

FTC Chairman Announces Reforms To Merger Review Process

In a 31-page document released on February 16, 2006, Federal Trade Commission Chairman Deborah Platt Majoras announced a number of reforms to that agency's merger review process. The reforms are designed to streamline the merger review process, formalize best practices, facilitate the rapid identification of relevant issues, produce better tailored information requests, and reduce the burden and cost to parties of complying with agency requirements. The reforms will apply to all filings made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") on or after February 17, 2006¹.

The reforms focus primarily on "second requests," the informal name for the information requests the FTC issues to the parties to the less than 5% of transactions notified under the HSR Act that do not receive agency approval during the initial 30-day waiting period. Owing in part to the increasingly fact-intensive market analyses the agencies perform in reviewing such transactions, and to technological advances that have facilitated the generation and retention of substantially larger volumes of documents than ever before, compliance with second requests now often involves months of work and costs in the millions.

We summarize below the most noteworthy reforms. Subject to certain conditions and exceptions, for second requests issued for transactions notified on or after February 17, 2006, the FTC will:

- Not require a party to a transaction to search the files of more than thirty-five employees (including officers, directors or agents) in complying with a second request.
- Establish a "relevant time period" for document collection dating back only two years from the date the request issues.
- Inform the parties about the competitive effects theories under consideration, as well as the types of empirical analyses that are likely to prove useful in the investigation.
- Provide parties the right to meet and confer with a Director or Deputy Director from the Bureau of Competition if the parties believe that the FTC staff has not sufficiently limited data requests.

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- Reduce parties' obligations with respect to retention of backup tapes, and require production from backup tapes only where responsive documents are unavailable through more accessible sources.
- Reduce the amount of information parties must provide as to documents that are withheld from production on the basis of privilege.

Notably, Chairman Majoras indicated that these changes mark only a first step in the agency's plans to reform the merger review process, and explained that the FTC will continue to examine ways to further reduce the scope of document and data requests.

The Antitrust Division of the Department of Justice, which has parallel jurisdiction with the FTC in reviewing mergers under the HSR Act, has given indications that it intends to adopt reforms to its second request process although it is unclear whether and when it will do so. Until then, any transactions reviewed by the Department of Justice, as opposed to the FTC, will presumably be unaffected.

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This memorandum is not intended to provide legal advice and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to any of the following members of our Antitrust Group:

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¹ Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Announcement: Reforms to the Merger Review Process (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>