REFORMS TO THE MERGER REVIEW PROCESS

Announcement by

Deborah Platt Majoras
Chairman, Federal Trade Commission

February 16, 2006

The Federal Trade Commission spends substantial time and resources reviewing proposed mergers and acquisitions to determine whether their effect "may be substantially to lessen competition, or to tend to create a monopoly."[1] Most reviewed transactions are reported to the FTC and the Department of Justice's Antitrust Division (the "agencies") pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").[2] Each year, more than 95% of all HSR-reported transactions are "cleared" during the initial 30-day waiting period, as the respective agency determines that the transaction is unlikely to lessen competition substantially. For the remaining transactions, the reviewing agency issues a request for additional information (known as a "second request"), which requires the parties to provide the agencies with documents and data from their paper and electronic files. The agencies issue second requests when additional information is needed to perform a proper analysis under the antitrust laws.

The HSR Act is an important component of U.S. antitrust merger policy. The law provides the agencies with the time and ability to review and, when appropriate, challenge mergers prior to consummation when they are likely to be anticompetitive. Since the HSR Act became operational in 1978, however, merging parties' burdens in responding to second requests have increased substantially, as have the burdens of

[1] 15 U.S.C. § 18.

[2] 15 U.S.C. § 18a.

agency staff in reviewing and analyzing the documents and information provided. Parties today advise that complying with a second request in a significant transaction routinely costs millions of dollars and requires months to respond.

While a number of factors have contributed to the greater burden, two developments in particular have combined to increase the volume of materials produced in response to second requests. First, standards for reviewing transactions have changed substantially since the passage of the HSR Act, such that today the agencies rely less on readily apparent structural indicators, such as market shares, and more on detailed and direct market analyses. Such direct market analyses are fact intensive, and can require substantial volumes of documents and quantitative data. Second, advances in technology – from the copy machine to e-mail – have resulted in companies' producing and retaining substantially more documents. This increased number of documents places burdens on firms that must respond to second requests and presents challenges to our agency staff, who must locate the relevant information in the parties' large productions.

To address the increased burden on parties and the staff, the FTC will implement new guidelines and procedures that will apply to the second request process. These guidelines and procedures will take effect for all HSR filings submitted on or after February 17, 2006. The reforms are intended to streamline the merger review process by formalizing well-defined best practices. They are designed to facilitate rapid identification of the relevant issues, preparation of more focused second requests, and use of consistent investigation timetables. The reforms also are designed to improve the FTC's merger review processes by making staff, the parties, and outside counsel more

accountable for deviations from the best practices. This document provides an overview of the reforms and explains their purpose and how the FTC will implement them.

Background of the Merger Review Process

The antitrust merger review process is a vital component of U.S. antitrust law and economic policy. Mergers and acquisitions are important mechanisms for transferring resources to their most productive use. These transfers can increase price competition, efficiency, and innovation, to the substantial benefit of U.S. consumers. Some transactions, however, can produce or enable the exercise of substantial market power by eliminating competition between close competitors, or by enabling firms to engage in anticompetitive coordination. Such transactions reduce the overall efficiency of the U.S. economy and can cause significant harm to American consumers.

Antitrust Merger Laws

The FTC and the Antitrust Division have authority to bring court actions to enjoin transactions that are likely to reduce competition substantially.[3] The FTC also may challenge anticompetitive mergers through administrative litigation.[4] The FTC reviews transactions in many industries that are vital to the American economy and consumers. These industries include pharmaceuticals, oil and gas, computer hardware, and many retail food products. This work, combined with the Antitrust Division's review of mergers in other critical industries, such as telecommunications, electricity, financial services, and steel, likely saves U.S. consumers hundreds of millions of dollars each year, by deterring, blocking, and modifying transactions that would have resulted in higher prices, lower levels of service, and reduced innovation.

[3] 15 U.S.C. §§ 25 and 53(b).

[4] 15 U.S.C. § 45(b).

In 1976, Congress increased the agencies' ability to enforce the antitrust laws with respect to mergers and acquisitions when it passed the HSR Act. The HSR Act requires parties to transactions of a specified size to notify the FTC and DOJ of their intention to consummate a merger or acquisition, and then wait until at least the expiration of an "initial waiting period" (usually 30 days) before they complete the transaction. Over the past five years, the agencies have "cleared" approximately 95% of all transactions reported under the HSR Act during the initial waiting period.[5]

The HSR Act also provides that if either agency determines during the initial waiting period that additional inquiry is necessary, the agency may issue a second request. A second request extends the waiting period for a specified time period (usually 30 days) after the parties have substantially complied with the request. While the FTC and DOJ jointly drafted a "Model Second Request," in most instances, the agencies issue second requests that are variations on the model that have been customized for particular industries.

