

Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations

As part of the Bureau of Competition's ongoing effort to improve the quality and efficiency of our merger review process, we are announcing the implementation of guidelines to be used in future merger investigations. This represents the first outcome of the Best Practices Review initiated in March of this year.⁽¹⁾ The Best Practices Review provided extensive and useful information, which we have taken into account in developing the policies discussed below. These policies are intended to accommodate two purposes: (1) to expedite the process of gathering useful and focused information, in order to facilitate our reviews of proposed mergers that are subject to a second request; and (2) to reduce burdens on the parties that have received second requests.

This announcement is not intended to be the final outcome of our merger review process, which is constantly evolving to reflect changing times and circumstances. In fact, some of the items announced today consist of interim changes or, in some cases, "menus" of options which are being circulated for further public input, and for use on a test basis in appropriate cases. However, the ideas presented below apply lessons we have learned from our past experience and through dialogue with the private sector to produce an even more efficient and effective merger review process.

Merger Review Guidelines for Future FTC Merger Investigations

1. Witnesses Will Be Able to Obtain Investigational Hearing Transcripts

The FTC's Rules of Practice allow the witness in an investigational hearing to obtain a copy of his or her testimony. However, the rules also state that, for good cause, the witness may be permitted only to inspect the transcript rather than retain a copy. In many cases, "good cause" has been presumed to exist, and witnesses have been unable to obtain copies of the transcripts until late stages of investigations. Consistent with the language of the rule, the Bureau's policy will now be that, in merger investigations, an investigational hearing transcript will be released to the testifying witness upon the witness's request as soon as the transcript is available.⁽²⁾ In those rare instances where staff believes good cause exists to support withholding the transcript, staff will be required to present their reasons in support of their position to the Bureau Director's office which will determine whether unusual circumstances warrant withholding the transcript.

2. Documents Will No Longer Have to be Sorted or Identified by Specification

Instruction O of the FTC's Model Second Request currently requires that documents produced in response to a second request be organized by the specifications of the second request, rather than as kept by the parties in the ordinary course of business. The Department of Justice does not generally impose this requirement. After careful analysis, we have concluded that, with the obvious exception of data specifications and interrogatories, producing documents to us in the order and sequence in which they are

actually kept in the course of business is likely to reduce parties' burdens and expense without compromising our investigations. Therefore, Instruction O of the FTC's Model Second Request will be revised to require documents to be produced in the order and sequence in which they are maintained in the ordinary course of business, rather than sorted or identified by specification.⁽³⁾

3. Policies Relating to Privilege and Waiver

We are also announcing a uniform policy for our treatment of privileged documents. Parties expend considerable resources in an effort to avoid the inadvertent production of privileged documents. They should continue to do so. However, despite parties' efforts, privileged documents occasionally are produced unintentionally during the merger review process.

From now on, the Bureau of Competition will not treat inadvertent production of privileged materials as a waiver of the attorney-client privilege or work product protection. By "inadvertent production," we refer to the established body of case law that defines truly inadvertent production as a mistake that occurs despite the existence and use of reasonable procedures to screen out privileged materials. This situation differs from production that occurs because of negligence so significant that - taking into account the totality of the circumstances, including the extent and timing of production - it may still constitute a waiver.⁽⁴⁾

Our standard procedure will be to return the original and all copies of any inadvertently produced privileged material as soon as the privileged nature of the material and the inadvertent nature of its production are apparent to us, either because the submitter brought the matter to our attention or based on our own examination of the materials. In some cases, this may not require any communication from the parties. Only in the unusual case when the facts suggest that the production may not have been inadvertent, or may have resulted from the party's failure to employ reasonable safeguards to avoid production, will we consider retaining the documents.⁽⁵⁾

We also believe that we can reduce the information we require in privilege logs without compromising our ability to conduct merger investigations. Therefore, Instruction P of the Model Second Request will be modified to incorporate the following changes:

