

MERGER REVIEW PROCESS INITIATIVE

I. STATEMENT OF PURPOSE

The objective of the merger review process initiative is two-fold: (1) to empower and encourage Division staff to tailor investigative plans and strategies according to each proposed transaction, in lieu of reliance on standardized procedures or models; and (2) to reduce merger review burdens by offering substantial limitations on HSR second requests in exchange for certain timing commitments. This effort builds upon the process improvements implemented by the Division over the last few years.

The staff, working together with the Section Chiefs and Deputy Assistant Attorneys General, and with support from the Office of Operations, will have considerable discretion to exercise judgment in devising an investigative plan. Key factors in tailoring an investigation will include the complexity of the transaction under review; the nature and magnitude of the competitive concerns at issue; the Division's expertise in the markets and issues under investigation; and the volume, types and availability of information required to make an appropriate law enforcement decision.

The goals are to identify critical legal, factual and economic issues regarding the proposed transaction more quickly, to facilitate more efficient and more focused investigative discovery, and to provide for an effective process for the evaluation of evidence, in an effort to deploy the Division's investigative resources more efficiently. These efforts likely will reduce the investigative burden upon all concerned.

The Division recognizes, further, that recent explosive growth in the number of electronic documents stored by firms, including e-mail, has substantially increased the volume of documents responsive to a second request. In order to reduce the burden on both the parties and the staff, and recognizing that very few merger investigations result in litigated challenges, parties are encouraged to enter into a merger review "Process & Timing Agreement" with the staff after receipt of a second request. This option, which is explained fully in section IV.C below, can limit the number of individuals that a party must search for potentially responsive documents to no more than 30 persons in most cases, which can significantly reduce compliance costs and delays.

This document sets forth a basic framework for conducting merger investigations, assuming a high level of cooperation by both sides. It is the Division's hope that this framework will encourage such cooperation, enabling quick and thorough investigation of important issues. This document sets forth no mandatory procedures. Nor does it create any entitlements for parties proposing mergers. The Division's willingness to adopt any particular investigative approach will depend upon the specific circumstances of the proposed transaction, including the parties' willingness to work on a cooperative basis.

II. INITIAL 15- OR 30-DAY PERIOD

The staff is encouraged to be as aggressive as possible during the initial 15- or 30-day waiting period in attempting to identify transactions that do not require further investigation, and to narrow and refine issues for transactions likely to progress to HSR second request inquiries. While parties remain free to decide whether and when to engage the staff, the success of this effort will require the active participation and cooperation of the parties. Thus, parties are encouraged to be equally active in framing issues for inquiry, substantiating claimed defenses and responding in a timely manner to staff requests.

A. Request to Provide Information Voluntarily

1. As soon as feasible during the initial waiting period, staff will contact the parties and request that they voluntarily provide preliminary information and documents tailored to the specifics of the proposed transaction. Depending on the specific issues raised by a transaction and the Division's expertise in the relevant area, a request might include, for example:
 - a. A list and description of all overlap and otherwise potentially relevant products;
 - b. Product/marketing brochures;
 - c. Business plans, market studies, strategic plans and information on market shares and competitor positioning;
 - d. A list of competitors, suppliers and customers;
 - e. Readily available data regarding sales, output, and margins;
 - f. Analyses or studies regarding the transaction; and
 - g. Recent periodic reports sent to or among senior management.
2. In order to ensure good faith compliance with voluntary requests, the staff may request that the parties describe the scope and nature of their search for the requested documents and information and certify that description of their search.
3. The earlier the information is provided, the sooner and more effectively the staff can determine whether a significant competitive concern exists or, if issuance of a second request is necessary, can tailor it to address the relevant issues.

B. Early Consultations Encouraged

1. Early substantive consultations are strongly encouraged. The goal of early consultations is to establish an effective process that will enable the Division to

determine whether the investigation can be concluded prior to issuance of a second request and, if it cannot, to enable the Division to devise an appropriate investigative plan that includes a tailored second request. Consultations will provide an opportunity for both the Division and the parties to present their preliminary views on the transaction and to identify issues requiring further inquiry. The success of such consultations will depend in large part on the cooperation between the staff and the parties.

