Second Request Reform Proposals For High-Tech Industries

Submission to the Federal Trade Commission's Workshop on Merger Investigation Best Practices

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We appreciate the opportunity to provide these comments to the FTC's workshop on the Second Request process. We believe that through these workshops, the Commission can begin a useful dialogue between practitioners, businesspeople and the enforcement agencies that will help make the Second Request process more efficient and effective. We are writing from the perspective of the impact of the Second Request process on high-technology industries and companies. Our comments are based on our experience in handling numerous Second Request investigations. In addition, we consulted with colleagues, attorneys at other law firms, and in-house counsel at over twenty high-tech firms, including firms in the biotech, pharmaceutical, computer and software industries.

I. Introduction

The question of how to reduce the burdens of Second Requests is vitally important, especially in high-tech industries. Mergers and acquisitions in these industries are largely procompetitive and efficient. Only a very small percentage are challenged and/or restructured after agency review. Reducing the time, costs and burdens of high-tech merger investigations is important so that competitively neutral or procompetitive acquisitions can be consummated as quickly as possible.

The costs and delays that accompany the Second Request process can often kill procompetitive transactions. Competition and innovation in high-tech markets is especially fast-paced. Firms are willing to engage in transactions with the expectation that they can integrate and achieve efficiencies rapidly. The typical three-to-six month period of a Second Request investigation is an eternity in most high-tech markets. Delays of even two or three months place a high-tech company in regulatory limbo which makes it far more difficult for that company to compete; even longer delays could spell disaster for a high-tech company competing in these markets. When faced with the potential cost and delay of a Second Request investigation, an

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otherwise procompetitive transaction will often dissolve, to the detriment of the industry, the parties and consumers.[1] The uncertainty that emanates from any regulatory review can itself be particularly costly.

When the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")[2] was first enacted, Congress envisioned very modest informational demands to assess the competitive impact of acquisitions. Twenty-five years later, companies subjected to merger investigations often receive substantial information requests requiring the production of truckloads of documents and answers to dozens of interrogatories. By contrast, the burdens and costs of investigations conducted by other antitrust enforcement agencies, such as the European Commission or the Canadian Competition Bureau, are far less onerous.

The costs of these investigations can—and often do—run into the millions of dollars, and the accompanying delays hamper the ability of businesses to compete.[3] The inability to quickly execute integration plans potentially is even more costly. Customers will abandon the parties—particularly the target—in light of the uncertainty surrounding the future of the companies and their inability to develop a product in time to be at the front-end of unusually short product lifecycles.Our experience, and the experience of our colleagues and the in-house counsel we surveyed suggest that there have been meaningful improvements in the Second Request process over the past few years. The agencies have begun to grapple with the extent of the burdens and costs of the process and there have been many occasions where the Staff has worked effectively with parties to focus investigations in an effective fashion. Yet we continue to experience and hear of significant discrepancies between the agencies and between individual merger staffs regarding the willingness to focus and streamline the process.

At the outset it is important to recognize that merger investigations are a regulatory process. The vast majority of investigations result in a negotiated settlement or no enforcement action. Less than a handful of investigations result in litigation. Yet the agencies frequently conduct investigations as if they are preparing for litigation, requiring massive document productions and copious interrogatory responses.

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[1] Both the agencies and the private bar need to facilitate the high-tech merger investigation process. *See Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity,* Prepared Remarks of Chairman Timothy J. Muris Before the American Bar Association (Aug. 7, 2001) ("In any event, given the burdens involved for both the merging parties and agency staff, we need to find ways to do our jobs more efficiently. We need to ensure that what you submit is as helpful as possible to our doing our job of protecting consumers.").

[2] *See* 15 U.S.C. § 18(a).

[3] For a thorough, albeit somewhat dated discussion of the variety of costs of the Second Request process, see William Blumenthal, *Market Imperfections and Overenforcement in Hart-Scott-Rodino Second Request Negotiations*, Antitrust Bulletin 745 (Winter 1991).

Below, we identify several aspects of the Second Request process that both unnecessarily lengthen the regulatory review period and unduly burden parties in high-technology industries subjected to the review process. These problems should undergo a rigorous cost-benefit analysis by the agencies. There are significant Second Request reforms that the agencies could implement without sacrificing the integrity or diminishing the usefulness of the Second Request investigation process.

II. Specific Suggestions to Reform the Second Request Process for High-Technology Industries

We have focused on several areas of concern and provide suggestions to optimize the Second Request process for high-technology companies.[4] In sum, we recommend that the agencies: (1) streamline the document production process and tailor it to the industry being reviewed, requesting only those categories of documents likely to yield information that would aid a competitive analysis; (2) more narrowly focus written interrogatory requests, to focus on truly meaningful information (rather than self-serving responses) and make responses to such requests voluntary in some circumstances; (3) quickly focus on relevant areas of competitive concern, taking into account the special substantive issues raised in high-technology industries; and (4) establish a process that enables the parties and the agencies to work more closely to resolve issues more expeditiously so that companies in industries with short product lifecycles are not unduly distracted from their business during a lengthy compliance process. Finally, we provide suggestions for long-term structural reform and evaluation that we believe will facilitate Second Request investigations in all industries, ultimately making the process more transparent, which we believe can significantly reduce the cost and time of compliance.[5]

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[4] Most of these suggestions are also applicable to all Second Requests and not just those involving high-tech industries. For a more general discussion of Second Request Reform, see "Proposals of the New York Bar Association" reprinted in *US merger review: changing at the edges*, Global Counsel 16, 24 (Mar. 2001).

