December 2000

GUIDANCE FOR FEDERAL MERGER INVESTIGATIONS AND COMPLYING WITH "SECOND REQUESTS"

Introduction

The Hart-Scott-Rodino[1] ("HSR") merger review process was designed by Congress to provide information about mergers to the federal antitrust agencies and an accelerated antitrust review for businesses prior to the consummation of a proposed transaction. The process is based on the assumption that both the antitrust agencies and the merging parties benefit from an efficient and complete understanding of the competitive issues that may be raised by a transaction being reviewed.

The merger review process is unique, and it creates challenges for merging parties, in-house counsel, outside counsel, and agency staff.[2] The process poses strategic and practical issues for all parties involved. Merging parties and their counsel seek to convince an agency not to take action against a proposed transaction, expedite the agency review of the proposed transaction, and minimize the time, effort, and costs of complying with a second request.[3] Agency staff desire to obtain the information they need to understand the potential competitive effects of a transaction, seek to gain information in the brief time period in which their investigation must be completed, and hope to minimize the time and effort spent reviewing the proposed transaction, which takes away from their limited time available to review other matters.

In the HSR process, the merging parties and agency staff share many common goals even though their interests may at times diverge. Accordingly, many attorneys in the private bar and government believe that for many transactions the merger review process is most effective and efficient when conducted as a two-way problem-solving exercise rather than an adversarial or zero-sum negotiation. The merger review process often

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[1] *See* The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.§ 18(a).

[2] Additional information and insights can be gained from ABA Antitrust Section, THE MERGER REVIEW PROCESS (1995) (second edition forthcoming); Casey R. Triggs, "Effectively Negotiating the Scope of Second Requests," ANTITRUST, Summer 1999, at 36; Thomas B. Leary, Janet L. McDavid, and Philip C. Larson, "How to Avoid Negotiations on Second Requests," ANTITRUST, Summer 1999, at 41; Brian C. Mohr, "Practical Tips for Negotiating a Second Request," ANTITRUST, Summer 1999, at 42; Michael Byowitz and William Rooney, "Second Requests: Suggestions for Reform," ANTITRUST, Summer 1999, at 43; Thomas D. Fina, "Second Request Negotiations and the Production of Electronically Stored Documents," ANTITRUST, Summer 1999, at 46; Robert S. Schlossberg and Robert B. Wiggins, "The Devil Is in the Details: Second Request Compliance," ANTITRUST, Summer 1998, at 6; Mark D. Whitener, "A Progress Report on the "Quick Look," ANTITRUST, Summer 1993, at 38; Robert S. Schlossberg, Premerger Notifications: Strategies and Procedures for Dealing with Second Requests," ANTITRUST, Summer 1991, at 6.

[3] The official name for a second request is "Request for Additional Information and Documentary Material."

begins with a very broad range of issues. If counsel for the parties and agency staff are communicating and sharing information appropriately, those issues can usually be narrowed. However, if counsel and staff operate in an adversarial fashion, this can inhibit the open exchange of information and views that is needed to narrow issues and move the process forward efficiently.

The Antitrust Section of the American Bar Association (the "Section"), in consultation with staff of the Federal Trade Commission and Department of Justice, [4] has created this Guidance for Federal Merger Investigations and Complying with Second Requests (the "Guides") to provide practical suggestions to private practitioners and agency staff as to how to conduct the process within a problem-solving framework in order to maximize the efficiency and effectiveness of the merger review process. The Section and the agencies have participated in prior efforts to improve the merger review process. Discussions between the Section and the agencies in 1995 led to the development of a "Model Second Request."[5] In April 2000, after the current discussions began, the agencies announced several modifications to the merger review process.[6] The current discussions

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[4] Members of the ABA Task Force on the Merger Process include: David T. Beddow, Charles T. C. Compton, Thomas D. Fina, Ilene K. Gotts, Janet L. McDavid, Brian C. Mohr, M. Howard Morse, Donna E. Patterson, and Tom D. Smith. The Antitrust Section thanks the Antitrust Division and Federal Trade Commission for the cooperation and participation of their staff.

[5] *See* THE MERGER REVIEW PROCESS 149-153. The Model Second Request is available on the FTC's website.

[6] The modifications the agencies announced in April 2000 included the following:

- All second requests will be reviewed prior to issuance by senior management to provide additional scrutiny of the scope of the second request;
- Staff will convene a conference promptly following the issuance of a second request to discuss the competitive issues raised by the proposed transaction with the parties.
- Staff will respond to party requests for modifications of second requests promptly to afford the parties greater opportunities for more efficient and better-directed searches;
- Parties can appeal second request issues to senior agency personnel not involved in the transaction to provide a more impartial arbiter (*see* § V.E.7.l *infra*); and
- Staff will be trained to make the process more efficient and effective.