Second Requests

Second requests are essential to the merger review process because they enable the FTC and DOJ to determine and document with facts, rather than guesswork and speculation, whether certain transactions are likely to be anticompetitive. The agencies exercise significant restraint in issuing second requests. Between 1998 and 2005, the agencies issued second requests at an annual rate of between 2% and 4.1% of the total

[5] The HSR process substantially increased the accuracy and consistency of the merger review process because it enabled the agencies to review transactions before consummation, and standardized some merger review procedures. Before the passage of the HSR Act, the agencies often learned about a transaction after it had closed. Antitrust review of completed transactions proved expensive, and in some cases impractical, because the merging parties quickly combined their operations.

number of reportable transactions. During this period, the majority of the investigations in which the FTC issued a second request resulted in a merger challenge, consent order, or modification to the transaction, suggesting that the FTC generally issues second requests only when there is a strong possibility that some aspect of a transaction would violate the antitrust laws. From 1998 to 2005, the annual percentage of second request investigations by the FTC that resulted in some type of enforcement action ranged from 44% to 78%.

Ratio of Enforcement Actions to Second Requests, Issued FYs 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Federal Trade Commission Second Requests	46	45	43	27	27	15	20	25
Number resulting in challenges, consents, restructurings, etc. [(1)]	33	35	33	12	19	10	10	12
% resulting in challenges, etc.	72%	78%	77%	44%	73%[(2)]	67%	50%	57%[(2)]

Notes:
1. These data refer to the number of Second Requests issued in the specified fiscal year that resulted in a challenge, regardless of whether the challenge occurred in the same fiscal year.
2. The percentages are computed with respect to the number of matters closed. One second request issued in 2002 and four second requests issued in 2005 relate to matters that are still open. The circumstances surrounding second request investigations that are still pending are not public information.

Despite the small number of second requests issued each year, and the relatively high percentage of second request investigations that result in some form of antitrust enforcement action, the second request process remains controversial. The primary sources of concern are the cost and time required to comply. The parties and the agencies often spend millions of dollars to collect, review, and analyze the responsive materials, and second request investigations can take a substantial amount of time, often ranging from six to nine months.

While responding to second requests always has involved substantial expense, in recent years complying has become even more costly and complex, primarily due to

fundamental changes in antitrust analysis and in technology. First, the FTC relies less on market shares and structural indicators and more on direct analysis of competitive effects. In the 1970s, the agencies and the courts primarily relied on structural presumptions that used market shares and concentration ratios to evaluate and ultimately challenge transactions. Transactions that resulted in a company's obtaining a high or even moderate-sized market share often were presumed unlawful, unless the parties to the transaction could produce compelling evidence that the transaction was not likely to reduce competition. Today, the agencies focus more on direct analysis of the competition in the market at issue. For mergers that raise significant competitive concerns, it is routine to attempt to assess the transactions' competitive effects with econometric models, which often can be highly fact-intensive and require large data sets and other information. For example, contemporary merger investigations often involve economic modeling of competitive bidding situations in the market at issue. There is widespread agreement within the antitrust community that the direct analysis of competitive effects has produced more reliable results than heavy reliance on structural presumptions, but an unintended collateral effect has been to increase the burden on the parties and the agencies.

Second, lower costs of storing electronic documents and the ubiquitous use of computers have substantially increased the number of electronic documents that firms produce and retain, which in turn has increased the size of many second request productions. Several years ago, the FTC received only two productions of over one million pages in its fiscal year; last fiscal year, the FTC received nine such productions. The growth in the number of electronic documents has increased the volume of

potentially relevant materials and raised substantial technical document production challenges due to the wide array of software and formats used to produce and manage electronic documents.

Reform to the Merger Review Process

Despite these challenges, the merger review process works well for many transactions, with staff capturing sufficient information to conduct the appropriate analysis with minimal burdens. Further, some complaints about the process are misplaced and unrealistic; the FTC typically cannot analyze a merger that falls into the very limited number that require close scrutiny in the manner required by the antitrust laws with only limited information about the transaction and the relevant markets. Thus, large electronic document productions (with their attendant costs), combined with the use of complex direct analyses of competitive effects, sometimes are required to protect American consumers.

Nonetheless, reform of the merger review process is necessary to adapt to current legal standards and technology. Our job is to serve the public, and if we are not continually working to improve and to make the merger review process as effective and efficient as possible, then we are not fulfilling our mission for consumers. Waste and inefficiencies in the process are paid for by taxpayers, shareholders, and consumers – and they are one and the same.

Over the past year, a team of FTC staff, forming our Merger Process Task Force, has assessed our merger review process. The Task Force has explored many issues, including the improvement of the FTC's technology to receive and review electronic productions and changes to the FTC's internal procedures. Our first set of reforms is

directed at the second request process because of its rapidly rising costs, and because the process is the area of greatest concern.

The fundamental approach of the reforms announced today is to turn well-accepted best practices into formal components of the merger review process. A core objective is to lower the costs of merger investigations for the FTC and the parties by reducing the volume of materials that parties must produce to respond to a second request. The reforms also are designed to permit staff, in cooperation with the parties, to identify rapidly the relevant substantive issues and focus more quickly and effectively on the relevant documents and data. To mandate smaller second requests, without giving staff the ability more effectively to determine the sources of the relevant information, would not produce durable benefits. Finally, the reforms are intended to control costs by reducing the volume of electronic storage materials that parties need to preserve, eliminating the need for most multiple searches of employees' files, and reducing the size of privilege logs.