[5] In June 2000, the Business Roundtable offered helpful suggestions as to the areas that most needed reform in the Second Request Process. The Roundtable, an association of CEOs of major U.S. corporations, observed, "In many cases, the merger review process goes smoothly and does not impose unnecessary burdens. But far too often, the process breaks down; and this has major consequences for both the Agency and the parties to the transaction, including delay, distraction and increased costs. While these breakdowns occur infrequently, they are very serious, and the Agencies should take visible and durable steps to reform their processes to ensure that these breakdowns do not occur." The association recommended reforms to document production, the appeals process, and a formal reporting mechanism to Congress. *See BRT Statement for the House Judiciary Committee on the Hart-Scott-Rodino Antitrust Improvements Act of 1976* (June 2000), available at http://www.brtable.org/document.cfm/417.

A. Document Productions

1. Electronic Productions

Second Requests demand that "[d]ocuments provided shall be complete and, unless privileged, unredacted, submitted as found in the Company's files (*e.g.*, documents that in their original condition were stapled, clipped or otherwise fastened together shall be produced in such form). . . .The Company may submit photocopies (with color photocopies of color documents)." These requests frequently cost companies millions of dollars.[6]

Requiring parties to produce potentially millions of pages of documents in paper format (and where appropriate, in color) is costly, time-consuming and burdensome, especially for high-technology companies, where a majority—if not almost all—of documents are retained electronically. E-mail, PowerPoint presentations, and Excel spreadsheets oftentimes are never reduced to paper and are kept in soft copy format only. We also know that those companies that generate soft copy documents habitually generate a tremendous volume of information. Consequently, the cost of downloading these documents from the company's IT infrastructure to a temporary third-party server and then printing, copying, reviewing for responsiveness and privilege, and shipping such information to the agencies is extremely time-consuming and costly.

On the other hand, if the agencies accepted electronic document production, the parties potentially could save a considerable amount of time and money.[7] First, electronic production eliminates the need to paper-copy documents, potentially saving the company a substantial cost investment. Second, it is considerably easier to review electronic documents before production. Whereas only one attorney at a time can review a banker's box of documents, multiple individuals can review boxes of documents stored electronically where such documents are "burned" onto a compact disc or stored on-line. Third, it is easier to sort and "bates label" electronically produced documents. Fourth, it is substantially easier for both the agencies and the parties to review such documents. Today, many software programs that enable electronic review allow the user to conduct full-text sorting and searching, making it considerably less

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[6] The American Bar Association's Report of the Task Force on Federal Antitrust Agencies—2001 recognized the extreme burden on private parties of a Second Request investigation: "Obtaining 'substantial compliance' with such a second request can take months and require the expenditure of hundreds of thousands – or millions – of dollars. While these burdens are visited on only a relatively small number of transactions each year . . . the burdens imposed on the unfortunate parties are quite significant." *See* American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2001* at 30, available at http://www.abanet.org/antitrust/antitrustenforcement.pdf.

[7] We agree with the thoughtful comments in Robert N. Cook's paper on electronic document productions, *The "Paperless" Second Request?*

burdensome for a reviewing Staff attorney to find important passages and eliminating the need to review documents produced in duplicate by different custodians.

2. Businesspersons Searched

Staff should focus the scope of the Second Request document production to include only those individuals with decision-making authority for the company and/or business or product line and those individuals who likely are the custodians of the most significant strategic documents. It is incumbent upon the parties to adequately identify such businesspersons by quickly producing organization charts and also by making available, for example, an in-house attorney or sufficiently knowledgeable businessperson to help the agencies identify those custodians who will have maintained the most pertinent evidence.

Our experiences, as well as those of our colleagues and in-house counsel, have led us to the conclusion that Staff requests information from businesspeople too far down the corporate chain. These searches are extraordinarily disruptive and hamper the ability of these businesspersons to conduct their job. Moreover, we believe this is an area in which there are significant discrepancies between different staffs.

Although it certainly is true that some lower-level sales and marketing staff, for example, may have within their files first hand observations regarding the industry, business or competition that could be useful in helping the Staff identify potential problem areas, including these businesspersons will likely result in overly burdensome document production requests that unnecessarily lengthen the review process. If the Staff truly believes that it is necessary to collect such information, it may be less costly to the parties—in terms of money and time—to first produce the documents of senior company officials. Only then, if such a review yields significant competitive concerns or leaves lingering questions, should Staff require additional productions before the parties can certify substantial compliance.[8] After all, without compelling company- or department-wide evidence that demonstrates competitive concern, troubling anecdotal evidence from the field will not support a decision to challenge a transaction.