See FTC Announces Changes to "Second Request" Procedures During Premerger Review," press release dated April 5, 2000 (available on the FTC's website). *See also* "Requests for Additional Information: Appeal Procedure," and, "Memo to Staff," dated May 16, 2000, regarding new policies and procedures relating to second requests (also available on the FTC's website) (hereinafter collectively cited as "FTC Press Release 4/5/00"); "Antitrust Division Announces Merger Review Process Improvements," press release dated April 6, 2000 (available on DOJ's website) (hereinafter cited as "DOJ Press Release 4/6/00").

between the Section and the agencies are a continuation of that process.

Attorneys engaged in merger reviews and second request negotiations should always consider their strategic options and the practical consequences of these options and make conscious choices about their strategies and tactics based on the unique characteristics of each transaction. Although the Section believes these Guides are useful and appropriate for most transactions, counsel and their clients may believe that other or different approaches are more appropriate for the unique circumstances of a particular transaction. These Guides do not attempt to create standards to govern either counsel or staff or express any view on the legal questions involved in the process, such as what constitutes "substantial compliance" for HSR purposes.

Most HSR filings involve no competitive issues. In the great majority of transactions, early termination is granted or the waiting period expires without further inquiry. The statistics show, however, that competitive concerns are identified in about 10% of transactions, that second requests are issued in less than 5% of transactions, and that some enforcement action is taken in many matters in which a second request is issued. [7]

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[7] Filings for 4,642 HSR reportable transactions were made in fiscal 1999 and for 4,926 reportable transactions in fiscal 2000. Most HSR filings involve no competitive issues and early termination is granted or the waiting period expires without further inquiry in the great majority of transactions. However, the statistics show that competitive concerns are identified in a significant number of transactions in which second requests were issued. Set forth below are statistics for mergers investigations at the FTC and Antitrust Division for the most recent two years:

> FTC (Fiscal 2000): Opened 220 preliminary investigations in which the FTC received clearance. Issued 43 second requests. 18 transactions resulted in consent decrees. 9 transactions were abandoned. 5 transactions were challenged in court. Three transactions were later settled or abandoned and two await decision.
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> FTC (Fiscal 1999): Opened 278 preliminary investigations in which the FTC received clearance. Issued 45 second requests. 18 transactions resulted in consent decrees. 12 transactions were abandoned. No transactions were challenged in court.
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> Department of Justice: Fiscal 2000: Opened 178 preliminary investigations in which DOJ received clearance. Issued 55 second requests. 16 transactions resulted in “fix-it-firsts" (i.e. a remedy prior to an agency decision to block the transaction). 18 transactions resulted in consent decrees. 13 transactions were abandoned. 2 transactions were challenged in court. DOJ prevailed in both cases.
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> Department of Justice: Fiscal 1999: Opened 230 preliminary investigations in which DOJ received clearance. Issued 68 second requests. 16 transactions resulted in “fix-it-firsts." 20 transactions resulted in consent decrees. 12 transactions were abandoned. 3 transactions were challenged in court. DOJ prevailed in all of these court challenges.

These Guides are most appropriate for those transactions that may reasonably be expected to raise competitive issues.

These Guides reflect two recurring themes equally applicable to both private counsel and to agency staff: 1) the importance of maintaining credibility; and 2) the importance of maintaining open communications. Information is also important to the process because without information, the process does not work for either the parties or the agencies. Communications and credibility create an environment in which accurate and reliable information can flow from staff to counsel and from counsel to staff.

These Guides are intended to apply to merger reviews conducted by the U.S. federal antitrust agencies—the Antitrust Division of the Department of Justice and the Federal Trade Commission. These Guides do not apply to merger investigations conducted by State Attorneys General, either under state law or federal law.[8] Nor do these Guides apply to investigations conducted by foreign competition authorities, which typically involve close cooperation with the U.S. agencies under cooperation agreements that have been executed with several foreign governments.[9]

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[8] Many State Attorneys General have authority to pursue antitrust issues relating to mergers, and generally, coordination of the federal and state investigations will promote more efficient resolution of issues for the parties. Parties often find that it is in their best interest to ask that the agencies coordinate their efforts if one or more states have expressed an interest in the transactions. Because HSR materials are covered by statutory guarantees of confidentiality, however, the federal agencies are statutorily prohibited from sharing HSR materials with their state counterparts. When states and the parties to a transaction request that an investigation be coordinated, therefore, the parties will be asked by the states to grant a waiver of their HSR confidentiality protections allowing the federal agencies to share HSR documents and information with the states. (*See* Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (March 11, 1998), available on FTC website (http://www.ftc.gov/os/1998/9803/mergerco.op.htm). The states have their own independent subpoena authority, however, and grant of a waiver does not guarantee that that they will not issue subpoenas. Similarly, refusing to grant a waiver will not preclude the agencies from coordinating the investigations if the agencies so choose; the federal agency will just be required to protect the confidentiality of the HSR materials.

