specified condition that raised the most notable concerns from parties was agreeing to a minimum of 60 days of post-complaint discovery should the matter proceed to litigation.

Second, we learned that the number of custodians had searched in many Second Requests generally had decreased since the announcement of the 2006 Reforms. Commentators prior to 2006 had found that the FTC frequently required parties to search significantly more than 35 custodians per company.³ Notably, in a limited survey in early 2005, half of the surveyed parties

² Among the explicit conditions, there was one notable exception that was commonly adopted. The parties frequently promised not to consummate their transaction after certifying substantial compliance for an additional 30 days, beyond the 30 days provided under the HSR Act.

³ See Letter from Joseph Angland to the Antitrust Modernization Comm'n re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (February 22, 2007), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_aba_mergers.pdf, cited in ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 164 (2007), available at

responding to 23 FTC and DOJ Second Requests had searched 94 custodians or more.⁴ Our study found much smaller custodian totals. On average, acquiring parties searched 30 custodians, and acquired parties searched 22 custodians. Examining our data in other ways also revealed a lower burden. For example, for investigations in our broad sample, almost 72% of merging parties responding to Second Requests searched fewer than 35 custodians. In 81% of these investigations, at least one of the parties searched fewer than 35 custodians. In 62% of these investigations, both parties searched fewer than 35 custodians. The reason for this apparent reduction might have been that the 35 custodian presumption, even if seldom triggered formally, served as a mental anchor for modification discussions. Merging parties would often raise the 35 custodian limit, without mentioning the specified conditions. FTC staff would typically dismiss the number as a suggestion, but not a requirement, and negotiations would proceed from that point onward.

Third, we learned that the length of investigations did not change materially since the announcement of the 2006 Reforms. According to our study, the average length of investigations involving Second Requests was 7.4 months from the opening of the investigation to the final action, which was generally in line with prior surveys.⁵ Almost half of the investigations were completed in under 7 months. Reasons for longer investigations included the time the parties took to comply with the Second Requests and the time spent negotiating consent decrees. In some cases, the parties were less eager to comply due to uncertainty about the consummation of the deal, typically due to competing bids for the party to be acquired.

We also learned more about how often, for what types of matters, and why Second Requests sought documents older than two years. Prior to the 2006 Reforms, such requests were commonplace. Shortly after the Reforms, requests for documents and data older than two years remained common.⁶ According to our study, specifications requesting documents more than two years old remain prevalent. Slightly less than half of the Second Requests included requests for

http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter Angland letter]; Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, 23 ANTITRUST 60, 63 (Spring 2009).

⁴ Angland letter, *supra* note 3.

⁵ The American Bar Association Antitrust Law Section's survey found that the average investigation lasted seven months. Angland letter, *supra* note 3. Joe Sims, Robert C. Jones, and Hugh Hollman found that, post-2006, their investigations took, on average, seven months to complete, but that some took significantly longer. Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, 23 ANTITRUST 60, 62 (Spring 2009).

⁶ Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, 23 ANTITRUST 60, 63 (Spring 2009). (finding one fourth of the Second Requests in the authors' sample sought documents more than two years old, with some specifications going back three to six years).

documents and data from beyond 2 years for isolated specifications. Reasons for departing from the default two-year time period included the need to collect information prior to exits, entries, acquisitions, or key contracts (especially in bid or lumpy markets). Other reasons included seeking information on prior patent litigation, on a relevant product that involved longer-term testing and development, and on pipeline construction and reversal plans. In addition, information requests sometimes reached beyond two years when staff knew the burden on the parties was limited, such as a request involving easily obtainable data that a party was required to report to other government agencies.