Again, although this concern is universally applicable, it is especially acute in high-tech industries where the parties face extraordinary time pressures. The strategic value of a combination could be lost if the parties are unable to consummate a merger quickly enough—for example, customers of the target company may abandon it due to the uncertainty surrounding the future of the company because of the investigation and/or the parties may be unable to integrate quickly enough to develop a product in time to be at the front-end of unusually short product lifecycles. The need for an expedited review process is imperative in such industries.

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[8] We suggest later in this paper that the agencies evaluate the Second Request process on a regular basis. One useful project would be to study the utility of burrowing down and searching the files of lower level employees. For example, the agencies could review past enforcement memos to determine which types of individuals possess the most valuable documents; such a review could provide guidance on how extensive a search the agencies should conduct.

3. Production of E-mails

The agencies invariably request that the parties produce all e-mails; complying with these requests can be very costly (especially if they must be copied). In addition, it takes a tremendous amount of time to review these documents. Our clients regularly retain tens of thousands of e-mails (in the trash, sent items, and inbox folders, for example), which do not relate to topics even remotely relevant to an investigation. We believe that requests for e-mails should be made in those few cases where there is a serious likelihood of litigation.

4. Productions from Foreign Offices

High-tech companies generally have a substantial presence in countries outside of the United States. Oftentimes, our clients have sales offices, subsidiaries, manufacturing facilities and research and development branches in India, Israel, and Mexico as well as throughout Asia. The cost of producing documents from these remote locations—including the cost to the search, ship productions and translate foreign-language documents—is significant and the yield is negligible. Unless such companies have decision-makers located in these offices, we recommend that the agencies eliminate the requirement that custodians in such offices need to produce their documents.

5. Back-up Tapes

The cost of maintaining and retrieving back-up tapes is extraordinary.[9] As discussed, high-technology companies maintain a substantial amount of their information electronically. Under present-day Second Request procedures, the parties are required to maintain and produce, during the course of a Second Request, responsive documents maintained on all back-up tapes. Such requests are unduly burdensome.

Back-up tapes take snapshots of the information maintained on a company's servers. Unless the company erases such information from its servers, it is generally maintained there as well. Back-up tapes maintain electronic information remotely in case of a catastrophic disaster. It is extremely expensive for a company to retrieve such information and takes a considerable amount of time.

For example, Wilson Sonsini Goodrich & Rosati recently represented a client during a Second Request investigation; the client maintained its company-wide information for 12 months on back-up tapes and rotated its back-up tapes monthly. Thus, it maintained back-up information for one year, on a month-by-month basis, and then rotated the oldest month of tapes on the beginning of the 13th month. The company, which is relatively small, utilized 70 servers during

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[9] *See* Michael Byowitz, William Rooney, *Second Requests: Suggestions for Reform*, 13-Sum Antitrust 43, 44 (Summer 1999) ("Significant inconvenience and cost is imposed by requiring parties to retrieve electronic documents that are stored on back-up tapes and that are no longer in use by company personnel.").

the normal course of business, and it required 35 back-up tapes to store one month's worth of information from those servers; thus, the company needed 400 tapes to store this "snapshot" information for the entire one-year rotational period.

To retrieve only one month's worth of backup, the company had to undergo a time-consuming, costly and rigorous process; the restoration of the information cost several hundred thousands of dollars. To conduct the Second Request search, the company was required to restore each of its servers for each month, at substantial cost to the company. The relative utility of such retrieval was minimal; the information contained on the company's servers was virtually identical to the information on the backup tapes. The cost was significant, and time required to download, print and review the back-up tapes was significant. From our discussions with other practitioners and in-house counsel, we understand that this experience was not atypical.

6. Updating Productions

Requiring the parties to continuously update document productions likewise imposes substantial costs, and these supplemental documents rarely if ever provide useful information. Second Requests typically require the parties to update their search and retrieve all documents responsive to any specification up to either 14 or 30 days before the parties' full compliance with the Request. In very few cases do the parties "fully" comply, so in most investigations the parties continue to update their document productions, often for several months. The benefit of such a rule is limited, especially relative to the time and cost of compliance. Such a request takes away valuable business time from businesspersons and requires them to both maintain and produce all documents created during the course of a Second Request. On the other hand, the value to the Staff of requiring such information must be limited, since the most relevant documents are presumably created before or just after the company decides to undertake the transaction being investigated.

The need for reform of this obligation cannot be understated. The obligation to continuously update a Second Request production can cost hundreds of thousands of dollars, even over one million dollars a month, depending upon the scope of the Second Request. Since very few cases are ever litigated, this obligation should fail a cost-benefit analysis. The agencies should act promptly to toll the requirement for updating searches, especially in investigations in which consent negotiations have begun.