- the elimination of the requirement that parties identify on their privilege logs any privileged or work-product documents produced after the parties' HSR filing;⁽⁶⁾ and
- the elimination of the requirement that the parties state in their privilege logs the specification to which privileged documents are responsive and the number of pages of the privileged documents.⁽⁷⁾

4. The "Second Sweep" Instruction

Instruction N of the Model Second Request, the so-called "second sweep" instruction, requires parties to submit responsive documents that are up-to-date. Compliance with this instruction may require the parties to re-search all of the persons and files subject to the second request within 30 days (and, for some specifications, within 14 days) of certifying substantial compliance. Since this may be quite difficult, staff typically agrees to make substantial modifications to the instruction.

Entirely eliminating Instruction N from all second requests is not an option since there are many cases in which at least a limited second sweep reveals documents that are very relevant to the staff's investigation and ultimate recommendation to the Commission. However, staff has been instructed to work with the parties in an effort to minimize any burden associated with conducting a second sweep, so that parties generally will be required to search each custodian only once. Accordingly, in the great majority of cases, with cooperation from the parties it should be possible to modify Instruction N so that no second sweep is required, or any such sweep is very limited. For instance, a second sweep may not be required at all in those cases where the parties agree to a rolling production of documents.⁽⁸⁾ In cases where there is a need for a second sweep, staff should strictly limit the number of personnel whose files need to be re-searched to certain key individuals. Staff also may negotiate with the parties to limit the second sweep to specific specifications or document categories.

5. Providing Additional Information on Appeals, Second Requests, and Modifications

Our merger review process includes an administrative appeal process by which, if second request negotiations with the staff have failed, a party can seek review by the FTC's General Counsel using an expedited procedure. These appeals are not formal decisions of the Commission. They are resolved under short deadlines and are not written for non-parties, so they may not always discuss the complete context or background of the dispute. Moreover, they are part of the HSR process and are therefore subject to HSR confidentiality requirements as well as various confidentiality provisions of the FTC Act. Nevertheless, we recognize that there is a valid public interest in these appeals and that some benefits may flow from a wider disclosure of how they are resolved. Accordingly, the General Counsel's office will endeavor either to obtain the consent of the parties involved to disclose some or all of the General Counsel's opinions, or to release copies of the opinions with appropriate redactions if necessary and feasible.⁽⁹⁾

In addition to the publication of these appellate decisions, we also plan to increase transparency by making redacted versions of certain second requests and modification letters available on our web site. We will not post every second request or letter on the site; rather, we will try to identify requests which can be used as models for particular industries or issues, and modification letters with significance extending beyond the particular transaction, to help provide guidance for future investigations.

6. Electronic Production and Electronic Documents

Searching electronic files and submitting productions in an electronic format present challenges to a "one-size-fits-all" approach because of the great disparity in the types of electronic files maintained by companies and the mechanisms available for submitting documents electronically. Nevertheless, several factors suggest that we need to offer alternatives for the production of electronic documents. For instance, the number of electronic documents maintained by a typical company has increased dramatically and those documents often are not reduced to paper in the ordinary course of business. In addition, important information may exist only in electronic form and cannot readily be printed. As a result, we are offering options for: (1) acceptable formats for the production of electronic documents; and (2) the scope of searches we will request for electronic documents.

a. Electronic Production of Documents Responsive to a Second Request

Electronic production has become a cost-effective method of producing documents. It has been accepted, in various formats and with various degrees of success, by both us and the Department of Justice. In light of this, we intend to develop options for electronic production.

Instruction C of the Model Second Request states: "Computer files shall be printed and produced in hard copy or produced in machine-readable form (provided that Commission representatives determine prior to submission that it would be in a format that allows the agency to use the computer files)." In other words, parties may produce documents electronically only if staff determines that the production format would be "useable," and the instruction provides no guidance as to which "machine readable" formats would meet that requirement. As a result, most electronic documents have been produced in paper form. When we have received electronic files, they have been produced in a variety of formats, including native file formats, .tiff, and .pdf. We have also received productions via CD, "snap" drives, and third-party web sites.