2. As soon as possible, the Division staff will request a consultation with the parties to discuss the parties' views of the transaction, the structure of each party's organization, and the industr(ies) that are likely to be affected by the transaction. In most instances, the staff will request that appropriate business persons participate in such consultations and that, where possible, parties provide relevant documents to support their contentions. These consultations will be most productive when the parties have provided the staff with any requested information and materials in advance of the meeting.
3. As part of the Division's efforts to engage the parties early in the process, the staff will, as early as feasible, discuss its current substantive evaluation of the transaction with the parties and attempt to identify critical or potentially dispositive issues. While the Division will endeavor in good faith to identify all such issues as soon as possible, certain issues may not be identified until later in the process. Accordingly, the Division will not consider arguments by the parties that the Division is estopped from later raising issues that were not discussed with the parties earlier in the process.
4. If it appears that major issues are unlikely to be resolved prior to issuance of second requests, it may be more productive to focus on other issues that potentially could be resolved prior to issuance of the requests and assist in narrowing their scope.

C. Record Testimony and Interviews

1. Division staff may request interviews of personnel of the merging parties to develop issues or allow the narrowing of the second requests. Voluntary interviews will be the preferred methodology. Record testimony, however, may be requested in the limited instances in which it could make significant progress towards resolving important issues (e.g., market definition, competitive overlaps, entry, efficiencies and failing firm defenses) or in other limited circumstances.
2. Division staff will also continue to interview customers, competitors and complainants and to seek limited submissions from them in order to evaluate the outstanding issues.

III. ISSUANCE OF SECOND REQUESTS

If it is determined that issuance of second requests is necessary, the Division staff will use the knowledge gained within the initial 15- or 30-day period to tailor the second requests as narrowly as possible to the transaction and the goals of the investigation. The prospect of post-issuance, agreed modifications will not serve as a substitute for issuing tailored second requests in the first instance. The second request Model will serve simply as an example, and while it may in some instances serve as a useful starting point, particularly for some definitions and instructions, consideration must be given to whether a particular definition, instruction or specification is appropriate or should be narrowed or otherwise altered.

The Division remains willing to modify its merger review process to reduce the burdens of compliance where such modifications are consistent with the Division's need for documents and information sufficient to enable it to satisfy its statutory responsibilities. For example, the Division has recently decided to: modify the instructions in its Model second request to provide companies an alternative to searching backup tapes and other media that may not be easily accessible for responsive documents; shorten the default time period for relevant documents and information from three years to two years; and significantly reduce the requirement that companies conduct "second sweeps" for responsive documents created or received after the initial search but before the company complies with the second request.

IV. POST-SECOND REQUEST PERIOD

A. Regular Consultations

1. The element of surprise in modern merger enforcement practice is highly overrated. Both the Division and the parties to a transaction benefit from the frank exchange of ideas and evidence that allows both sides to identify and test the competitive theories for and against the transaction.
2. In appropriate circumstances, the Division may agree to meetings or teleconferences with the parties on a regular basis (*e.g.*, every other week) throughout the investigation to promote a continuing dialogue and provide a regular opportunity to discuss progress made on both sides.
3. While the Division will endeavor in good faith to identify critical or potentially dispositive issues as soon as possible, certain issues may not be identified until later in the process. Accordingly, the Division will not consider arguments by the parties that the Division is estopped from later raising issues that were not discussed with the parties earlier in the process.
4. In multi-issue investigations, once the Division determines that an issue that had been raised and discussed has ceased to be a concern, the Division will expeditiously communicate that to the parties.