B. Narrative Interrogatories

Requiring written narrative responses to several specifications can be particularly burdensome and oftentimes not relevant to high-technology industries. For purposes of this paper, we rely upon those specifications set forth in the agencies' Model Second Request, although we recognize that the Model Second Request is usually somewhat customized for each

transaction depending upon the parties and the industry involved.[10] However, even though the agencies frequently modify the Model, many of the problematic specifications are generally found even in customized "actual" Second Requests. Moreover, as written, the Model provides precious little guidance for companies and counsel attempting to ascertain the scope of a potential Second Request.

First, we recommend that the agencies draft new model Second Requests to reflect the dynamics of certain industries instead of the existing one-size-fits-all model request. Like law firms that establish "best practices" term sheets, merger agreements and pleadings, depending upon the type of transaction and the industry involved, we recommend that the agencies draft model requests that are industry specific, so that the parties can better anticipate and prepare for a Second Request. It is, of course, obvious that the information needed to analyze a grocery store merger is different from the information needed to analyze the merger of two PC manufacturers; it may be less obvious that the information needed to analyze a software merger is vastly different than that of two semiconductor equipment manufacturers. The same is true for pharmaceutical and biotech mergers. Perhaps if the agencies drafted guidelines, based upon their experiences, that detailed the type of information needed to analyze mergers in different industries, counsel would be better equipped to prepare their clients for the type of information that they would need to gather to respond to a Request for Information.

Second, many of the Specifications that call for narrative responses ultimately yield self-serving and unhelpful responses; in essence, the parties produce persuasive "white papers" rather than narratives that will assist in the agency's review. These narrative responses take a considerable amount of time to complete, and their informational yield is generally low. The agencies should consider eliminating many of the narrative responses, or making some responses voluntary. For example, if the parties do not consider entry to be a significant issue, the agencies should permit the parties to respond "Not Applicable" without fear that at the end of the process, the agencies may consider their submission non-compliant. Another useful alternative would be to permit the parties to identify responsive documents, in lieu of answering specific interrogatories. This approach is commonly taken in civil discovery.

There are also several specifications ill suited for some high-technology industries, including:

1. Facilities Interrogatories

The Model Second Request asks the parties to produce information concerning the nature of their facilities, including manufacturing capacity and detailed information concerning sales offices—including foreign sales offices. Specifically, the Model Second Request asks for: "[T]he capacity and the quarterly capacity utilization rate for production of each relevant product manufactured at the facility, specifying all factors used to calculate capacity (including, but not

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[10] The Model Second Request is available on the Federal Trade Commission's website at http://www.ftc.gov/bc/hsr/introguides/guide3.pdf.

limited to, any changes in capacity attributable to ramping up from initial production to full production), the number of shifts normally used at the facility and the feasibility of increasing capacity, including the costs and time required."[11] The Model also asks whether facilities are leased or purchased, whether built or acquired, when opened, and cost to replace if closed.

In many high-technology fields, and especially in merger investigations that focus on innovation competition, these "capacity" questions are irrelevant. For instance, in the software industry, capacity is obviously not a concern; therefore, information concerning software parties' facilities is largely irrelevant, but time consuming for the parties to collect. Likewise, information regarding the precise nature of the parties' foreign sales offices is likely irrelevant, unless the Staff truly believes that the geographic market is not worldwide, or is concerned that the sales process or competitive environment is materially different from country to country.

More subtly, in addition to being irrelevant in the software industry, capacity concerns oftentimes have little or no relevance in today's high-tech hardware industries. Many so-called hardware-manufacturing companies are "fabless" and outsource their manufacturing requirements to third-party contract manufacturers. Even for those companies that still keep their core manufacturing requirements in-house, because there is so much outsourced manufacturing capability in the world today, capacity questions may indeed be irrelevant in non-fabless industries as well. Again, unless the Staff truly believes that capacity constraints are a concern (perhaps in sophisticated semiconductor equipment manufacturing or optical networking industries where there is more limited optimized manufacturing capacity available), the parties should not be burdened with collecting such detailed information.

2. Pricing/Bid Specifications

The Second Request often demands substantial econometric data in the form of very detailed pricing and bid information. Often, parties do not maintain this information in the format requested by the Second Request, and it is a significant burden to collect, format and produce the information as requested. Likewise, the requests for detailed sales data (*e.g.*, Specification 3 of the model asking for sales by SKU, import and export information, sales by product "feature") is also burdensome, and could result in the production of reams of paper. As a result, the production of such information is costly, especially relative to its apparent relevance to the Staff's analysis. We have found that collecting such information sometimes takes as long as several weeks, thus adding a substantial cost to comply with the Second Request. In some high-technology industries these weeks are invaluable, at least relative to the benefit that such information provides the agencies.

