

FTC Reforms to Merger Review Process

February 21, 2006

On February 16, 2006, the Federal Trade Commission ("FTC") announced a number of reforms to the merger review process under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR Act"). These reforms will take effect for all HSR filings submitted on or after February 17, 2006, where the FTC is the reviewing agency. These reforms will not apply to the Antitrust Division of the U.S. Department of Justice.

The main objective of these reforms is to improve the merger review process by increasing the efficiency and decreasing the costs and time associated with responding to FTC requests for additional information regarding notified transactions (known as "Second Requests"). The reforms are in response to the increased scale of Second Requests in recent years, caused by changes in merger review standards and the greater use of electronic communications by parties and the government.

CUSTODIAN LIMIT

The reforms reduce the scope of Second Requests by creating a *presumptive* limit on the number of employees the party must search for relevant documents. Under the reforms, a party will generally not be required to search the files of more than 35 of its employees ("custodians") to comply with a Second Request, provided the party meets several requirements.

These requirements include, among others, providing FTC staff with complete organizational charts and related information, providing access to employees who are knowledgeable about the transaction and about relevant products or services, and producing materials responsive to the Second Request 30 days before formally certifying substantial compliance (or entering into a rolling production or other timing agreement). In certain circumstances, however, the FTC may agree to smaller search groups, or require more than 35 custodians to be searched. In addition, the custodian search limit does not apply to "company" or "central" files, such as central databases, contracts, licenses, responses to requests for proposals, financial reports, budgets, and company sales files.

RELEVANT TIME PERIOD

The reforms also reduce the presumptive relevant time period for responsive files. The previous Model Second Request ("MSR") required parties to search files for a three-year time period. The reforms reduce this period to two years. Similarly, the reforms adjust the "cut-off" date to help parties avoid the need to perform a "second sweep" of their documents. Under the old MSR, for most document requests, parties were required to submit responsive documents produced or obtained by the parties up to 30 days before substantial compliance. The new presumptions set the cut-off date as 45 days prior to substantial compliance or the production of responsive materials. However, the FTC may choose to lengthen or shorten the relevant time period in appropriate circumstances. In addition, the two-year relevant time period will not apply to requests for data.

EMPIRICAL DATA REQUESTS

The FTC staff will inform the parties at the outset of an investigation of the competitive effects theories under consideration, and the types of empirical analyses that may be useful in the investigation. Parties will be encouraged to provide FTC staff with a description of how the party maintains responsive data, a proposal to limit the data request, and access to employees with knowledge about how the party collects, maintains, and uses the requested data, and the databases and other software used to store and analyze the data. If, after negotiations with staff, the parties believe that data requests remain too broad, the party will be entitled to meet and confer with senior FTC officials.

BACKUP TAPES

Document requests that require parties to produce data from archived backup tapes and comparable storage media can significantly increase costs. Accordingly, parties may elect to preserve backup tapes for two calendar days identified by FTC staff, and parties will be required to produce documents contained on backup tapes only when responsive documents are not available through other more accessible sources.

PARTIAL PRIVILEGE LOGS

The FTC will generally allow a party to elect to produce a partial privilege log for all of the custodians in the party's search group, together with a complete privilege log for a small number of those custodians. In certain circumstances, however, the FTC may require complete privilege logs for all custodians.

ELECTRONIC PRODUCTION AND DE-DUPLICATION

Parties will be required to notify FTC staff about the use of "de-duplication" software during the negotiations over modifications of the document request. This will provide FTC staff with more complete information earlier in the investigation process, thereby providing the FTC with greater flexibility to authorize the use of de-duplication tools.

DEFINITION OF "DOCUMENTS"

The FTC recognizes that the term "documents" is often defined very broadly in Second Requests, calling for categories of documents such as tax and other types of regulatory documents that do not contribute to the FTC's antitrust analysis. The FTC will modify its instructions to exclude these materials presumptively.

MISCELLANEOUS ADDITIONAL REFORMS

The reforms make several smaller changes to the Second Request process, the most notable of which is to require the participation of an experienced staff attorney in the negotiations over modifications to the Second Request, in order to ensure that the staff has the authority to accept modifications to the Second Request in a more efficient manner.

ADDITIONAL MODIFICATIONS TO SECOND REQUESTS

Finally, the FTC will continue to encourage parties to negotiate with staff for additional modifications to Second Requests or to enter into other forms of time and cost-saving agreements. For example, the FTC has recognized that parties can expedite certain investigations by agreeing to produce promptly a limited set of core documents and information in exchange for FTC staff's commitment to analyze the materials in a short time period and advise the parties on the status of the investigation.

* * *

For further information about these reforms, please feel free to contact members of the Firm's Antitrust Practice Group, including:

New York City:

Kevin Arquit (212-455-7680, karquit@stblaw.com)

Chuck Koob (212-455-2970, ckoob@stblaw.com)

Ken Logan (212-455-2650, klogan@stblaw.com)

Joe Tringali (212-455-3840, jtringali@stblaw.com)

Aimee Goldstein (212-455-7681, agoldstein@stblaw.com)

Washington, D.C.:

Peter Thomas (202-220-7735, pthomas@stblaw.com)

Arman Oruc (202-220-7799, aoruc@stblaw.com)