

# LEGAL DEVELOPMENTS

February 21, 2006

## FTC Announces Reforms to the Merger Review Process: Attempt to Make Second Requests Less Onerous

The Chairman of the Federal Trade Commission has announced a series of reforms designed to streamline compliance with Requests for Additional Information and Documentary Material (commonly known as “Second Requests”) pursuant to the pre-merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act (the “HSR Act”). The reforms are also intended to allow FTC staff to review such productions more efficiently. The reforms cover several areas that affect the expense and burden of complying with a Second Request, including:

- (1) the number of custodians searched;
- (2) the time period covered by the production;
- (3) the scope of data requests;
- (4) the timing of production of the privilege log;
- (5) the preservation of backup tapes; and
- (6) de-duplication of electronic documents.

The new procedures are effective immediately to newly-filed HSR notifications. Significantly, the Antitrust Division of the Department of Justice (“DOJ”) did not implement these

procedures along with the FTC. DOJ is expected to announce its own revised Second Request policies shortly.

Consistent with our experience, the FTC announcement notes that complying with a Second Request can take many months and cost the parties millions of dollars, substantially more than when the HSR Act was originally enacted. The FTC ascribes that increased burden to: (1) the increased focus of merger analysis on actual competitive conditions (as opposed to a reliance on presumptions from market structure) and (2) the technology-enhanced ability of companies to generate and retain substantially more documents. The FTC believes that the new guidelines will focus the parties and staff on issues that are most important and most likely to be dispositive. The new guidelines are an attempt to universally implement “best practices” that in past have been implemented unevenly.

***Establishing a Presumptive Limit on the Size of the Search Group:*** The first of the FTC reforms—and potentially the most significant—establishes a presumption that a party will only be required to search the files of 35 or fewer custodians (*i.e.* employees, officers, directors, or agents) for responsive documents. Under prior practice, the parties and the FTC staff would

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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, FDA law and various regulatory areas.

negotiate a search group, but often it could result in over 100 custodians being searched.

In exchange for the 35 custodian limit, the party will be required to agree to cooperate with the FTC in three general areas. First, it must provide FTC staff, early in the Second Request process, with organizational charts and other related information and allow staff to meet, in person, with at least one employee who is knowledgeable about different employees' responsibilities with respect to the transaction and the relevant markets and at least one employee who is knowledgeable about how the company assembles and uses the types of data specified in the Second Request, all with the goal of helping staff identify the proper search group.

Second, the party must agree to consent to a discovery period of at least 60 days, should the FTC choose to challenge the transaction in "an adjudicative forum." That period, the announcement explains, will allow the FTC to ensure that it is not prejudiced in litigation by not having access to information that could have been gained from additional custodians. Staff will be permitted, however, to agree to a period less than 60 days in appropriate circumstances.

Finally, the party must agree to produce its response to the Second Request at least 30 days prior to certifying "substantial compliance" (and thus triggering the beginning of the second waiting period), or agree with staff on a mutually-satisfactory rolling production. The FTC announcement notes that such rolling production or timing agreements are common today, and tend to reduce the overall time needed to resolve investigations.

The 35-person presumption will not apply to documents contained in "corporate" or "central" files, and each identified custodian will also require the party to search the files of personal assistants, secretaries, or other persons with similar responsibility for maintaining the identified custodian's files. Finally, staff may request

a search group containing more than 35 custodians if it believes that to be necessary for an effective investigation of the transaction (such as where the parties compete in numerous geographic or product markets), but such a request must be approved by the Director of the FTC's Bureau of Competition, and the party concerned will have an opportunity to discuss the matter with the Bureau Director before a decision is made. If the Bureau Director authorizes a search group of more than 35 individuals, the merging party will not be required to agree to the concessions discussed above.

***Reduction of the "Relevant Time Period":*** As part of the announced reforms, the FTC will reduce from three years to two years the time period for which the parties must provide responsive documents. The two year presumption will not, however, apply to data, and may be modified where necessary to appropriately analyze the transaction's competitive effects or to align with the parties' fiscal years or other reporting periods.

***Streamlined Data Requests:*** Recognizing the increased importance of empirical data and analysis in modern merger investigations, the FTC reforms provide that staff should inform the parties, early in the process, of analytical theories currently under consideration and the types of empirical analysis they believe may be useful; in exchange, parties are "strongly encouraged" to provide staff with written descriptions of the types of responsive data in their possession, as well as access to employees knowledgeable about such matters, and to propose ways to limit the scope of the FTC's data request. This formalizes the best practices currently followed in many investigations. A new feature, however, is that parties that believe that staff's data requests are overly broad will have the right to "meet or confer" with a Director or Deputy Director from each of the Bureaus of Competition and Economics to request a further limitation of the scope of data called for under the Second Request.