Thus, instead of automatically including requests for such information, Staff should consider foregoing the request for disaggregated econometric information if they or, more importantly, the economists do not believe it is critical to the determination of whether the transaction is anticompetitive. Additionally, it may make more sense for Staff to limit such

[11] *See* http://www.ftc.gov/bc/hsr/introguides/guide3.pdf.

econometric data requests such that parties are required only to submit aggregated information, which is more likely to yield significant statistical results.

Because econometric requests are so expensive to comply with, they should receive strict scrutiny by management, before these costs are imposed. In some contexts, such requests require the production of millions of items of data. Such an undertaking should be required in only the most limited of circumstances.

3. Entry

In some transactions, entry is not a relevant consideration. Thus, in the end, parties' responses to the narratives regarding entry oftentimes are self-serving, and do not facilitate the agencies' review of the transaction.

In addition, the entry specification oftentimes is too broad, extending too far back into the past. It is, of course, cliché for parties to declare that high-technology industries are rapidly changing and proclaim that what has happened ten years ago is always irrelevant in high-technology transactions. However, it is true that in some industries requests for information dating back ten or even five years are totally irrelevant to the industry and transaction. The onus initially is on the parties to so demonstrate during the initial 30-day waiting period. However, the Staff should certainly be receptive to the notion that in some high-technology industries, specifications asking for broad entry information will likely yield little or no relevant information and serve only to burden the parties unnecessarily.

For example, a well-established software company may recently have developed a new bleeding-edge technology for system-on-a-chip design and seeks to acquire another start-up company in the same field. During the Second Request process, asking that well-established company to describe their entry from five years ago (and maybe even three) is burdensome, costly, and time-consuming and unlikely to yield any relevant information for a transaction involving the cutting-edge. In contrast, the Staff is certainly justified in asking for information relating to entry conditions from ten years prior in the semiconductor equipment manufacturing industry where development planning sometimes stretches a decade or more.

In the end, the Staff and the parties should strive to customize certain requests for information, depending upon the nature of the parties and the industries involved; burdensome interrogatories that are unlikely to yield considerable information should be eliminated.

4. Other Specifications

There are other less significant specifications that individually do not impose a tremendous burden on the parties, but cumulatively do lengthen the process, and at the same time, do not add much, if anything, to the quality of the government's investigation. For example, requests asking for information "relating to actual and potential import into, or exports from, each relevant area of any relevant product, including, but not limited to, documents showing: the names of importers or exporters; the market share or position of such importers or exporters; the quality or quantity of products imported or exported in total or by any person; and any costs or barriers to imports or exports" likely will not yield any pertinent information in a truly global high-technology industry, such as on-line retailing or enterprise software. Such

requests, however, may require a substantial investment of time and money by the parties involved in the Second Request, and in the end provide very little detail that aids in the analysis of the competitive effects of a transaction.[12]

C. Substantive Areas

1. Identifying Troublesome Relevant Products Early

Over the past several years, the agencies have become significantly more adept in their investigations of high-technology industries; Staff has done an admirable job in identifying and focusing on only those product groups that raise competitive concerns. That said, the Second Request process must better reflect the reality that only some products in a multi-product transaction merit a Second Request. It is also incumbent upon the parties to quickly identify for the Staff those product areas where no competitive concern arises. As many high-technology transactions are time-sensitive, the parties do not want—and management should not allow—months of investigation reviewing documents, interviewing business executives, deposing witnesses and entertaining presentations for those areas where Staff ultimately has no intention of challenging the transaction.

Some high-technology companies develop and manufacture multiple products based upon one core technology; those products ultimately serve different applications for distinct customer groups. For instance, a semiconductor company may develop a methodology to allow analog and digital signals to interface seamlessly. That company may have, in turn, produced multiple products that employ that methodology for several different applications. A proposed transaction involving that company and a small start-up may result in an accumulation of market share for only one or two of those distinct applications. If there is a significant likelihood that the transaction will not raise competitive concerns with regard to the other products, the Staff should either (1) eliminate such product groups from the scope of the Second Request, or (2) use a "quick-look" approach for those less worrisome applications, in an effort to streamline the Second Request process.

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[12] We recommend that the agencies consider eliminating or modifying the following specifications from the Model Second Request, depending upon the industry and transaction: (1) Specification 1 should ask for only current organization charts; the Request should ask for documents held by specific positions, and any individual who held that position during the course of the relevant time period should be searched; (2) Specifications 4 and 11, concerning facilities, should be eliminated from most Second Requests, except where there are specific concerns; (3) Specifications 9 and 10, concerning entry, should be voluntary, and should cover, generally, a more limited time period; (4) Specification 12, concerning imports and exports, should be eliminated from most Requests; (5) Specifications 3, to the extent it asks for disaggregated econometric and sales data, should be used in only those circumstances where it is essential to the government's analysis; and (6) Specification 5(a), requesting a "sample" of the relevant products, generally is unhelpful.