Native file productions are unsatisfactory for various reasons, and production by CD often imposes an unacceptable burden on our resources. However, productions by .pdf format, accessed on the web, have proven to be extremely effective, for both the parties and our staff. In light of this, the Model Second Request will be modified to encourage the production of electronic files in specified electronic formats. However, both because we need additional experience with electronic productions, and because the technologies are evolving rapidly, we are not yet prepared to modify the Model to require the production and acceptance of electronic files. Rather, we intend to provide specific options, to be negotiated with the staff in each case. It will also be critically important for parties to provide staff with early and direct access to company personnel with expertise in each company's information technology and data systems.

The revised Model instruction will state that computer files - not including data subject to data requests - may be produced using one of several options, subject to agreement of

the staff. Any such production will have to include a very basic index identifying the sources (author or custodian) and Bates ranges for each document. Parties will not be required to produce printed versions of electronic documents unless those versions are different from the electronic versions - for example, they may contain handwritten notes or signatures, date stamps, or other unique attributes. The production options available will be detailed in the Model Second Request, but they will include the following:

- in a searchable .pdf format, through a third-party web-based document review vendor providing FTC staff with secure and unlimited online web access and unlimited rights and access to download and print electronic documents;
- in a searchable .pdf format on CD-ROM or on an external network appliance such as a "snap server" or large hard drive (generally, this will only be acceptable if the volume of documents is relatively small);
- in an equivalent, searchable format, not including .tiff, produced either through a secured web site, or by CD-ROM or external network appliance (if the volume is not large); or
- in a .tiff format, if accompanied by a Summation document summary file including a variety of more detailed indexing requirements, where each .tiff file represents a separate record in the Summation file, and the .tiff files are at least 300 dpi image quality.

As we gain additional experience, we hope to modify these options, and possibly even move to a specified electronic production format as the required production methodology for electronic documents.

In many cases, production of electronic documents (or at least certain electronic documents) by electronic means is vital to substantial compliance. For example, printed versions of Microsoft Excel spreadsheets are inherently inadequate, because they do not include cell contents, comments, and formulas. Similarly, many programs generate conflicts when their files are printed on popular printers; such conflicts may, for example, eliminate or change underlined or bolded characters, or result in the failure to show the existence of attachments. Further, electronic documents contain "metadata" - embedded data that does not print with the document, but which includes vital information such as bibliographic data about the document and the names of the recipients of "blind" copies on emails. Fortunately, producing electronic documents by electronic means is likely to be considerably less expensive and time-consuming than producing printed versions of such documents.⁽¹⁰⁾

We received many statements to the effect that it is often difficult and costly to respond to second request "data" specifications. However, data specifications often generate critical information for our investigations. On November 7, 2002, the Bureau of Economics announced suggestions for best practices in providing data, economic, and financial analyses in investigations. We encourage parties to consider and follow these suggestions.

b. Use of Term Searches

Staff frequently is asked to agree that a production resulting from a term search will be sufficient, regardless of the number of documents the search produces. Staff also has been asked to edit and provide input on the acceptability of terms to be searched. While a prohibition against term searches for parties' increasingly voluminous electronic document databases seems unreasonable, so does a request to agree, in advance, that a specific term search is all a party need do, regardless of the search's efficacy. We view term searches as a mechanism which, if used properly, may enable parties to respond adequately, up to and including substantial compliance. A thorough and well-executed term search of electronic files may be an efficient way to respond to a second request, just as a thorough and well-executed physical review may be.