Three additional points are worth noting. First, given the highly fact-specific nature of merger analysis, views vary within the agency on how to reduce the burdens of the merger review process without sacrificing the quality of the investigation. Views among merger practitioners on this issue vary as well. The reforms are designed to improve, rather than diminish, the FTC's ability to conduct merger investigations and to challenge anticompetitive transactions, while lessening the burdens on all involved.

Second, comprehensive review of the merger review process reveals the significance of the "human" element. In our effort to identify why the process has broken down in some but not all cases, it became clear that conduct of staff or the parties that is

perceived as unreasonable or untrustworthy can significantly disrupt and prolong a merger investigation. Not surprisingly, the process works most effectively and efficiently when staff and outside counsel and their clients communicate effectively and work in a cooperative and professional manner. These reforms are intended to demonstrate the FTC's good faith intention to work hard to minimize the burdens of the merger review process. We anticipate that parties, in turn, will approach the merger review process in a spirit of cooperation.

Finally, today's rollout of reforms does not mark the conclusion of our work in this area, even as concerns second requests. We will continue to work on mechanisms and procedures that will reduce the scope of document and data requests and improve our logistical processes.

Merger Review Process Reforms

The Bureaus of Competition and Economics will implement the following reforms to the merger review process.

1. Custodian Presumption

A. There will be a presumption that the FTC will not require a party to a transaction to search the files of more than 35 of its employees[6] to comply with a second request, provided that the party:

(1) provides staff with the organization charts specified in the second request, or provides equivalent materials that allow staff to identify the party's employees and their positions;

(2) makes at least one of its employees available to meet in person with staff to inform staff about the responsibilities of those employees of the party who have knowledge about (a) the transaction, (b) the relevant products or services, and (c) the other issues identified in the second request, and after this "Initial Meeting," continues to make its employees available on a reasonable basis, either in person or by telephone, until

[6] The term "employee" includes any officer, director, employee, or agent of the party.

staff has the information that is reasonably necessary to designate a search group;

(3) provides staff, if staff requests after the Initial Meeting, with brief written descriptions of the responsibilities of a limited number of employees who have been reasonably designated by staff, within seven business days of the receipt of a request by staff;

(4) makes available to meet with staff in person at least one employee who is knowledgeable about how the party collects, maintains, and uses the types of data specified in the second request, and the databases and other software used by the party to store and analyze the data, and after this "Initial Data Meeting," continues to make its employees available on a reasonable basis, either in person or by telephone, until staff and the party agree upon the data to be produced; [7]

(5) produces the materials responsive to the second request 30 days before formally certifying substantial compliance with the second request or agrees to a mutually acceptable "rolling" production or other form of timing agreement; and

(6) agrees to propose to the court jointly with the FTC a scheduling order that contains at least a 60-day discovery period, if the FTC challenges the transaction in an adjudicative forum.[8]

B. Staff promptly will notify the party of the identities of the 35 or fewer employees whose files the party is required to search once the party has provided staff with the information that is reasonably necessary for staff to designate the search group.

C. The files of an employee in a search group shall be considered to include all hard copy and electronic files of all persons responsible for maintaining the files of the employee, including the employee's personal assistants, secretary, or persons with the same or similar responsibilities.

D. The restriction on the number of employees in a party's search group does not apply to requests for information contained in "corporate" or "central" files, such as central databases, budgets, contracts, and financial reports.

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[7] Staff may agree to waive the requirements in paragraphs 1(A)(2) and 1(A)(4) that a party make its employees available in person for the Initial Meeting and the Initial Data Meeting.

[8] Staff may agree to a scheduling order with a shorter discovery schedule.

E. The party will not be required to produce its privilege log until it certifies that it has substantially complied with the second request.

F. The Director of the Bureau of Competition may authorize a larger search group for a party when it is reasonably likely that a larger search group is necessary for the FTC to analyze a transaction's potential competitive effects. Staff shall notify the party if staff asks the Director to authorize a larger search group, and, when reasonably feasible, shall notify the party of the identities of the employees whom staff believes should be included in the search group. Before the Director decides whether to grant staff's request, the party will be entitled to meet or confer with the Director to present its views on why the search group should be limited to no more than 35 employees.[9] The Director will promptly decide whether to authorize a larger search group after receiving the views of the party. If the Director authorizes a larger search group, the party will not be required to comply with the requirements contained in paragraphs 1(A)(5)-(6) of the custodian presumption.

The most difficult issue that the FTC confronted during its evaluation of the merger review process was whether to limit the number of the employees (often referred to as "custodians") whose files the FTC may require a party to search to comply with a second request. The information required to conduct merger investigations varies substantially due to differences in the number of product and geographic markets, differences in how businesses are conducted and organized, and the degree of complexity of the competitive issues. It is clear that there is no "one-size-fits-all" search group for every transaction. At the same time, it is equally clear that the size of the search group is one of the most important determinants of the total cost of most merger investigations. The number and type of the specifications in a second request affect the cost and size of productions, but to a much smaller degree than the number of employees in the search group. This is because many of the costs involved in searching an employee's files are fixed.