2. Failing Company Considerations

U.S. antitrust law is not predisposed towards the failing firm defense. Under U.S. law, the defense is met only where a target firm is near financial ruin with no viable, alternative buyer. Nevertheless, in high-technology industries, it is essential for the agencies to understand the viability of target firms to understand the competitive effects of a transaction. In short, a deal involving a floundering firm in some high-technology areas is the only way to truly preserve a technology; even though that firm may not be "failing," customers in many high-tech industries simply are unwilling to gamble on products from firms that may not be around in six months' time.

We will not address the merits (or shortcomings) of U.S. antitrust law as it pertains to the failing company defense. Nevertheless, in the high-technology world, the relative strengths and weaknesses of competitors are particularly relevant in a determination of whether a particular transaction will yield anticompetitive effects, or ultimately be procompetitive. The Second Request process does not formally allow any consideration of such concerns. We recommend that in appropriate cases the agencies consider adding a specification that considers the distressed nature of a company. Although generally responsive to other specifications, information pertaining to a company's precarious market position should be separately considered in the Second Request process, not only in an analysis of the competitive effects of the transaction, but also in any determination of the length of an investigation. In high-technology industries, distressed companies often are "dead in the water" if uncertainty surrounding their fate seems to loom for too far into the future.

3. Elimination of Vertical Issues

Although not a significant source of inquiry in most Second Requests, the agencies generally, at a minimum, ask the parties to explain the need for vertical integration in an industry and also sometimes ask the parties for a list of suppliers of component parts in an effort to determine whether a merger raises any vertical issues. In some high-technology industries, after gaining an understanding of the core technology, it is not necessary to request such information. In many biotech, pharmaceutical, and medical device industries, for example, such queries generally are irrelevant, as the parties' products require no vertical inputs.

D. Process Recommendations

1. Providing Guidance on the Types of Information Necessary During the Initial Waiting Period

In high-tech industries, the Staff often requests very specific information during the initial HSR 30-day waiting period. Yet the parties generally are unaware of the type of information that the Staff will request. This 30-day window is valuable time that can be utilized more effectively if the parties know beforehand what type of information Staff will need to minimize the possibility of an extended Second Request review. The agencies should publish the categories of information that parties typically should produce during the initial waiting period.

For example, from experience we know that Staff routinely asks for product brochures, third-party analyst information, internal market studies, marketing, sales, business and other strategic plans, customer lists, and competitor lists. In pharmaceutical and biotech mergers the primary focus is on intellectual property rights, licensing arrangements, and alliances. Staff also requests information concerning pipeline sales, research and development projects, and new product rollouts. Staff also routinely informally requests technical information concerning the parties' products, and studies, plans or discussions that describe alternative solutions that compete with the parties' products. If the private bar was generally informed about these requests, we expect that the agencies could make better use of the initial 30-day period and this would result in more focused investigations, or in some cases, would eliminate the need to issue a Second Request.

2. Timing Issues

From our discussions with members of the bar and in-house counsel, we believe there is a general perception that the Staff will be over-demanding in its requests as a means of assuring that they have sufficient time to conduct the investigation. We recognize that the current time periods are frequently too short to conduct an adequate investigation. Using the Second Request as leverage for time, however, is not the correct approach. Rather, the Staff and the parties should be willing to enter into a timing agreement. This agreement should specify that if production is complete by a certain day, the staff will commit to make its recommendation within a certain number of days following certification. By agreeing to a certain time period, the parties will be able to plan more effectively. Timing is especially crucial in high-tech deals; if the parties understand when an investigation will end, they will be better equipped to plan for integration and will be ready to "hit the ground running" if and when they receive clearance. This will enable the parties to better plan product roadmaps and map out strategies to deal with suppliers, distributors and customers. Moreover, uncertainty about timing can often kill a deal.

3. Weekly Meetings with the Staff

In high-technology deals, it is imperative to move the process along as quickly as possible. We recommend that the Staff make themselves available for weekly meetings with the parties to discuss the progress of the investigation and to make their concerns known to the parties. If the Staff has resolved certain issues, it would be a tremendous help to the parties to so notify them so that valuable time and resources are not wasted. Staff should also memorialize such conclusions in writing to the parties, so that parties do not need to concern themselves that such issues will reappear later in the investigation. Likewise, if Staff has particular concerns or needs certain documents on an expedited or rolling basis, it should make such opinions known to counsel immediately.

4. Management Involvement

In high-technology deals, it is important for those in the agencies with decision-making responsibilities to have access to important information early. Not only would such access facilitate the review process upon the parties' certification of compliance, it would help educate those ultimately responsible for deciding whether to clear or challenge a merger early in the process about the intricacies of the technology involved in the transaction. Often, the only way

to understand the reasons for a high-technology transaction is to understand the technology; in many high-tech deals, the parties are in search of partners who can provide technological synergies. We recommend that those with decision-making authority have access to and participate in depositions of individuals responsible for explaining the crucial technology of the company. Often, a written submission cannot adequately reflect how particular technology works. Without that understanding, it may be difficult, if not impossible, to comprehend the reasons for a deal.