[9] Counsel should note that as of the date of publication of these Guides there were approximately 60 foreign jurisdictions with some form of merger notification. Where the merging parties have foreign sales or assets, counsel should analyze whether competition filings may be required in other jurisdictions. In some transactions with possible competitive effects in foreign jurisdictions, the agencies may request the parties to waive HSR confidentiality provisions and allow the agencies to share documents and data with foreign competition authorities. Regardless of whether or not the parties have waived HSR confidentiality provisions, it is becoming increasingly common for U.S. and foreign competition authorities (and particularly DG Competition within the European Union) to discuss transactions with potential crossborder competitive effects. *See, e.g.*, Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, Sept. 23, 1991, 4 Trade Reg. Rpt. (CCH) ¶ 13,504. As in the case of State Attorneys General, the confidentiality requirements of the HSR Act

These Guides are limited to the merger investigation process, and do not address several other issues related to that process, such as: the role counsel may play in a client's analysis of a potential transaction, preparation of the HSR Act filing and assembly of Item 4(c) documents, "gun jumping" issues that often arise in merger investigations where the parties prematurely integrate their operations prior to completion of the investigation,[10] negotiation of remedies with the agencies,[11] or preparation for litigation that may arise out of a merger investigation.

These Guides provide guidance on topics ranging from pre-filing preparation to second request compliance. Section I discusses the basic themes of the Guides. Section II provides guidance about the pre-HSR filing period. Section III discusses data and documents counsel should compile to prepare for a merger investigation and practices that should be considered during the initial waiting period to avoid or minimize the scope of a second request. Section IV discusses data and documents counsel should compile to prepare for a merger investigation. Section V addresses actions to be taken once a second request issues. Section VI concerns second request compliance. Finally, Section VII discusses the certification of compliance parties must execute and submit to DOJ or the FTC.

I. THEMES

A. *Maintain credibility.* The HSR process works most effectively and efficiently when staff, counsel and the parties maintain credibility with one another. Although counsel and staff may analyze the facts of the industry and the competitive effects of the proposed transaction differently, the investigation will proceed most effectively and efficiently if staff, counsel and the parties deal credibly with one another.

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preclude disclosure of HSR materials to foreign competition authorities absent the consent of the parties. *See* THE MERGER REVIEW PROCESS 29-31.

10 *See* THE MERGER REVIEW PROCESS 79-81.

11 The FTC's approach to remedies has been influenced by a report on the effectiveness of past divestitures. *See* Staff of the Bureau of Competition of the Federal Trade Commission, "A Study of the Commission's Divestiture Process" (Aug. 1999); Robert Pitofsky, "Nature and Limits of Restructuring in Merger Review" (Feb. 17, 2000), available on FTC web site (http://www.ftc.gov/speeches/pitofsky/restruct.htm).

B. *Maintain communications.* The HSR process entails an ongoing dialogue between staff and the parties. Staff and counsel should periodically discuss the government's competitive concerns and the parties' arguments. These discussions allow useful arguments to surface, allow counsel to present evidence on issues raised by staff, and may allow the government to narrow and focus its investigation. At a minimum, open communications reduce the possibility of surprises to staff and the parties.

II. BEFORE COUNSEL MAKES THE HSR FILING

A. Prior to filing HSR notification of a transaction that potentially raises material competition issues, counsel should compile and analyze information about the transaction's likely competitive impact. [12]

1. A competitive analysis by counsel (and perhaps involving an economist) should precede the HSR filing.

a. If counsel is analyzing the transaction and gathering documentation and information at the same time the initial 30-day (or 15-day, for cash tender offers) waiting period is running, counsel will lose strategic options and may be handicapped in dealings with agency staff.

b. The depth to which the competitive analysis is pursued at the prefiling stage is necessarily a matter for counsel's judgment. Factors that counsel may wish to consider include: (i) the extent of the competition problem revealed by counsel's initial review, (ii) the consequences to the parties of an incomplete analysis, (iii) the parties' intended time frame for closing the transaction, and (iv) counsel's intended strategy for approaching the agencies. The types of information that the agencies typically request during the early phases of their analysis are described at Section IV.A.6 *infra*.

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[12] Counsel should carefully protect their client's legal privileges. Counsel should consider executing a joint defense agreement to allow communication among multiple counsel and parties without loss of the attorney-client privilege. Joint representation of both parties to a transaction, on the other hand, raises significant conflict of interest issues that counsel and the parties should carefully consider. This is particularly true where a transaction raises significant competitive issues. However, joint representation of both parties to a transaction can be efficient and cost-effective in certain situations. In those cases, it should be undertaken only after careful consideration and informed consent by both parties.

2. Counsel in some transactions elect to meet with the agencies prior to the HSR filings. As a general practice, any pre-HSR filing communication should be made to both agencies, except where it is clear that one agency will be cleared to handle the investigation based on past experience with the lines of business in which the transaction might pose competitive issues or the agencies clear the transaction pre-filing. Counsel should be aware that pre-HSR filing communications with the agencies may become an issue if the agencies themselves are likely to have a dispute about clearance (*i.e.*, about which agency will review a transaction).[13]

3. In other circumstances, counsel may decide to delay the HSR filing until counsel has information to demonstrate that the transaction will not raise competitive issues or until counsel is prepared to engage in substantive discussions with the agencies. In some cases counsel may prepare a "white paper." *See* § IV.A.9 *infra*.