[9] The party may meet or confer in person or by telephone with the Director, or may present its views in writing.

The strong relationship between search group size and investigation cost warrants adopting procedures that ensure that the number of employees whom parties are required to search is not greater than necessary. Therefore, the FTC will establish a presumptive limit of 35 employees for a party's search group ("custodian presumption"). To utilize the custodian presumption, a party must provide staff with the organization charts (or equivalent materials) required by the second request and with the specified additional information and access to its employees (described above), produce the materials responsive to the second request 30 days before formally certifying substantial compliance (or enter into a mutually acceptable rolling or other form of timing agreement), and, if the FTC challenges the transaction, agree to propose to the court jointly with the FTC a scheduling order that contains at least a 60-day discovery period.

Size of the Custodian Presumption

The FTC will implement a presumptive limit of 35 employees per party because our experience suggests that search groups of that size are likely to be sufficient for the FTC to analyze the competitive effects of most of the transactions that the FTC reviews. The presumption number does not preclude staff and the parties from negotiating smaller search groups, as has occurred in past practice. In some circumstances, smaller search groups will be appropriate. The presumption level is not intended to function as a "floor" on the number of employees in a search group.

The FTC considered but ultimately rejected establishing a range of presumptive custodian limits that are tied to the size of the transaction or the type of industry. The added costs in the complexity of such an approach likely would have outweighed the flexibility it might provide. Nor does it appear viable to limit search groups only to

certain types or categories of employees. We have reviewed "hot documents" from prior investigations to determine whether there was a reasonably clear pattern of plainly relevant documents in the files of persons holding certain positions. The review did not reveal such a pattern.

An absolute cap on the number of custodians in a search group also was rejected. As stated, there is no one-size-fits-all search group. Some investigations almost certainly will require search groups that are larger than 35 custodians per party. For example, a larger search group probably would be needed to review a merger of firms that have retail gasoline operations in many geographic markets. Similarly, a merger that implicates a large number of product markets also may require more than 35 employees per party in the search groups. To address these situations, staff may request that the Director of the Bureau of Competition authorize staff to exceed the presumptive limit. The Bureau Director may authorize a search group that exceeds 35 employees by an amount determined by the Bureau Director when it is reasonably likely that a larger search group of that amount is necessary for the FTC to analyze a transaction's competitive effects. Staff shall notify the potentially affected party if staff requests authorization to use a larger search group. The affected party will have the right to meet or confer with the Bureau Director or a Deputy Director before the Director decides whether to authorize staff to exceed the presumption level.

Access to the Parties' Employees

To narrow a party's second request search group and the overall scope of a second request, staff requires accurate and complete information about the responsibilities of the party's employees and the nature of its relevant operations. When negotiating search

groups, staff sometimes encounters outside counsel or party representatives who lack this information, which can lengthen the time required to modify the second request and make it difficult to designate a narrow search group.

It is particularly important that staff have accurate information about a party's employees and operations when a presumptive limit applies to the number of employees in a search group. Accordingly, the reforms provide that, for the custodian presumption to apply to a party, after the party provides staff with the required organization charts (or equivalent materials), the party must make available, to meet in person with staff, one or more of its employees who are knowledgeable about (a) the responsibilities of the party's employees likely to have relevant materials, (b) the party's relevant business operations, and (c) the relevant quantitative data. The party must continue to make its employees available on a reasonable basis, either in person or by telephone, until staff and the party agree upon a search group, and until staff and the party agree upon the data to be produced. In some instances, staff can narrow search groups more effectively when a party provides documents that describe the responsibilities of its employees, as a supplement to the organization charts required by the second request. To ensure that staff has access to such materials, the reforms also condition the use of the custodian presumption on the party's providing staff, if staff so requests after the Initial Meeting, with brief written descriptions of the responsibilities of a limited number of employees who have been reasonably designated by staff, within seven (7) business days of the receipt of a request by staff.

Timing

Staff will be required promptly to notify a party of the identities of the 35 or fewer employees whose files the party is required to search once a party has provided staff with the information that is reasonably necessary for staff to designate the search group. In addition, as discussed below, the FTC will implement a requirement that a Bureau of Competition staff lawyer with substantial merger experience participate in all negotiations over the second request. This requirement should increase the efficiency of second request negotiations. If staff asks the Bureau Director to authorize a search group that contains more than 35 employees, the Bureau Director must promptly decide whether to grant staff's request after meeting or conferring with the party (if the party requests to meet or confer).

The custodian presumption does not specify a particular number of days within which staff must designate the employees for the search group after staff meets with the party's employees, nor does the presumption set forth a specific time within which the Bureau Director must decide whether to authorize a larger search group. Such requirements could provide greater certainty in some circumstances, but in many situations they likely would create incentives for strategic behavior and generate counterproductive procedural disputes and other transaction costs that exceed their benefits.