E. Long-Term Suggestions for Reform

1. Best Practice Guides and Training

There seems to be significant variation between the DOJ and FTC, as well as among the individual merger staffs, on the approach to Second Requests, modifications, and compliance. We believe the FTC should develop a Best Practice Guide for Second Request investigations, including but not limited to) one for Second Request negotiations.[13] These Best Practice Guides should be made available to the public.

Training is also an important component for creating consistency within the agencies. The agencies should train new staff on how to conduct Second Request investigations and how to approach modifications negotiations. In addition, the agencies should establish Best Practice Training for merger division staff and managers to promote adherence to guidelines and consistency within and across divisions. Finally, Bureau management should identify means of monitoring modifications across divisions to promote consistency.

We believe that both the Justice Department and FTC managers can learn a great deal from each other about the approach to Second Request productions and modifications. Therefore, we propose that the two agencies regularly hold Best Practices merger investigation seminars among managers to discuss approaches to conducting Second Request investigations.

2. Greater Guidance on Process

The Second Request process would work more effectively if there were procedural guidelines for Second Request investigations that were made available to the business community and private bar.[14] Some of the areas for guidance could include the following:

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[13] In an article in *Antitrust,* Casey Triggs outlined several helpful suggestions to facilitate the negotiation process. *See* Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, 13-Sum Antitrust 36 (Summer 1999).

[14] Guidance does not necessarily have to be provided through Guidelines. The agency can provide guidance through other vehicles such as frequently asked questions, speeches, and reports.

- What type of supporting information the Staff will need when determining whether to grant a request for modification (*e.g.,* sample documents, volume estimates, other estimates of burden and cost);

- The categories of supporting information and documents the Staff would find useful in assessing a request to limit the scope of document searches;

- Guidelines for negotiating modifications of requests for back-up electronic data;

- Guidelines for negotiating modifications of requests for econometric data;

- Guidelines for translation and searches of foreign documents; and

- Guidelines for requiring parties to purchase market data.

3. Objectively Defining "Substantial Compliance"

The critical issue in all Second Requests is whether the parties have substantially complied with the Second Request. That determination is wholly subjective. Based upon our own experience, such determinations are often inconsistent among Staff. We have heard many complaints that the Staff requires "absolute" compliance, rather than substantial compliance.

The parties, of course, advocate that they have substantially complied, but they are at a severe information disadvantage vis-à-vis the agencies. There is little case law[15] or articulated standards set forth by the agencies about what substantial compliance means. The agencies should develop a common law of Second Request policies that is articulated through written decisions and speeches.[16] The agencies should publish, in some form, the recent decisions by the General Counsel on compliance issues where parties appeal Staff compliance determinations. Clear standards on substantial compliance will level the playing field in negotiations over whether the parties have achieved substantial compliance.[17] Our high-tech clients would benefit

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[15] *See FTC v. Dana Corp.*, No. CA 381-003 H (N.D. Tex. 1981); *FTC v. McCormick & Co.*, 1988-1 CCH Trade Cas. ¶ 67,976, at 57,985 (D.D.C. 1988) and *McCormick & Co. v. FTC*, No. JFM-88-1184 (D. Md. Apr. 22, 1988). Although these decisions generally concern the concept, they really do not set forth sufficient guidelines as to what constitutes "substantial compliance."

[16] The ABA Antitrust Section has endorsed this principle. "[W]e urge the agencies to promulgate standards (1) by which the proper scope of second requests can be assessed and (2) for determining whether substantial compliance has been achieved." *See supra* note 7, ABA Antitrust Section, *The State of Federal Antitrust Enforcement—2001* at 32.

[17] We all recognize the effect of a determination by Staff that the parties have failed to comply. *See* George S. Cary, Deputy Director, FTC Bureau of Competition, Remarks Before the ABA Section of Antitrust Law Clayton Act Committee Spring Meeting at 2 (Mar. 28, 1996) ("We expect corporate America to treat its obligations under the Act seriously . . . . Full compliance

greatly from established standards on Second Request compliance; time and predictability are valuable commodities in these industries.

4. Managerial Tools

Internal managerial tools are useful to make sure that the Second Request process is as effective and efficient as possible. There are a variety of internal reports that can be used to monitor the status of investigations, modifications, and compliance. These reports could also identify the status of modification negotiations. For example, management should track the status of modifications and the number of boxes produced in individual investigations.

We suggest that there be a 15-day goal to complete the modification negotiations from the date the Second Request is issued. If that goal has not been met, Staff should meet with the Bureau Director (or designate) to discuss the status of the negotiations.

