



FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS

Timing is everything: The Model Timing Agreement

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The Bureau of Competition has undertaken several initiatives to streamline our merger review process in order to reach swifter resolutions—whether that be clearance, a negotiated settlement, or a lawsuit. As part of these efforts, we are announcing a new [Model Timing Agreement](#) for the Bureau's merger reviews.

New FTC Model Timing Agreement

Merger investigations commonly involve timing agreements, which—among other things—provide an agreed-upon framework for the timing of certain steps in the investigation. Timing agreements also ensure that FTC staff has notice of parties' plans to consummate the transaction. Both parties and staff benefit from having such a framework established shortly after issuance of the Request for Additional Information and Documentary Material, also known as a Second Request, as it allows staff and the parties to engage efficiently in a substantive exchange without undue uncertainty during the Second Request review period.

The Bureau began using a version of the Model Timing Agreement earlier this year, and we have been refining provisions of the agreement based on feedback and experiences in recent merger investigations. The version of the Model Timing Agreement announced today supersedes any versions that parties may have seen previously. The Bureau may continue to update the Model and any such updates will be publicly available.

It is worth noting that a timing agreement does not affect the statutory expiration of the Hart-Scott-Rodino waiting period. Regardless of the commitments made in the timing agreement, the HSR waiting period expires 30 days after the parties certify substantial compliance with the Second Request. (These periods may differ in a cash tender or bankruptcy filing.) Additional time provided by the parties beyond this 30-day waiting period is by agreement, and does not alter this statutory provision. (For more information, see the prior blog post, [Getting in Sync with HSR Timing Considerations](#).)

Key Provisions of the Model Timing Agreement

Many of the provisions in the Model Timing Agreement will be familiar to those who regularly engage with the Bureau, but here are a few highlights.

The Model requires parties to agree not to close the proposed transaction until 60 to 90 calendar days following certification of substantial compliance with the Second Request depending on the complexity of the competition issues raised by the deal. This timeframe, which is consistent with prior practice, is intended to serve as a benchmark and not an upper limit. The post-compliance timing will depend on the circumstances of each case. For instance, in matters involving particularly complicated industries, staff may need more than 90 days to analyze data or information before making a recommendation to the Commission.

In addition, the Model requires that the parties provide 30 calendar days' notice before certifying substantial compliance with the Second Request, and 30 calendar days' notice before consummating the proposed transaction. These notice requirements help staff structure the timing of preparing a recommendation on the matter. More importantly, they allow staff to plan an appropriate timeline for any meetings that the parties would like to have with division management, the Bureau's Front Office, and individual Commissioners so that parties have opportunities to present their arguments and evidence prior to expiration of the agreed-upon review period.

Parties that seek to limit staff's time to review Second Request materials may foreclose the parties' opportunity to meet with the Bureau or Commissioners, who may have to devote their energies to preparing or reviewing recommendations to the Commission. Further, parties are advised not to file their notice of intent to consummate the transaction if they know that they cannot close within 30 days. Rather, they should file the notice when they actually expect to be able to close. An early notice would force the Bureau to assume that closing was imminent and take any necessary steps based on that assumption. Such a misunderstanding could negatively alter on-going negotiations with the parties.

With respect to communication and exchange of information, the Model Timing Agreement commits Bureau staff to engage in a good-faith continuing dialogue regarding facts and relevant legal and economic issues related to the case. We encourage parties to raise arguments and present white papers early in the review process. Waiting until the meeting with the Bureau Front Office, or even until meeting with the Commissioners, to submit white papers and advance arguments for clearance does not serve the parties well. The Bureau Front Office is not able to engage fully on arguments not raised with or vetted by Bureau staff and division management. Note that, even though the Model anticipates continuing dialogue with Bureau staff, the Bureau Front Office will continue to adhere to the practice that it will meet only once with the parties during the Bureau's review of the matter. Parties are free to take that meeting whenever they like, but an early meeting on a discrete issue, rather than a later meeting on the Bureau's broader recommendation to the Commission, may not be the parties' best use of this opportunity.

The Model contains timing and logistics provisions regarding document productions and investigational hearings. These timelines ensure that Bureau staff has adequate time to review information submitted by the parties, and provides parties with sufficient notice of the identity of potential IH witnesses.

Finally, the Model includes a stipulated Temporary Restraining Order that prevents the parties from consummating the proposed transaction until after the fifth business day following a court ruling on a motion for a preliminary injunction. This provision is designed to avoid time-consuming and distracting negotiations between the parties and staff related to a TRO. That time could otherwise be spent on substantive discussions or potential settlement negotiations. Multiple parties have agreed to such stipulated TROs in the past year and this has functioned as a significant benefit to both sides by allowing the Bureau staff, the Commission, and the parties to focus on the issues in the matter, rather preparing for a TRO hearing.

Expectations Going Forward

The new Model Timing Agreement represents the culmination of extensive input from each of the divisions and regional offices within the Bureau, as well as the Bureau's Front Office. The Bureau expects that future timing agreements will conform, or substantially conform, to this Model. Deviations from the Model may be necessary in certain cases. The Bureau's Front Office reviews all timing agreements before execution and will consider the justification for any changes.

As always, parties are encouraged to reach out to staff early on in a Second Request investigation to negotiate a timing agreement. Part of the goal of an effective timing agreement is to facilitate constructive feedback between Bureau staff

and the parties by creating more certainty about the timing of an investigation. Our hope is that the new Model will allow parties to better anticipate the Bureau's expectations, which should in turn help promote smoother, more efficient investigations.



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