B. Negotiated Frameworks Tailored to Goals of Investigation

1. The Division's chiefs, in consultation with the relevant Deputy Assistant Attorney General, will be authorized in appropriate cases to commit the Division to specific procedural agreements in exchange for specific undertakings by the parties regarding their submission of information and compliance with particular investigative requests.
2. There will not be a single model for procedural agreements. Instead, the chiefs and deputies will have considerable discretion as to how, if at all, a procedural agreement should be structured based on the specific facts and issues involved in the case. Factors in fashioning an agreement will include the complexity of the transaction; the Division's expertise in the markets and issues under consideration; the nature and magnitude of the competitive concerns at issue; and the volume, types and availability of information required to make appropriate law enforcement decisions.
3. As soon as possible after second requests are issued, but generally no later than three (3) business days after issuance, the Division staff will contact the parties to discuss whether negotiation of a plan and schedule for the investigation would be appropriate under the particular facts of the case, and whether the parties are candidates for the "Process & Timing Agreement" option described in section IV.C below. If an agreement would be appropriate, some of the potential commitments *may* include, for example:
 - a. Commitments for modification of and compliance with second requests and other discovery, including ordered or rolling production, compliance dates, etc.
 - b. Commitments for early access to the parties' technical personnel, or discussions of timing and format of electronic production.
 - c. Dates for depositions of the parties' executives (which may be conditioned on receipt of certain documents in advance).
 - d. Date for the mutual exchange of economic data and other appropriate information.
 - e. Date(s) for discussions between the Division's and the parties' economists and other consultants.
 - f. Date(s) by which the parties will submit white paper(s) and underlying datasets, and the date or time period by or within which the Division will discuss the white paper(s) with the parties. The Division will ordinarily seek an agreement that empirical analysis, plus underlying data and

explanation of variables, procedures, etc., will be submitted by the parties at least five business days before the meeting at which the work will be discussed.

- g. Date by which DOJ staff will describe to the parties their recommendation to the front office.
 - h. Date(s) when the parties will meet with front office personnel.
 - i. A Division commitment that it will advise the parties as soon as the Deputy Assistant Attorney General makes a recommendation.
 - j. Date before which the parties commit they will not close the transaction.
4. The staff might also consider in appropriate circumstances negotiating a schedule to advance an alternative investigative path.
- a. For example, the staff might identify certain potentially dispositive issues (*e.g.*, failing firm, entry) or key documents (*e.g.*, bid documents) and agree to a schedule for a “quick look” at those issues or documents and, if staff determines that the “quick look” was insufficient, agree to a schedule for the additional necessary phases of the investigation.
 - b. Or, the staff could agree to a schedule for a “quick look” at certain potentially dispositive issues or documents and excuse additional production in exchange for legally binding stipulations from the parties and adequate assurances of sufficient discovery, should the Division ultimately challenge the transaction.

C. “Process & Timing Agreement” Option

1. Parties wishing to reduce significantly the scope of their second request productions may enter into a merger review Process & Timing agreement with Division staff. This option will be made available to all recipients of Department of Justice second requests, except in cases where the staff obtains a waiver from the responsible Deputy Assistant Attorney General, for example in particularly complex matters. This option will be conditioned on certain timing and procedural agreements that, among other things, protect the Division’s ability to obtain appropriate and necessary discovery in the event of a litigated challenge to the transaction.

This option is entirely voluntary. Parties may elect to proceed under the timing and processes provided by the relevant statute, and the Division will continue to adhere to the principles of the Merger Review Process Initiative set forth above.

2. In order to qualify for the merger review Process & Timing agreement option each party, or either party in the case of a cash tender offer transaction, must meet the following conditions (to the extent that they did not do so during the initial HSR waiting period):
- a. Voluntary production materials: Each party shall provide any information that Division staff requested it to provide voluntarily during the initial HSR waiting period, as described in Section II.A.1 above.
 - b. Organization charts: Each party shall provide Division staff with one copy of each current organization chart and personnel directory for the company as a whole and for each of the company's facilities or divisions involved in any activity relating to any relevant product or service, as required by the second request. If such organization charts and personnel directories are not available, a party may create them for this purpose or may provide other documents sufficient to identify its officers and other employees, the persons who report to each, and the manner in which the company is organized (divisions, business units, facilities, etc.).
 - c. Company Organization Contacts: Each party shall make available to the staff on an ongoing basis employees or agents who are able to explain the organizational structure of the company, including the job responsibilities of the individuals identified in the company's organization charts.
 - d. IT Personnel: Each party shall make available to the staff on an ongoing basis employees or agents knowledgeable about the company's electronic data systems and policies or practices regarding retention, storage, deletion, and archiving of electronic data, including e-mail, as required by the second request.
 - e. Data Personnel: Each party shall make available to the staff on an ongoing basis employees or agents knowledgeable about any databases or data sets used and maintained by the company that may contain information responsive to the second request.
 - f. Process/Timing Agreement: The parties shall enter into a merger review Process & Timing agreement with the Division. *See, e.g.*, the Model Process & Timing Agreement available on the Antitrust Division's website. This agreement may include any of the timing commitments listed in section IV.B.3 above. The agreement shall include provisions to ensure that the Division has sufficient time to conduct post-complaint discovery if it challenges the transaction in district court. Even in cases preceded by full HSR compliance, it has been the Division's experience that a period of four to six months is generally necessary to conduct appropriate post-complaint discovery. The guidelines of section IV.B above shall apply to the crafting of such procedural agreements.