5. Striving for Greater Transparency

Transparency is critical to effective merger evaluation and to assure that parties are on a level playing field. Clearly articulating the rationale for challenging, or refraining from challenging, significant transactions would add to the understanding of the agency's underlying approach to merger investigations. The Merger Guidelines are obviously a very useful tool, but greater transparency in both decisions taken and enforcement actions not taken would be very useful. If the FTC published on its website redacted opinions explaining its reasons for challenging or not challenging a merger, including a discussion of the key pieces of evidence that the Staff relied upon to reach its decision, the private bar would have much greater insight into the black box of merger investigations. Likewise, the agencies should publish their decisions regarding appeals of Second Request disputes. Practitioners and their clients would benefit if they understood how and why the agencies resolved specific Second Request disputes, which would act as benchmarks for subsequent disputes, and likely resolve such concerns expeditiously.

In addition, as discussed above, it would be useful to publish model industry-specific Second Requests in areas such as pharmaceuticals, software, supermarkets, and natural gas and oil. The agency should also consider publishing sample specifications on particular issues that are relevant to some mergers, such as installed base/switching cost issues, econometric issues, and bid competition.

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means . . . that the parties to a transaction turn over all of the information that is required under the Act. . . . If the initial filing is incomplete, the parties could be faced with a second search of their files and a delayed start to their waiting period, both of which can substantially increase the compliance burden.").

6. Establishing Goals and Evaluating the Process

The merger review process will work best if it is effectively evaluated.[18] Efforts at controlling and reforming the process depend upon establishing measurable goals and evaluating the achievement of those goals. The Canadian Competition Bureau has established such goals. For example, the goal for completing a merger review in a non-complex transaction is fourteen days in Canada; for a complex transaction, review terminates in ten weeks; and for a very complex investigation, review lasts five months.[19] The agencies should consider establishing similar goals.

The agencies already establish important performance goals under the Government Performance Reform Act ("GPRA"). One of the most important goals is to "Stop Anticompetitive Mergers and Practices through Law Enforcement." We believe that the FTC should establish GPRA goals and performance measures on making the merger review process as cost effective, timely, and efficient as possible. Some possible performance measures might include: (1) the percentage of investigations resulting in enforcement actions, (2) the number of boxes produced per investigation, and (3) the duration of investigations. The agencies should benchmark their performances, set goals and report, on a formal and regular basis, their performance.

Periodic evaluation of the agencies' performance in meeting these goals is a useful part of achieving a high level of performance. These studies should evaluate the Second Request process from a cost-benefit perspective. The FTC's study of the merger review process issued last June was a useful first step.[20] Last year the Canadian Competition Bureau conducted a very comprehensive study of its merger review process, which included surveys of private parties and its internal staff, reviews of past actions, and benchmarking with other enforcement agencies.[21] The report identified those areas of merger enforcement that were effective and efficient and discussed those areas where changes were required to create a best practice process from start to finish.

We believe that the U.S. agencies would benefit from a similar audit and an ongoing evaluation process. Such a study could review individual Second Requests to determine whether

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[18] "[A] willingness to review and revisit, and adjust where appropriate, is a critical feature of any long-term program." ABA Antitrust Section, The State of Federal Antitrust Enforcement – 2001 at 14.

[19] Competition Bureau Merger Branch, Merger Review Performance Report (June 2001).

[20] *See* Staff Report to Congress Regarding Merger Review Procedures (June 19, 2001), which can be found at http://www.ftc.gov/opa/2001/06/fyi0135.htm.

[21] Competition Bureau Releases Merger Review Benchmarking and Performance Report (June 15, 2001) that can be found at http://strategis.ic.gc.ca/SSG/ct02194e.html.

the agencies were meeting their goals and if not, the reasons why. The audit process could also detail which Second Request specifications yielded the most useful information and which were relatively unhelpful; which businesspersons typically possessed the most useful documents; when econometric data proved useful; the effectiveness of a quick look approach; how effective are industry-specific specifications; how timely was the modification process; and other issues germane to structuring the Second Request and modifications.

7. Reinstate the Clearance Agreement

We believe that it is unfortunate that the agencies rescinded their recent clearance agreement, which provided important jurisdictional clarification for high-tech businesses. In many high-tech industries, especially computers, software, and biotech, it is unclear which agency has jurisdiction under the current agreement. For example, both agencies have brought software merger cases, but it is nearly impossible to detect where the jurisdictional lines are drawn. Without an agreement, there have been significant clearance disputes for some high-tech mergers, which greatly hampered the ability of the firms to effectively utilize the initial 30-day waiting period. We believe that the agencies should attempt to enact a new clearance agreement that will clearly set forth the jurisdictional boundaries for high-tech industries.

III. Conclusion

We commend the FTC for organizing these workshops and for their ongoing efforts to make the Second Request process more efficient. Although there has been some recent progress in reducing the burdens on parties, we believe the agencies are still near the beginning of reforming the process. Especially in high-tech industries, where competition is so rapid and aggressive, the burdens, costs, and time associated with the Second Request process, has in the past—and will continue to in the future—derail procompetitive mergers. The agencies should apply thorough managerial tools and a careful evaluation process to streamline investigations and eliminate unnecessary burdens. By making process an important goal, the agencies will reduce roadblocks for procompetitive mergers and can better marshal their resources to attack those few mergers that pose competitive problems.◆