B. The agencies may learn of a transaction prior to the HSR filings from the news media or a complaint.[14] The agencies may conduct an initial evaluation of a transaction from public data and information already held by the agencies.[15] However, agency procedures do not allow staff to contact the parties to a transaction or any third parties (other than other government agencies) until it has received "clearance" to investigate the transaction from the other agency.

1. Staff requests clearance by providing appropriate information to the Premerger Notification Office at the FTC and the Office of Operations at DOJ about the parties to the transaction, the industry that may be adversely affected, the geographic scope of the affected industry, applicable enforcement statutes and related investigations.

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[13] Agency practice is that clearance should be resolved within five business days following the HSR filing or, at most, within nine business days. However, in certain industries that are within the expertise of both agencies, or transactions that are likely to be controversial, clearance may not be completed within those time periods.

[14] Counsel and the parties will not learn from staff either the identity of any complainants or the nature of the information provided to the agency by third parties at any point during the merger review process. The agencies treat that information as highly confidential.

[15] Pre-HSR filing, sources of public information include SEC filings, the parties' annual reports, the parties' and third parties' websites, and the media.

2. Staff may file for clearance as soon as it has developed enough information to believe that an investigation is warranted. Staff does not have to wait for an HSR filing to request clearance.

3. At both agencies, once clearance has been received, an economist will be assigned to the investigation.[16]

4. Staff will also investigate whether prior investigations in the same industry developed useful information.

C. Where the existence of the transaction itself is confidential, counsel should inform staff.[17] Most staff will attempt to make third party inquiries in a manner that does not directly disclose the transaction. However, as a practical matter, counsel should understand that it is difficult for staff to conduct its investigation without revealing the existence of a transaction. Moreover, even if staff avoids specific mention of the proposed transaction, it is likely that third parties contacted by the agencies will be able to determine what transaction is under consideration.

D. The HSR filing *formally* sets in motion Federal Trade Commission and Department of Justice review of a transaction, with strict (and short) statutory time frames that the agencies are obligated to follow. However, as indicated above, staff may initiate an investigation of a transaction before the HSR filing.

E. While awaiting clearance, staff will carefully review Item 4(c) documents, SEC documents, SIC Code overlaps and information about prior acquisitions. In addition, staff will gather information from other public sources.

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[16] The parties may want to consider whether it would be appropriate or useful to retain their own economist. Factors to consider in deciding whether to retain an economist include the complexity of the case, the level of the competitive concerns raised by the transaction and the experience of counsel in merger investigations. In cases where the parties have retained a consulting economist, the effectiveness of the dialogue will be greatest when the economist provides to the staff any source data and an explanation of analytical methodologies and modeling relied upon for the economist's analysis.

[17] HSR filings themselves and the fact that parties have made an HSR filing are confidential and exempt from the Freedom of Information Act ("FOIA"), except for disclosures to Congress, other federal agencies in limited circumstances, or in a litigated merger. THE MERGER REVIEW PROCESS 29-46.

III. HOW TO MINIMIZE THE CHANCE OR SCOPE OF A SECOND REQUEST

A. Counsel's goal during the initial waiting period should be to provide the staff with sufficient information to analyze the transaction in order to avoid or narrow the scope of a second request. The best strategy for complying with a second request is to avoid one.

B. Counsel should be prepared to interact and work with the staff during the initial waiting period. An important decision counsel must make before or shortly after the HSR filing is whether and, if so, when to initiate contact with agency staff.

1. If a transaction raises few or no competitive concerns, counsel may decide to wait to see if the agency contacts counsel. For some transactions, contacting staff might result in an investigation that otherwise might not have taken place. One risk, however, with waiting for staff to contact counsel is that if staff does determine it has a concern and does so late in the initial waiting period, counsel may not have time to address staff's concerns before a second request is issued.

2. Whether counsel should initiate contact with staff is a strategic issue on which the views of experienced counsel may differ. Such an approach should be considered in the following circumstances:

a. The transaction facially raises competitive concerns (based on counsel's analysis of the transaction, the 4(c) documents[18] or other issues; or

b. A more thorough understanding of the transaction by staff would obviate competitive concerns; or,

c. The transaction is conducive to a competitive "fix."

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[18] Item 4(c) documents are those prepared by or for officers or directors concerning certain important competitive issues. These documents are critically important to agency analysis. Failure to provide all Item 4(c) documents can result in civil penalties, "bouncing" the filing, and other relief. *See* FTC Press Release, "ADP Settles FTC Charges over Autoinfo Acquisition" (June 18, 1997) (FTC required divestiture and imposed a civil penalty of $2.97 million), available on the FTC website.