Thirty-Day Advance Production or Rolling Production Period

For the custodian presumption to apply to a party, the party also must agree to produce the documents and data responsive to the second request 30 days before it submits its certification of substantial compliance with the second request, or to enter into

a mutually acceptable "rolling" production or other timing agreement. (Rolling production agreements involve the production of responsive materials over an agreed-upon period of time.)

The requirement that a party produce materials responsive to the second request 30 days before certifying substantial compliance (or pursuant to a mutually acceptable rolling or other timing agreement) will create incentives for staff and the parties to agree to the types of investigation schedules that often promote faster resolution of the core issues, more accurate decisions by the agencies, and fewer litigation challenges to transactions.

The advance/rolling production requirement is not an effort to change or modify the HSR Act. Under the Act, the agencies have 30 days to decide whether to challenge a transaction after the parties to a transaction certify that they have substantially complied with the second request. It is relatively rare, however, for parties to withhold the materials responsive to the second request until they certify that they are in substantial compliance. Instead, they typically produce documents on a rolling basis. It is even rarer for parties to trigger the 30-day clock, and then require the reviewing agency to make an enforcement decision by the end of the waiting period when questions about the transaction remain. Far more common is for staff and the parties to enter into a timing agreement in which the parties agree to produce substantial amounts of materials that are responsive to the second request before they certify that they are in substantial compliance.

The parties and staff frequently enter into advance and rolling production agreements because they often enable staff to focus more effectively on what can be

dispositive issues – a practice that shortens the length of investigations. In contrast, when the parties do not provide the materials responsive to the second request until they certify that they are in substantial compliance, the FTC often must simultaneously conduct a wide-ranging competitive effects analysis, negotiate a potential settlement agreement, and prepare for a possible litigation challenge to the transaction. In rare circumstances, this dynamic produces a resolution within the 30-day time period. Far more often, it produces inefficiencies, which in turn generate eleventh-hour requests by staff, Bureau management, the Commission, and (quite often) the parties to extend the deadline in order to reconcile the multiple tracks on which the FTC and the parties are proceeding. The FTC and the parties almost always agree to each other's extension requests. In the FTC's experience, these last-minute extensions lengthen the total investigation more than do mutually acceptable timing agreements entered into by staff and the parties during the second request negotiations.

Accordingly, linking the custodian presumption to an advance/rolling production requirement will formalize a practice that the FTC's experience shows generally reduces the cost and length of the merger review process. Again, however, the advance production requirement does not change the provisions of the HSR Act, or its implementing regulations. Parties remain entitled to trigger the 30-day clock by substantially complying with the second request.

Non-Application to Central Files

The custodian presumption will not apply to requests for documents that are contained in "company" or "central" files. Staff may request that parties produce these materials regardless of whether they are contained in the files of the employees in the

search groups. This provision is not a loophole that will allow circumvention of the restrictions imposed by the custodian presumption. Requests for information contained in corporate and central files generally will be limited to the types of documents and data that parties produce routinely in merger investigations, but which often are not found in complete form in the files of an individual employee. Examples of these materials are central databases, contracts, licenses, responses to requests for proposals, financial reports, budgets, and company sales files.

The exclusion of materials contained in corporate or central files from the limitations imposed by the custodian presumption reflects two realities. First, in many circumstances, there is no individual who retains a complete set of the types of materials that often are stored centrally, such as contracts and proposals. Second, even when an individual does possess all of the required information, the time and cost needed to identify and agree upon the individual often would offset the value of any reductions in document production size that such an approach might achieve.

Sixty-Day Pre-Trial Discovery Period

The custodian presumption and the provisions of the other reforms place limitations on the volume of information that the FTC will require parties to produce in most second request investigations. In most instances, these limitations should not prevent the FTC from obtaining access to the relevant persons and information needed to challenge a transaction in court. It is important, however, to make certain that if the FTC brings a litigation challenge, the FTC has the opportunity to take additional necessary discovery.

To ensure that the FTC is not prejudiced if it challenges a transaction, the reforms condition the limitations of the custodian presumption on the party's agreement to allow the FTC adequate time to take discovery of relevant information that the party did not provide during the investigation. Accordingly, for the custodian presumption to apply to a party, the party must agree that, if the FTC brings a litigation challenge to the transaction, the party will agree to propose to the court jointly with the FTC a scheduling order that contains at least a 60-day discovery period. (Staff may agree to a scheduling order with a shorter discovery schedule.)

2. **Two-Year Relevant Time Period**

A. There will be a presumption that the "relevant time period" for a second request will be from two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party certifies that it has substantially complied with the second request. When the custodian presumption's 30-day advance production period applies, the presumptive relevant time period will be from two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party produces the materials responsive to the second request. A party will be required to produce all responsive documents that it generated or obtained during the relevant time period.

B. The two-year relevant time period presumption does not apply to requests for data.

C. Staff may enlarge the relevant time period when it is reasonably likely that a longer relevant time period is necessary for the FTC to analyze a transaction's competitive effects.