Note: It has been the Division's experience that the information described in IV.C.2.c-e. (organizational structure, electronic data systems, and databases) typically resides with the company's senior executives and managers, or with specialized employees, and that outside counsel usually does not possess the requisite knowledge to be able to discuss such information in sufficient detail. The Division therefore encourages parties to make appropriate company employees available for the purpose of providing the information described in section IV.C.2.c-e.

3. Second request recipients that satisfy all of the requirements of section C.2 above generally shall be required to search the files of no more than 30 individuals for hard copy and electronic documents that are potentially responsive to the request.
 - a. This limitation will not apply to:
 - i. the hard-copy and electronic files of any predecessors or successors of the 30 individuals identified by the Division, to the extent that such files may include documents that fall within the relevant date range specified in the request;
 - ii. the hard-copy and electronic files of secretaries and other administrative assistants who support any of the 30 individuals identified by the Division; or
 - iii. any hard copy or electronic central files, databases, data sets, or other central or shared repositories of potentially responsive information (*e.g.*, business plans, budgets, sales reports, bid files, patent files).

However, parties may negotiate additional limitations with the staff to cover such sources of documents and/or data.

- b. The search list may exceed 30 individuals only with the express authorization of the relevant Section Chief responsible for the investigation. The parties will be given an opportunity to discuss the matter with the responsible Section Chief before he or she decides whether to grant the staff's request for a broader search. For example, if the second request covers many different relevant products, services, or geographic markets, or if the transaction raises multiple complex issues, the Division may require each party to search more than 30 individuals for potentially responsive documents. If the Section Chief approves a broader search, the parties will be given an opportunity to discuss the Chief's decision with the responsible Deputy Assistant Attorney General.

- c. Subject to the review and approval of the responsible Section Chief, over the course of the investigation staff will be permitted to add up to a total of five custodians to each party's search list. Custodians may be added at any time prior to the party's certification of compliance with the second request, prior to the filing of a complaint, or as otherwise agreed. However, such additions to the search list shall only be made in the event that information received over the course of the investigation leads staff to conclude that access to the files of the additional custodians is reasonably necessary. In addition, should either party produce or rely upon information from an individual who is not on the search list, it will be required to conduct a thorough search of that person's files and produce to the Division any responsive documents and information found. The addition of custodians pursuant to this paragraph IV.C.3.c will not delay a party's certification of compliance with the second request, provided that the parties agree in the Process & Timing agreement to submit responsive documents found in the files of any additional custodians within 15 business days of the party's receipt from the Division of the names of the additional custodians. Failure to meet this schedule shall cause all agreed-upon post-certification dates to be moved back, day-for-day, until all requested materials have been submitted.
4. Within five business days of when the parties comply with the requirements of section IV.C.2 above, the staff will provide each party with a written list of the names of those individuals that the company must search for potentially responsive documents and information. As soon as is practicable, staff will also provide written confirmation of any additional second request modifications to which the Division has agreed, including those described in section IV.C.3 as appropriate, and any other limitations that the parties and the staff have negotiated.
5. This Process & Timing Agreement option is not intended to limit the ability of second request recipients to negotiate additional or different modifications with the staff. As always, if any second request recipient believes that the required search or any other part of the second request can be narrowed in any way that is consistent with the Department's need for documents and information, that party is encouraged to discuss such possible modifications with the staff. Such discussions may proceed within the context of negotiating a narrowed search, or independent of such discussions.
6. Other than as expressly provided for back-up tapes, or as provided in any Process & Timing agreement, the Process & Timing Agreement option is not intended to modify a second request recipient's responsibility to preserve all documents, data, or other information that may be responsive to the second request for the duration of the Division's investigation.

7. This Process & Timing Agreement option does not limit the ability of parties to take advantage of the Division's Second Request Internal Appeals Procedure, which shall continue to be available to all second request recipients.

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