3. Even if a decision is made not to contact staff, counsel should give serious consideration to the scope and nature of a presentation that could be made in the event of an inquiry by staff.

C. The advantage of contacting staff instead of waiting for staff to contact counsel is that counsel may be able to provide additional information to staff or arrange a meeting to engage the staff in discussions earlier than if one waits for staff to contact counsel.

1. Time is of the essence during the initial waiting period if the transaction raises competitive issues. This is particularly true for cash tender offers, where the initial waiting period is only 15 days.

2. Counsel can learn from the FTC Premerger Notification Office or the DOJ Premerger Office which agency and which section has clearance to investigate the transaction, or which section will be assigned the filing to review.

3. By calling that section, counsel can learn which attorney has been assigned to the matter. If counsel has decided to initiate contact, counsel should contact staff to schedule a meeting or phone conference to discuss the transaction. Counsel should realize that the transaction may require several meetings with staff and plan accordingly.

D. Counsel should plan the initial communication with staff carefully. Analyze why the transaction *facially* suggests anticompetitive problems but does not *actually* present competitive problems. For example, issues to consider include:

1. Why are the parties engaged in the transaction? What is the rationale for the deal?

2. Do the HSR filing and the 4(c) documents present an inaccurate picture of the industry? Why? What documentation (documents, data, or information) can counsel provide that presents a more accurate industry perspective? How can these data best be assembled to provide an accurate and objective view of the industry and the proposed transaction?

3. Is the industry complex or is the staff unlikely to be familiar with the industry and therefore reluctant to allow the initial waiting period to

expire without a thorough investigation? If so, explaining how the industry works (perhaps with a business person) may allay staff concerns.

4. Are there special characteristics of the industry? For example, are customers "power buyers" such that the merged entity will not have the ability to exercise market power, even though post-merger market shares are high?

5. Are customers' reactions to the transaction likely to be positive or neutral? Can this be confirmed by staff through interviews?

6. Are the barriers to entry or expansion in the industry low, such that any attempt by the merged entity to increase prices anticompetitively would lead to prompt new entry sufficient to defeat any such price increase?

7. The parties should be prepared to explain (and demonstrate using company documents and data) any efficiencies that satisfy the requirements of the efficiencies section of the Horizontal Merger Guidelines.

E. What existing, "ordinary course of business" documents exist with which counsel can substantiate his/her arguments?

F. Counsel should request that staff provide assurances that all information provided is treated as confidential within the scope of applicable statutes.

G. Section IV below describes in greater detail the type of information and documentation counsel should gather and be prepared to provide staff during the initial waiting period.

IV. BEFORE THE SECOND REQUEST

A. Assuming that staff inquires about a transaction, or counsel contacts the agency, counsel's goal during the initial waiting period should be to provide the staff with sufficient information to analyze the transaction in order to avoid or narrow the scope of a second request.

1. Although the parties are not required to provide information during the initial waiting period, counsel should interact and work with the staff

during the initial waiting period because failure to do so may increase the likelihood of issuance of a second request.

2. Counsel's credibility with the staff is *critical* to effective representation. Counsel should ensure that information provided to and statements made to the staff are accurate, including statements by the client. If there is any doubt or uncertainty about information, counsel should insist on substantiation from the client. *If a fact is misrepresented or a mistake is made, it should be corrected promptly.*

   a. Counsel should recognize that staff will seek to corroborate independently the information counsel provides.

   b. Staff will typically contact third parties, including competitors, customers and industry analysts.

3. *Staff's credibility* with counsel is critical to *counsel's* willingness to cooperate with staff and provide information voluntarily. Staff is more likely to get responsive, probative information if it is open with counsel about its concerns. Counsel is likely to have less incentive to cooperate with staff if staff is not forthcoming about its concerns.

4. Counsel should anticipate the types of documents and data that the staff is likely to request on a voluntary basis during the initial waiting period. Counsel should compile this information in *anticipation* of its request. Counsel should do his/her "homework" about the location of documents likely to interest the government and how the client maintains data. The staff will be under severe time pressure during the initial waiting period. Counsel is more likely to avoid or limit the scope of a second request by having this information collected *before it is requested.*

5. *Prompt* (within a day or two) responses to staff requests for information are critical in merger investigations because of the short waiting periods imposed by statute. As described below, the actual time for investigation by staff is even shorter than the statutory time periods suggest.

6. In addition to Item 4(c) documents, data and documents that should be reviewed in advance by counsel, and that are likely to be requested by staff, include:

a. Strategic plan(s);

b. Marketing plan(s);

c. Due diligence analyses of the proposed transaction, including materials prepared by investment bankers;

d. Third party consultant's reports or market studies;

e. Product literature and/or brochures for the overlap product(s);

f. Lists of top 10 customers, with contact names, titles and telephone numbers, for overlap product markets for the most recent year or two;[19]

g. Quantification of the product overlaps, in terms of annual dollar revenues and/or units;

h. Market share data;

i. Information on the competitive landscape of the relevant product market(s). If favorable, be prepared to discuss with staff. If not, develop an explanation. This information includes:

   (1) Who are the competitors?

