

# LEGAL DEVELOPMENTS

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## **FTC's New Merger Review Guidelines are Helpful, But Early Negotiation Remains Important**

Requests for Additional Information and Documentary Material ("Second Requests") are one of the broad, sweeping investigatory tools used by the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") to investigate mergers raising antitrust issues. Compliance is often expensive and time-consuming. Following a review of the Second Request process and input from the private bar (including AV&H), the FTC's Bureau of Competition published Merger Review Guidelines for Future FTC Merger Investigations ("Review Guidelines"). Although the Review Guidelines are a step in the right direction, parties must still negotiate several key points with FTC staff to reduce the burdens imposed by a Second Request.

*The FTC will attempt to provide greater transparency relating to its decision-making during the Second Request process.* Currently, both the modification process and the administrative appeal process by which parties can seek expedited review of staff decisions regarding Second Request compliance are confidential. Recognizing that transparency provides guidance to parties and their counsel involved in future investigations, the FTC will endeavor to publish redacted versions of certain Second Request modifications and administrative appeals decisions.

*Electronic production of responsive electronic documents is encouraged.* Current rules result in most electronic files being produced in paper form, imposing a sizeable expense on parties. The Review Guidelines provide that the Model Second Request

will eventually be modified to encourage the production of electronic files in specific electronic formats, such as .pdf or .tiff format, preferably accessible via the Internet. While it is encouraging that the FTC recognizes the benefits of electronic production, the Review Guidelines do little to substantially reduce the burden of compliance. The FTC's preferred manner of electronic production (including the requirement that "pages" of electronic documents be bates stamped) essentially requires parties to hire an electronic production vendor, which can be costly.

*Search terms may be used to locate responsive electronic documents.* Parties and staff frequently agree to utilize term searches to limit the volume of responsive electronic documents. The Review Guidelines suggest steps to improve the parties' ability to reach agreement with staff on a universe of search terms. These include providing staff with organizational charts, information technology system data, glossaries of industry and company terminology, proposed search methodologies and sample search results. Although a positive step, it remains critical that parties promptly reach an agreement with staff on a narrowly-tailored search term list.

*At the staff's discretion, searching of back-up tapes and e-mail may be limited, especially for less critical personnel.* The Model Second Request currently requires searching of archives and back-up tapes, which can be both expensive and duplicative. Moreover, with the ubiquitous adoption of e-mail as

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### **Axinn, Veltrop & Harkrider LLP**

1370 Avenue of the Americas  
New York, NY 10019  
Tel: 212 728 2200  
Fax: 212 728 2201

90 State House Square  
Hartford, CT 06103  
Tel: 860 275 8100  
Fax: 860 275 8101

1801 K Street, N.W., Suite 411  
Washington, DC 20006  
Tel: 202 912 4700  
Fax: 202 912 4701

Axinn, Veltrop & Harkrider LLP practices in the areas of antitrust and trade regulation, intellectual property and complex commercial litigation. The firm provides ongoing advice and services to Fortune 500 clients in the antitrust aspects of M&A transactions. The firm also counsels clients in a wide range of other areas, including deceptive acts and practices, health care, consumer protection, employment law and various regulatory areas.

the primary means of communication and the growth of “spam” e-mail, employees typically have tens of thousands of mostly irrelevant e-mails retrievable from their PC, company servers and back-up tapes. Although the FTC is not willing to modify the Model Second Request, the Review Guidelines suggest that staff will be open to modifications to reduce the burden of compliance. Again, parties should communicate with the FTC shortly after receiving a Second Request to limit the scope of archived electronic materials and e-mail searches.

*Inadvertently produced privileged documents will no longer waive the privilege.* Recognizing that parties must often produce thousands of boxes of documents under significant time pressure, the FTC will no longer treat inadvertent production of privileged materials as a waiver of the attorney-client privilege or work product protection, unless production occurs from negligence so significant that, taking into account the totality of the circumstances, it may still constitute a waiver. Although the FTC will return the original and all copies of any inadvertently produced privileged documents, parties are cautioned to continue to implement all reasonable measures to prevent production of privileged materials. The Review Guidelines also eliminate certain requirements for the privileged document log.

*Staff are directed to be amenable to reducing the burdens of the “second sweep” instruction.* The Model Second Request currently requires parties to submit all responsive documents up to 30 days prior to (and, for some specifications, up to 14 days prior to) certifying that they have substantially complied with the Second Request. This requirement can involve re-searching many or all of the files already reviewed, imposing a large burden with little benefit to the investigation. Although the FTC is unwilling to formally change the “second sweep” instruction, it is encouraging staff to work with 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.

*Documents will no longer have to be sorted or identified by specification.* The FTC’s Model Second Request traditionally required parties to produce documents organized by the specification of the Second Request to which the documents were responsive. In a move that will reduce parties’ compliance burden without hampering the investigation, the FTC adopts the DOJ practice of allowing documents to be produced as parties maintain them in the ordinary course of business.

*Witnesses will be able to obtain transcripts of investigational hearings.* Adopting a reasonable and long-overdue change, the Review Guidelines provide that a hearing transcript will now be released to a testifying witness upon request. Staff retains the ability, however, to withhold a transcript if they demonstrate that good cause exists.

*Sample products will no longer be required.* Recognizing that the production of sample products was burdensome and offered few benefits, the Review Guidelines eliminate this requirement from the Model Second Request.

**TAKEAWAY: While the Review Guidelines do little to formally modify a burdensome Second Request, the FTC’s willingness to engage parties in a productive dialogue to limit the scope of productions is encouraging. The key point is to commence this dialogue as quickly as possible after receiving a Second Request. It is both feasible and advantageous to educate FTC staff regarding company organization, responsibilities of critical departments and personnel, information technology infrastructure and document retention/destruction policies. Parties can pursue these conversations constructively without jeopardizing litigation strategies. In past investigations, AV&H has successfully negotiated several modifications with federal and state antitrust authorities that significantly reduced clients’ production burden.**