

DOJ Announces Reforms to Merger Review Process

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On December 15, 2006, the Antitrust Division of the U.S. Department of Justice ("DOJ") announced a number of reforms to its merger review process under the Hart-Scott-Rodino Antitrust Improvement Act of 1976. Although many of the reforms formally adopt modifications and merger investigation procedures the DOJ already follows informally, the reforms are significant in effectively acknowledging the need to increase the efficiency and decrease the costs and time associated with responding to DOJ requests for additional information regarding notified transactions (known as "Second Requests"). The reforms are in response to the increased scale of Second Requests in recent years, caused by changes in merger review standards and the greater use of voluminous electronic information by parties and the government.

The reforms also bring the DOJ's official merger review process further in line with the procedures adopted by the Federal Trade Commission ("FTC") in February 2006. While, as noted below, differences remain between the formal procedures employed by the two agencies, in practice, parties can expect more or less the same procedures regardless of whether the transaction is being reviewed by the DOJ or the FTC.

CUSTODIAN LIMIT

The reforms reduce the scope of Second Requests by creating a voluntary option, available to parties to most transactions reviewed by the DOJ, to limit the number of employees the party must search for relevant documents. Under the reforms, a party will generally not be required to search the files of more than 30 of its employees ("custodians") to comply with a Second Request, provided the party meets several requirements. These requirements include, among others, providing DOJ staff with complete organizational charts and related information, providing access to employees who are knowledgeable about the transaction and about relevant products or services, and producing materials responsive to the Second Request by an agreed date (or entering into a rolling production or other timing agreement). In certain circumstances, however, the DOJ may agree to smaller search groups, or require more than 30 custodians to be searched. In addition, the custodian search limit does not apply to "company" or "central" files (such as central databases, business plans, financial reports, budgets, and company sales files) or to predecessors, successors, secretaries or administrative assistants of the identified custodians.

This reform is similar to the FTC's current approach, which includes a presumptive limit on the number of employees a party must search for relevant documents. However, under the FTC approach, the limit on the number of custodians a party can be required to search is 35.

RELEVANT TIME PERIOD

The reforms also reduce the presumptive relevant time period for responsive files. The previous Model Second Request (“MSR”) required parties to search files for up to a four-year time period. The reforms reduce this period to two years for all files, with the exception of documents responsive to requests for the submission of data. The reforms also adjust the “cut-off” date for document collection, review and production to help parties avoid the need to perform a “second sweep” of their documents. Under the old MSR, for most document requests, parties were required to submit responsive documents produced or obtained by the parties up to 14 days before substantial compliance. The new MSR sets the cut-off date as 30 days prior to substantial compliance for companies that comply with the Second Request within 90 calendar days of issuance. This cut-off date does not apply to transaction-specific and efficiencies documents.

The FTC also employs a two-year presumption for most materials and a provision to limit parties’ obligation to conduct a “second sweep” for documents. However, for cases subject to merger review by the FTC, parties must conduct a second sweep for responsive documents produced or obtained up to 45 days prior to substantial compliance or the production of responsive materials. In addition, the FTC requires that parties not providing rolling production of responsive materials must provide at least 30 days notice before formally certifying substantial compliance with the Second Request.

PARTIAL PRIVILEGE LOGS

Parties may omit from their privilege log certain documents that were sent only between the company and its counsel. Documents sent solely between counsel, including in-house counsel acting solely in a legal capacity, and documents authored by outside counsel that were not directly or indirectly given to any third party may be omitted from the privilege logs. However, any attachments to such documents must be included on the privilege log unless such attachments are addressed and sent solely to counsel.

Parties’ privilege log obligations differ slightly under the FTC’s approach. Parties generally can elect to produce a partial privilege log for all but a few of its custodians.

ELECTRONIC PRODUCTION, DE-DUPLICATION AND BACKUP TAPES

The reforms eliminate the requirement that companies produce electronic documents in both hard copy and electronic formats. Parties will be allowed to submit such documents in electronic form only, unless otherwise requested by the DOJ. The reforms also reduce the costs of producing data from archived backup tapes and comparable storage media. Parties may elect to identify and preserve a select subset of their backup tapes for the duration of the investigation in lieu of searching all available storage media.

Similarly, the FTC limits the parties' obligation to produce electronic data. Parties may elect to preserve backup tapes for two calendar days identified by FTC staff, and parties will be required to produce documents contained on backup tapes only when responsive documents are not available through other more accessible sources.

ADDITIONAL MODIFICATIONS TO SECOND REQUESTS

The DOJ will continue to encourage parties to negotiate with staff for additional modifications to Second Requests or to enter into other forms of time and cost-saving agreements. For example, the DOJ has recognized that parties can expedite certain investigations by agreeing to produce promptly a limited set of core documents and information in exchange for DOJ staff's commitment to analyze the materials in a short time period and advise the parties on the status of the investigation.

For further information about these reforms, please feel free to contact members of the Firm's Antitrust Practice Group, including:

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