   (2) What are their "market" shares?

   (3) How difficult is entry? Has anyone entered the market recently? Is anyone poised to enter?

j. Organizational charts for the parties.

k. Documents and information addressing the strategic rationale for the transaction? Quite simply, why are the parties contemplating the transaction?

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[19] To the extent that counsel provides staff with customer information, counsel may wish to inform customers that they may receive a call from the FTC or DOJ. Staff will not advise counsel of the outcome of these calls, but counsel can seek feed-back later from customers.

7. Staff may also want to interview employees during the initial waiting period. Anticipate this request and determine which employees (often senior marketing or management personnel) would be best able to provide the information needed by staff.

8. Vertical transactions can raise additional and different issues than horizontal transactions. In vertical transactions, counsel should also compile information about both customers and suppliers. Other subjects about which it is useful to compile information include:

    a. Potential competition issues;

    b. Research & development;

    c. Entry (would new entrants have to enter on more than one level?); and

    d. Pricing.

9. Counsel may want to consider preparing a “white paper” or other written submission for staff either during the initial waiting period or following a second request. If a white paper is submitted to staff, it is most useful if provided at as early a stage possible. Whether to provide a white paper to the agency involves a complex strategic analysis that will be unique to each transaction. Set forth below are some considerations relevant to that evaluation.

    a. A white paper allows the parties to marshall their evidence and present coherent fact-based and legal arguments on why the transaction does not pose competitive issues.

    b. However, presenting a white paper to the agency also poses some risks, such as sparking potential competition concerns that might not otherwise arise. Presentation of such a paper prior to a thorough review of the evidence also poses the risk that counsel may be unaware of contrary facts or documents in the company's files, which can undermine credibility.

    c. The process of preparing a white paper may be useful to counsel and the parties to organize and evaluate the strength of their arguments and evidence, regardless whether it is submitted to the agency.

10. Counsel and staff should take every opportunity to discuss issues of competitive concern and to engage in a dialogue during the initial waiting period. Staff should describe its competitive concerns to counsel (to the extent that it can be done without jeopardizing confidentiality) and counsel should respond to those concerns. Counsel and staff can gain valuable insights by hearing questions and providing answers to staff as the issues are focused and refined.

B. Counsel and the parties should realize that the time staff *actually* has for investigation during the initial waiting period is *substantially* shorter than the statutory waiting periods (30 days for most transactions; 15 days for cash tender offers).

1. The first few days of the waiting period are typically consumed by the review of the HSR filings by the premerger offices, clearance and assignment of a transaction to a staff attorney.

2. During the last week of the waiting period, staff has to make a decision and recommendation to grant early termination, allow the waiting period to expire, or to issue a second request. The recommendation must be made early enough to allow review by the staff's supervisors and, in some instances, by the "Front Office."

3. Consequently, during an initial 30 day waiting period, staff actually has perhaps as few as 10 to 14 days to conduct its investigation. During a cash tender offer with a 15 day waiting period, staff obviously has even less time. Thus, it is critical for counsel and parties to be very responsive to voluntary requests for information during the initial waiting period to avoid a second request It can be useful to provide some data in electronic format, but doing so also can be difficult

C. During the last week of the initial waiting period, staff must decide whether or not to seek a second request. If staff believes a second request should be issued, staff will draft a memorandum briefly describing why it believes a second request should be issued. At both agencies, senior personnel evaluate whether to issue a second request and review the scope of the request.

1. At the FTC, staff will schedule a merger screening meeting for the investigation. At that meeting, staff will provide facts about the

industry and the transaction and explain to the Bureau Director why a second request should be issued. At the FTC, all second requests are reviewed by senior management in the Bureau of Competition prior to issuance to provide additional scrutiny of the scope of the second request.[20]

2. At DOJ, the Director of Merger Enforcement will determine, with information from staff's recommendation, whether a second request should be issued. DOJ also has procedures to provide centralized, high level review of second requests prior to issuance.[21]

D. If staff believes no second request should issue, staff will draft a closing memorandum at DOJ. At the FTC, staff will orally recommend to the Premerger Notification Office that no second request be issued. This recommendation requires the approval of the Bureau Director.

E. By statute, the agencies cannot extend the initial waiting period except by issuing a second request. However, the *acquiring* party can, in effect, restart the initial waiting period by withdrawing its HSR filing and refiling it.[22] This gives the agencies an additional, initial waiting period before deciding whether to issue a second request or allow the new waiting period to expire without taking action. Based on advice of experienced counsel, the parties should consider whether withdrawing the filing is in their best interests.

F. In March 1995, as a result of a joint effort between the Antitrust Section of the American Bar Association and the agencies, the agencies jointly adopted a model second request.[23] The agencies use the Model Second Request as a starting point, and revise it for specific industries and companies when a second request issues. Reviewing the Model Second Request can help prepare counsel and client for the likely scope and breadth of the second

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[20] FTC 4/5/00 Press Release.