The length of the time period for which a party is required to search for documents (the "relevant time period") also can affect the size, cost, and length of a second request investigation. For example, in recent second requests that had a three-year relevant time period, approximately 25% of the materials produced by the parties were more than two years old. The Model Second Request currently requires that the

party produce responsive materials for a three-year relevant time period. Experience shows, however, that in many investigations documents generated or obtained more than two years before the FTC issues a second request do not significantly inform the FTC's analysis of the competitive effects of the transactions.

The forward "cut-off" date for a second request production – the most recent date for which a party is required to produce documents – also can have a significant impact on the cost of a second request. The Model Second Request requires a party to submit responsive documents produced or obtained by the party up to 30 days before substantial compliance for most of the specifications. Specifications 7 and 15 (the competition and acquisition document specifications) require a party to produce documents that it produced or obtained up to 14 days before the party certifies substantial compliance. The 14-day cut-off period, and even the 30-day cut-off period, can generate significant expenses by requiring parties to conduct multiple searches of some employees' files – known as "second sweeps." The benefits of these relatively short cut-off periods rarely outweigh the costs. In many merger investigations, staff agrees to significantly longer cut-off periods.

The FTC's experiences indicate that it is appropriate to reduce the length of the standard relevant time period. The FTC will adopt a presumption that the relevant time period for the FTC's second request will be from two years prior to the date on which the FTC issues the second request until 45 days prior to the date on which the party certifies that it is in substantial compliance. When the custodian presumption's 30-day advance production period applies, there will be a presumption that the forward cut-off date for the relevant time period will be 45 days from the date on which the party *produces* the

materials responsive to the second request. A party will be required to produce all responsive documents that it generated or obtained during the relevant time period.[10]

Staff will retain the discretion to enlarge or shorten the relevant time period in appropriate circumstances. In some circumstances, it may be simpler or more cost-effective to make the relevant time period slightly longer than two years by starting the period on the first day of a company's quarter, or the first day of a calendar or fiscal year. Starting dates at the beginning of a quarter or a calendar or fiscal year also may be necessary to make certain that the parties produce at least two years of their strategic plans and other core business documents.

In addition, in some circumstances, it may be necessary to use a three-year or longer relevant time period. For example, a longer relevant time period may be appropriate for a transaction that involves markets with long-term contracts.

Finally, a more recent forward cut-off date for some specifications or for some custodians also may be warranted in some circumstances. For example, if potential efficiencies are a major issue in the investigation, the FTC may need a more recent cut-off date for efficiencies-related specifications because the parties are likely to generate documents reflecting anticipated efficiencies throughout the merger review process.

3. Empirical Data

A. Staff will inform the parties about the competitive effects theories under consideration and the types of empirical analyses that may prove useful in the investigation.

B. Parties are strongly encouraged to provide staff with the following: (1) a written description of how the party collects, maintains, and uses the

[10] The two-year relevant time period presumption does not apply to requests for data. As explained in the next section, the period of time for which data are needed varies considerably.

types of data that are responsive to the second request; (2) a proposal to limit the data request, and data samples to support the proposal; and (3) access to the employees of the party who are knowledgeable about how the party collects, maintains, and uses the types of data specified in the second request (collectively, "Data Negotiation Information").

C. A party will be entitled to meet or confer with a Director or a Deputy Director from the Bureau of Competition and from the Bureau of Economics if the party believes that staff has not sufficiently limited the data requests. An employee from the party who previously was made available to staff to discuss the party's data must attend the meeting. A party's providing the Data Negotiation Information to staff will greatly assist Bureau management's ability to evaluate a claim that data requests are too broad.

During merger investigations, staff and the parties often devote significant resources to gathering and analyzing empirical data. The greater emphasis on direct analysis of competitive effects has increased the need for such information. Also adding to the cost and complexity of data analyses is that lower storage costs and improved software tools have increased the volume of potentially relevant data. Unfortunately, to date, we have found no viable one-size-fits-all limitations or presumptions that will reduce the costs of data productions in merger investigations. The number of employees searched typically is not a relevant metric. It is possible to establish a presumptive limit on the time period covered by data requests, but experience has shown that a presumption is not likely to be effective because the period of time for which data are needed varies considerably.

The most realistic approach to control the cost and complexity of data productions is to formalize practices that facilitate early and ongoing communication between staff and the parties' business personnel, combined with the exercise of sound judgment about the types and volume of data that are reasonably necessary to analyze transactions. The

Bureau of Economics articulated some such practices in 2002.[11] These practices continue to be the best approach to handle data issues efficiently during the second request process.

First, staff will inform the parties of the competitive effects theories under consideration, and the types of empirical analyses that may prove useful in the investigation.

Second, the Bureaus will strongly encourage each party to provide staff with: (1) a written description of how the party maintains the responsive data; (2) a proposal to limit the data request and data samples to support the proposal; and (3) access to employees or officers of the party who are knowledgeable about how the party collects, maintains, and uses the types of data specified in the second request, and the databases and other software used by the party to store and analyze the data (collectively, "Data Negotiation Information").