As with more traditional methods for searching for responsive documents, staff will work with parties to help ensure that term searches are thorough and complete. Also like other second request issues, this is an area in which early discussions with the staff, in which key personnel from the company are directly involved, can make a difference. While this will be a case-by-case issue, we are providing suggestions for steps parties can take to improve the likelihood that their term searches will be sufficiently comprehensive. Specifically, parties should consider the following possible options:

- providing, at the earliest possible time, organizational charts and information on data and document flows and systems so that the staff can evaluate the search methodology;
- providing a glossary of industry and company terminology;
- providing proposed search methodologies (including the applications that will execute the search) and the results of a sample search or searches so staff can evaluate how the search is working;

- submitting a rolling production, so any deficiencies can be detected and corrected;
- in certain cases, agreeing that certain key employees' files will be physically reviewed in addition to, or in lieu of, being term-searched;
- in certain cases, agreeing to safeguards such as a stipulation to produce any responsive documents not identified in the term search, but identified by other means, before certifying substantial compliance, or a stipulation that documents not identified in the term search will not be used or cited by the parties before the Commission or in litigation.

c. Searches and Productions of Archives and Backup Systems

Definition C of the Model Second Request includes archives and backups as documents subject to search. Many commentators have stated that this is expensive and may be duplicative. However, in our experience, in some cases the search of even a small portion of the parties' archive and backup systems produces valuable information that is helpful to the staff's investigation. As a result, we cannot eliminate the

requirement that parties search archive and backup systems. However, in order to facilitate case-by-case solutions to the problems posed by searching archive and backup systems, we intend to revise the Model Second Request to include separate language relating to the search and production of documents from those systems, and to provide a range of modification options from which the staff will be able to select, based on information the parties provide. These options will range among the following:

- excluding searches of archives and backups (possibly with some right for the staff to request follow-up searches if it appears that files are inexplicably missing from the company's "live" files);
- negotiating significant limitations to the portion of archives and backups that needs to be searched and produced (either by person, dates, or terms/specifications); or
- requiring a more inclusive search and production, similar to what is included in the current instructions of the Model Second Request.

By making these options publicly available, we hope to encourage parties to actively and cooperatively negotiate with the staff. In order to quickly and effectively negotiate any modification to the requirement that the parties search archive and backup systems, the parties should request a call with investigating staff and IT personnel from the company and the FTC to discuss information about the archives and backup systems.

d. Search and Production of Email

Email has become the primary means of corporate communication, and in many recent merger investigations has been of tremendous importance. However, email also has been responsible for much of the increase in the volume of second request responses, even when the parties make a good-faith effort to weed out unresponsive or irrelevant emails. Accordingly, staff has been instructed to offer options to tailor the second request to the new reality of email. The availability and choice of options will be largely determined by the parties' willingness to promptly provide accurate information about their email systems and their organizational structures, employees and responsibilities. As with other issues subject to modification, the most effective means of limiting the volume to be produced will be to reduce the number of people searched. Alternatively, term searches may substantially reduce the volume of email produced. Another option which the staff will consider in each case is reducing the time period of the search of emails for different levels of an organization. For example, in a particular investigation, the staff may be able to agree that personnel in particular organizations, or below certain levels of seniority, only need to have the most recent year's emails searched; higher-ranked personnel, or persons in organizations more likely to generate relevant documents, may have to have two years of email searched; and the most senior company officers and executives may be subject to a three-year search.

7. We Will no Longer Require Sample Products in the Model

Specification 5(a) of the Model Second Request requires the parties to produce a sample of the relevant products. Experience has demonstrated that this specification is rarely useful and could be problematic in certain investigations. We are eliminating this specification from the Model. We continue to encourage parties to provide samples voluntarily if they believe doing so will facilitate discussion of the issues. In some specific cases, it may be appropriate for staff to request samples.

Conclusion

The changes announced today are designed to streamline the FTC's merger review process, improving the efficiency and speed of our investigations while reducing the burden on the parties. While we are striving to be as efficient on our end as possible, the parties' good-faith cooperation is still critical to making the process work.