[21] DOJ 4/6/00 Press Release.

[22] If a HSR filing is withdrawn and refiled, the acquiring party is obligated to provide any new Item 4(c) documents created since the original filing and to recertify. If the HSR is refiled within two business days no additional filing fee is required.

[23] The model second request is available on the websites of the Antitrust Division's and the Federal Trade Commission.

request. If possible, it is advisable to obtain copies of recent second requests in the same industry.[24]

V. IF A SECOND REQUEST ISSUES

A. The agency conducting the investigation will call counsel (or the "Item 10" person listed on the HSR filing) to inform counsel that a second request is being issued.

1. Staff will typically offer, or be willing, to confer with counsel to discuss the focus of the investigation. The FTC has a policy of convening a "second request conference" within five business days of issuance of the second request, unless the parties to the transaction wish otherwise.[25] Similarly, DOJ staff will participate in early conferences with the merging parties to identify competitive issues.[26]

2. In addition, the second request will specifically invite counsel to discuss possible modifications with staff.

3. At the same time, staff will be contacting third parties (typically customers and competitors) for information. Many third parties will submit that information voluntarily. However, both agencies have access to compulsory process to require, through subpoenas or a Civil Investigative Demand (CID), the production of information and documents from third parties.

4. Upon receipt of such notification, the companies should suspend routine document destruction policies, including electronic back-ups (pending resolution of electronic document issues – *see* § V.E.7.g *infra*).

B. Counsel should assess why a second request was issued. There are several possibilities, including:

1. The staff has received complaints about the competitive effects of the transaction.

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[24] The agencies, however, will not provide copies of second requests issued to other parties.

[25] FTC Press Release 4/5/00.

[26] DOJ Press Release 4/6/00.

2. On its face, the transaction raises competitive concerns warranting further investigation.

3. Staff needed additional information that was not available during the initial waiting period. Staff issued the second request to get access to that information.

4. Staff has a specific concern/issue (*e.g.*, entry) that it needs to address and understand.

5. A narrow, competitive concern exists that can be resolved through a "fix."

C. An assessment of the reason the transaction received a second request helps counsel develop a strategy to respond to the second request.

1. For example, staff may be able to resolve its concerns with little or no compliance with the second request if, for example, a lack of information that is now provided led to the issuance of the second request. Production of the documents and information listed above in § IV.A. may be adequate.

2. If staff is concerned about a specific issue (*e.g.*, entry), then a "quick look" on that issue without full compliance may be sufficient. This can be a very efficient way to complete an investigation without substantial compliance. However, counsel should be aware that staff may later conclude that a "quick look" was not adequate and that full compliance is required after all. If counsel has stopped full compliance with the second request, valuable time may be lost.

D. Counsel's goal is to resolve staff's concerns as quickly as possible while protecting the interests of the client. Sometimes this is possible with partial compliance; sometimes full compliance is required.

1. The government's goal is to investigate the competitive concerns raised by the merger, rule out or resolve competitive concerns, and move on to the next transaction.

2. Consider using a "rolling production" and producing key documents first to the government. This may allow the government to resolve its concerns early in the process.

a. Counsel should be aware that a refusal to engage in a rolling production may heighten concerns at the agency about the anticompetitive nature of the transaction.

b. At the same time, staff should be aware that a true rolling production significantly increases the costs of second request compliance.

c. A useful compromise may be to provide key documents or key executives' documents requested by the government *seriatim* without actually producing all of the documents to the government on a rolling basis.

d. In exchange for a rolling production or production of key executives' documents first, staff may be willing to modify certain procedural requirements of the second request.

3. Staff will sometimes agree that certain data need not be provided initially, but will be provided within 3-5 business days following a request.

E. Counsel should determine the breadth and scope of the second request and identify possible modifications to narrow the second request. What specific modifications to the second request would make it less burdensome to the client without depriving staff of information that it needs?

1. Counsel should suggest workable modifications to staff. The keys to successfully negotiating modifications to a second request are (a) knowledge about the entity that received the second request, and (b) a thorough understanding of staff's theory as to the potential adverse competitive effects of the proposed transaction.

a. Staff will be most responsive to credible, focused, well articulated concerns about the burden of specific sections of a second request and suggestions to narrow the scope that do not deprive the staff of information it needs.

b. Staff is unmoved by non-specific, generalized complaints about the burdens of a second request or the second request process itself.

2. Offer and elicit cooperation, not combativeness, in second request modification negotiations. It is not effective to belittle staff, to be uncooperative or uncommunicative or to adopt a "scorched earth" approach. *Ad hominem* attacks on staff are never productive.

3. Staff should be forthcoming about the issues of concern. Because the scope of second requests is often broad, staff should be willing to modify requests that are not likely to be relevant to the investigation or resolution of staff's concerns.