If, after negotiations between staff and a party, the party believes that the data requests remain too broad, the party will be entitled to meet or confer with a Director or a Deputy Director from the Bureau of Competition and from the Bureau of Economics. An employee from the party who previously was made available to staff to discuss the party's data must attend the meeting. While the right to meet with Bureau management is not expressly conditioned on the party's having provided all of the Data Negotiation Information to staff, the party's having done so will greatly enhance the ability of Bureau management to evaluate the party's claim that the data requests are overly broad.

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[11] *See* Bureau of Economics, Federal Trade Commission, *Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations* (Nov. 2002), *available at* http://www.ftc.gov/be/ftcbebp.pdf.

4. Preservation of Backup Tapes

There will be presumptions that (1) a party may elect to preserve backup tapes for only two calendar days identified by staff, and (2) the FTC will require a party to produce documents contained on backup tapes only when responsive documents are not available through other more accessible sources. If a party's document storage system does not permit designation of backup tapes for two specific calendar days, staff will work with the party to designate a comparable set of backup tapes that the party must preserve.

Instruction C of the Model Second Request defines "documents" to include responsive documents contained on all backup tapes and comparable storage media (collectively, "backup tapes"). Backup tapes are used for disaster recovery or archiving purposes, and generally are not configured for routine document review. Consequently, the production of information contained on backup tapes often is particularly expensive. Moreover, in most investigations, the production of information contained on backup tapes is not necessary because the information on the tapes is available through more easily accessible sources. For this reason, staff often eliminates or modifies the requirement that the parties search and produce responsive materials from backup tapes. In certain instances, however, backup tapes are the only sources of relevant information.

The FTC will establish presumptions that (1) a party may elect to preserve backup tapes for two (2) calendar days identified by staff, and (2) the FTC will require a party to produce documents contained on backup tapes only if responsive documents are not available through other more accessible sources. In appropriate circumstances – such as when backup tapes are the only source of highly relevant information – staff may require a party to preserve and produce information that is contained on additional backup tapes. These presumptions will reduce expenses for many parties and will preserve the FTC's ability to obtain needed information.

5. Partial Privilege Log

The Model Second Request requires a party to produce a log of all responsive documents and information that the party withholds pursuant to a claim of privilege. The requirement that a party produce a log creates incentives for the party to make certain that documents withheld on privilege grounds do, in fact, satisfy the legal requirements for the applicable privilege. By enabling staff to review the appropriateness of any privilege claims, the privilege log also increases the likelihood that the party will withhold only materials that qualify for a privilege. Preparation of a complete privilege log, however, can impose substantial costs on a party that in some circumstances outweigh the benefits of the log. In particular, preparation of a complete privilege log may not always serve the public interest for second request investigations that are resolved rapidly – either because staff concludes that the transaction does not violate the antitrust laws, or because the matter is resolved quickly through a consent agreement.

To balance these costs and benefits better, the FTC will modify the instructions to the second request to allow a party to elect to produce a partial privilege log for all of the custodians in the party's search group, in conjunction with a complete privilege log for a small subset of those custodians. The FTC and its staff, however, will retain the right to require any party to produce a complete privilege log for all custodians in appropriate circumstances.

The modified instructions will contain the following provisions:

a. In place of a Complete Privilege Log ("Complete Log") for all of the custodians in the search group, a party may elect to submit a Partial Privilege Log ("Partial Log") for all of the custodians in the search group and a Complete Log for a subset of the custodians in the search group, as specified in paragraph d.

b. A Complete Log will contain the information specified in the instructions to the Second Request, including, but not limited to, the following information, for each withheld document for a covered custodian: (1) authors; (2) addressees; (3) all recipients of the original and any copies; (4) date; and (5) a description of the document in a manner that, though not revealing the privileged information, provides sufficiently detailed information to enable staff, the FTC, or a court to assess the applicability of the privilege claimed.

c. The Partial Log will contain the following information for each withheld document for a covered custodian: (1) the name of the custodian from whom responsive documents are withheld on the basis of a claim of privilege; and (2) the total number of documents (stating the number of attachments separately) contained in each such custodian's files that are withheld under a claim of privilege.

d. Within five business days after receipt of the Partial Log, staff may identify in writing 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 Log in order to certify compliance with the Second Request.

e. For a party to exercise the option to produce a Partial Log, the party must provide a signed statement in which the party acknowledges that, in consideration for being permitted to submit a Partial Log:

   i. The FTC retains the right to serve a discovery request or requests regarding documents withheld on grounds of privilege in the event the FTC votes to seek relief through judicial or administrative proceedings;

   ii. The party will produce a Complete Log for all custodians in the search group no later than fifteen calendar days after such a discovery request is served, which will occur promptly after the filing of the FTC's complaint; and

   iii. The party waives its objections to such discovery, including the production of a Complete Log for all custodians in the search group, except for any objections based strictly on privilege.

f. A party must retain all privileged documents that are responsive to the Second Request until the expiration of the HSR waiting period or the completion of any litigation challenging the transaction.

g. The FTC will retain the right to require a party to produce a Complete Log for all custodians in a party's search group in appropriate circumstances.