**Preservation of Backup Tapes:** The FTC will modify the standard Second Request instructions to presumptively allow the party to retain electronic backup tapes for only two calendar days to be identified by staff, and to produce documents contained on backup tapes only if responsive documents are not available from more accessible sources. While those presumptions will be subject to change in appropriate circumstances, they should significantly reduce the burden and expense incurred by parties.

**Privilege Log Reforms:** The Second Request instructions will be modified to provide that parties will no longer be required to produce a complete log of all documents withheld from their production under claim of privilege. Instead, a party will have the option of producing a “Partial Privilege Log” consisting of the names of all custodians who had at least one document withheld under a claim of privilege, along with the total number of documents and the total number of attachments withheld from that custodian’s files. Within five business days of the receipt of the Partial Privilege Log, the FTC staff will be able to identify five individuals or ten percent of the total number of custodians searched, whichever is greater, for which the party will be required to produce a Complete Privilege Log (in the same format as is currently required). In exchange, a party must agree that, if the FTC challenges the transaction in a judicial or administrative proceeding, the party will produce a Complete Privilege Log within 15 calendar days of the receipt of a discovery request, and will waive objections to such a discovery request other than strictly on the grounds of privilege. As with the other reforms, the FTC’s announcement reserves the Commission’s right to require a Complete Privilege Log from any party in appropriate circumstances.

**De-Duplication:** The FTC also announced its intent to amend the Second Request instructions to require any party seeking to use de-duplication or similar technology on its production to consult with FTC attorneys and technical staff to

determine the appropriateness of using any such technology in complying with the Second Request. Depending on how restrictive the FTC is in allowing de-duplication, this change could substantially increase the burden on parties.

**Other Reforms:** Beyond the principal reforms discussed above, the FTC announced other changes to the standard Second Request specifications, including narrowing the set of company agents that must be disclosed; requiring staff to consult with the parties as to reductions in the number of manufacturing facilities that must be described in the production; and excluding certain types of documents that are unlikely to aid in the competitive analysis, such as tax and regulatory documents. Finally, the FTC announced that it will require at least one staff lawyer from the Bureau of Competition with “substantial experience” to participate in all negotiations over modifications to a Second Request, to ensure that staff has sufficient authority to agree to modifications in a timely manner

The announced FTC reforms should ease the burden of Second Requests on parties, although many of them merely codify existing best practices. Importantly, they do not eliminate the need for parties and their attorneys to engage in case-specific negotiations with staff to tailor the Second Request process to the exigencies of particular transactions. As always, Axinn, Veltrop & Harkrider LLP stands willing to assist in that process. If you have questions or would like to discuss these matters further, please do not hesitate to contact Lauren S. Albert at (212) 728-2230 or [lisa@avhlaw.com](mailto:lisa@avhlaw.com) or William M. Rubenstein at (860) 275-8180 or [wmr@avhlaw.com](mailto:wmr@avhlaw.com).

## **FTC Sets New HSR Thresholds**

In separate news from the Federal Trade Commission, the annual adjustments to the various monetary thresholds under the HSR Act went into effect last week. As of February 17,

the \$10 million (as adjusted) threshold is now \$11.3 million, the \$50 million (as adjusted) threshold is now \$56.7 million, the \$100 million (as adjusted) threshold is now \$113.4 million, and the \$200 million (as adjusted) threshold is now \$226.8 million. The \$500 million (as adjusted) and \$1 billion (as adjusted) thresholds are now, respectively, \$567 million and \$1.134 billion. The exemption generally available for acquisitions up to the next higher notification threshold applies to the adjusted values, so, for

example, a person who filed for the \$50 million (as adjusted) threshold last year can now acquire up to one dollar less than \$113.4 million of assets or voting securities without observing an additional waiting period. If you have questions or would like to discuss these matters further, please do not hesitate to contact Lauren S. Albert at (212) 728-2230 or [lsa@avhlaw.com](mailto:lsa@avhlaw.com) or William M. Rubenstein at (860) 275-8180 or [wmr@avhlaw.com](mailto:wmr@avhlaw.com).