Unquestionably the best way to reduce the burden of second requests is for the staff to limit the number of individuals whose files must be searched. In order to do that, the parties must come in at the earliest possible stage and explain to the staff, with credible support, how the company is organized, the roles and responsibilities of particular individuals, and the pattern of information flow and storage in the company.

Unfortunately, a surprising number of parties are unwilling to take even this modest first step. The invariable result is much broader search than otherwise would be required, a slower review process, and a much greater expense for the parties, with no significant benefit for the agency.

We encourage the parties to negotiate with staff in order to obtain modifications to the second request. Because staff never knows merging companies as well as the companies know themselves, the typical second request is often broader than it needs to be. The staff knows this, and will cooperate - quickly - in negotiating limits to the second request. Also, Bureau management is taking an active role in monitoring second request negotiations, and the Bureau will become involved very quickly if necessary.

We also continue to encourage the parties to engage the staff in a dialogue on substantive issues, beginning at the earliest possible date. Subject to the limits of confidentiality (and litigation considerations), in order to facilitate a productive exchange the staff will identify and discuss the theories and issues that are being considered with as much specificity as reasonably possible. Although these theories and issues are likely to be relatively general at the early stages of investigations, the staff will discuss them with parties on an ongoing basis as the investigation proceeds and concerns evolve, change, or are refined. Active and helpful participation by the parties in a dialog on the substantive issues will assist the staff in tailoring the second request itself, as well as subsequent modifications, to the subjects of greatest concern and relevance.⁽¹¹⁾

Many of the proposals described above focus on increasing the flexibility of the Model Second Request. We intend to be more flexible, not just in the specific areas discussed, but in a more general sense, by continuing to encourage the staff to recommend

issuance of second requests tailored as closely as possible to the industry in question, the transaction at issue, and the specific competitive concerns motivating the requests. This flexibility is not intended to consist of simply adding specifications to the model; rather, we hope to continue to see second requests truly focused on particular transactions.

More changes, including further evolution of the changes described above, may follow. Feedback on every aspect of the process - and particularly on our new procedures - is critical.

Endnotes:

1. That initiative included public workshops held in various cities across the country where interested members of the public were given the opportunity to meet with senior lawyers from the Bureau - or submit written comments - to discuss ideas about the merger review process. Transcripts of the sessions, and the written comments, are posted on the FTC's web site at <http://www.ftc.gov>.

2. As with deposition transcripts, investigational hearing transcripts will be deemed accurate unless the witness submits corrections within a specified number of days.

3. Counsel should note that the separate identification or production of documents relating to merger "defenses," such as efficiencies or failing firm arguments, may assist the staff in evaluating those issues.

4. See, e.g., *United States v. TRW, Inc.*, 204 F.R.D. 170 (C.D. Cal. 2001); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000); *Local 851 of the International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127 (E.D.N.Y. 1999).

5. Of course, FTC attorneys will continue to comply with applicable bar rules and decisions.

6. Parties should, however, retain all such documents, as they may become subject to privilege logs, or even production, in litigation.

7. In the event of litigation, more complete privilege logs may be necessary. Similarly, in the event Commission staff has reason to believe that ostensibly privileged communications require closer scrutiny - such as in the unusual situation where the crime/fraud exception to the privilege may apply - the staff may use compulsory process to seek such documents.

8. Specifically, rolling productions - where files belonging to specified sets of employees are produced in an agreed-upon sequence, commencing soon after each set of employees' files are searched - are likely to eliminate concerns about staleness, except

in unusual circumstances (and even in such circumstances, generally only a small subset of custodians would need to be re-searched).

9. We also believe that publication of suitably redacted opinions will help to enhance confidence in the procedure.

10. The staff will also continue to strongly consider requests to produce paper documents in an electronic format.

11. For more details on best practices for substantive discussion with the staff concerning data and theories, see the Bureau of Economics' November 7, 2002 "Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations," available at <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/best-practices>.