6. Electronic Production and De-Duplication

Today's rollout of reforms does not mark the conclusion of our work to improve the merger review process. One ongoing project is aimed at improving the FTC's ability to accept and review electronic documents. We also are working to identify more clearly to parties the various formats and technology platforms that parties can use to provide electronic documents.

While improvements to electronic production technologies and procedures will occur over time, the FTC will implement one procedure today that will give greater clarity to an important electronic production issue: the use of "de-duplication" software tools. Some parties eliminate from their second request productions duplicate e-mails, as well as other documents that are essentially identical to documents that they do produce. These processes often are referred to as "de-duplication" and "near-de-duplication." Some parties use these techniques without first discussing the issue with staff, while others discuss the issue and then receive modifications that allow them to eliminate duplicates in some circumstances.

As the volume of electronic documents grows, the use of electronic de-duplication techniques can be effective in reducing the size and cost of document productions. Such techniques also can significantly impair the FTC's ability to investigate a transaction. For example, if document collection and de-duplication occur before or during second request modification negotiations, important documents may reside in the files of a custodian who is not included in a party's search group. De-duplication and near-de-duplication across entire productions also can conceal that a particular custodian received documents, which could impair staff's ability to conduct investigational hearings.

To achieve the benefits of de-duplication without impeding the FTC's ability to enforce the antitrust laws, the FTC will add the following instruction to the second request, which requires a party, during negotiations about modifications to the second request, to advise staff about the use of de-duplication and other comparable analytical tools:

> If you intend to utilize any De-duplication or Near-de-duplication software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this Request, or if the Company's computer systems contain or utilize such software, you must contact the attorneys for the government to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this Second Request.

These requirements will provide staff with more complete information earlier in the investigation process, which in turn will give staff greater flexibility to authorize greater use of de-duplication tools.

7. Additional Reforms to the Merger Review Process

A. Specification 1(b)

Specification 1(b) of the Model Second Request requires a party to provide a list of all agents and representatives of a company. The specification can be overbroad in some circumstances because it requires parties to produce a complete list of their agents and representatives, regardless of their role. Staff routinely modifies this specification to limit the request to those agents and representatives involved with the transaction and the relevant products. To eliminate the potentially unnecessary scope of this specification, the FTC will presumptively modify the request to require that parties list only their agents who are involved in the transaction and the relevant market(s).

B. Specification 4: Facilities

Specification 4 of the Model Second Request requires a party to provide information about each of its facilities that are or have been involved in the manufacture or sale of any relevant product. In some circumstances, this specification can impose unnecessary requirements. There is, however, no plausible bright-line modification to this specification. Accordingly, the FTC will modify Specification 4 to require staff to consider reductions in the scope of this request on a case-by-case basis.

C. Definition of "Documents"

The definition of "documents" in the Model Second Request can include some categories of documents that do not necessarily further the FTC's analysis of whether a transaction is likely to violate the antitrust laws (in particular, tax and other types of regulatory documents that do not concern the potential competitive impact of the transaction). The FTC will modify the instructions to its second requests to exclude these materials presumptively.

8. Reforms Do Not Preclude Other Modifications to Second Requests

The foregoing reforms are not intended to preclude or discourage staff or parties from negotiating additional modifications to second requests, or entering into other forms of agreements. As stated, no two investigations are alike, and there is a substantial human element in the merger investigation process. To conduct a merger investigation efficiently requires staff and the parties to work on an ongoing basis to enter into agreements that identify and narrow the relevant issues and identify the information that is needed to resolve those issues.

Particularly important is that staff and the parties make use of processes that enable "quick look" investigations in appropriate circumstances. The most efficient approach to expedite some investigations is for the parties to produce quickly a limited set of core documents and information (*e.g.*, the chief strategic officer's documents, bid data), in exchange for staff's commitment to analyze the materials in a very short period (*e.g.*, three weeks) and then to advise the parties about the status of the investigation. In all situations, staff, the parties, and their counsel should work aggressively to devise mechanisms to collect the information that will allow the FTC to determine in a cost-effective manner whether a transaction violates the antitrust laws.

9. Internal Reforms

In addition to implementing reforms that will directly reduce the scope of second requests, the Bureaus of Competition and Economics have worked on developing reforms to the Bureaus' internal processes. The Bureaus have implemented several new practices, and this work is ongoing. The FTC is, however, announcing today the implementation of a requirement that a Bureau of Competition staff lawyer with substantial experience participate in the negotiations over modifications to a second request. This requirement should ensure that the staff who negotiate the second request have sufficient authority to agree to modifications to the second request in a reasonable time period.

Conclusion

The reforms announced today mark the completion of one stage of an ongoing process to improve the merger review process. The FTC will continue to work to streamline our procedures, and improve our technology, so that we quickly clear

transactions that do not raise anticompetitive concerns and effectively challenge transactions that violate the antitrust laws.