4. To assess adequately the breadth and scope of the second request and to prepare to negotiate modifications, counsel should meet with employees of the client who have a good understanding of the company and how it maintains information. In particular, it is useful to work closely with the company to identify substitute or alternative sources of information. It is particularly useful to involve business people in identifying sources of relevant data. Counsel should review relevant corporate organizational charts with key employees and discuss the following questions.

    a. Who reports to whom?

    b. What is the flow of documents and information in the organization?

    c. Are there certain summary documents that are regularly prepared for senior management?

    d. Which offices/locations are likely to have responsive documents? "Scope of the search" limitations are often the most effective in limiting burden.

    e. What employees are likely to have responsive documents?

    f. What kinds of documents are employees likely to have?

    g. Does the company store documents offsite (*e.g.*, archives)?

    h. Does the company store documents electronically? How?

    i. Is there a less burdensome format or way to provide the information? How?

j. Are voluminous documents or data (*e.g.* invoices) available electronically or in summary form?

5. Evaluate staff's competitive concerns and theories and identify alternative means of addressing the key issues. This is possible, however, only if staff has explained its competitive concerns.

6. Counsel may want to explore whether staff interviews or depositions of business people would be useful to narrow the scope of inquiry or suffice in lieu of compliance with segments of the second request.

7. Negotiating modifications to the second request.

   a. Modification negotiations should begin as soon after issuance of the second request as counsel is prepared to negotiate from a position of *knowledge* about the client's organization and files. It may be useful to bring in knowledgeable company personnel for these negotiations.

   b. Educate staff about the structure of the company with organizational charts of the company.

   c. Counsel should be prepared to explain briefly the responsibilities of each employee listed on the organizational chart and the types of documents each employee maintains. Narrowing the universe of employees whose files have to be reviewed is a highly effective way to reduce the scope of a second request. Staff may be willing to exclude an employee's files from the search if an employee has

      (1) Limited or low level responsibility in a relevant area; or,

      (2) Only marginally responsive documents; or,

      (3) Few or no unique documents.

   d. A second request may call for the production of huge volumes of marginally useful documents. Counsel may be able to exclude these documents by providing samples of documents to staff and estimating the likely volume of these documents. The staff will typically want to see samples of types or

categories of documents proposed for exclusion before agreeing to exclusion.

e. If the staff does not agree to modify or limit the second request, counsel can ask the staff to "defer" the production of certain categories of documents or data, and agree to promptly respond to any requests from the staff to later produce these deferred items. Staff typically requires an affidavit from the party deferring the documents, agreeing to retain them and make them available promptly upon the government's request. This process provides the staff with a measure of comfort, and deferred items are rarely revisited, although that is possible.

f. Modifications and limitations may include:

(1) *Product market* -- The most important variable in determining the scope of the second request is often the number of products or product classes covered. The more products or product classes, the more data and documents required by the second request. Counsel may be able to convince staff that certain product markets are cumulative, of marginal relevance or not competitively significant.

(2) *Geographic market* – The geographic market or the number of geographic markets is also a critical variable in determining the scope of the second request. Generally speaking, the larger the geographic market or the greater the number of geographic markets, the more data and documents required by the second request.

(3) *Time period covered* -- does the government need all data and documents for x years? Can the time period be shortened, at least with respect to certain specifications?

(4) *Employees* -- Exclude from the search the files of specific employees/positions for relevant documents.

(5) *Location* -- Search only certain key locations (*i.e.*, headquarters, sales and marketing offices, etc.) and

exclude, for example, plant, service and support locations or local or regional sales offices. Limit production to particular divisions, subsidiaries, or business units.

(6) *Foreign locations* -- Defer producing documents from foreign locations.

(7) *Certain voluminous types of documents if they are of marginal significance* -- This can include certain financial documents, advertising calendars, promotional materials, repetitive price lists and documents that are responsive only because they refer to a price. It is effective to provide staff with samples of documents proposed for exclusion.

(8) *Cut-off date for production* -- The model second request contains cut-off dates of 45 days (documents to be translated), 30 days (the default) and 14 days (documents relating to the transaction and competition and business and strategic plans). If any of these cut off dates are problematic, counsel should indicate to the staff the reason and seek a modification so that a file search need be undertaken only once.

(9) Index of Privileged Documents

(a) In-house counsel sometimes plays multiple roles in companies. In some companies, in-house counsel only provide legal advice, while in other companies inside counsel also provides business advice. The nature of the communications involving in-house counsel should influence outside counsel's requests for modification to the privilege log.

(b) The model second request requires the production of a log of documents withheld under a claim of privilege with an extensive list of required “fields” for each document, including

author, addressee, recipient, title, document length and attachments, among other things. Production of a log of documents withheld under a claim of privilege that exactly follows the model second request format can be extremely burdensome. Accordingly, these Guides recommends that counsel discuss with staff the following possible modifications:

(i) Eliminating the requirement to identify the number of pages of each privileged document withheld.

(ii) Eliminating the requirement to identify the specification to which the privileged document is responsive.

(iii) Eliminating the requirement that attachments to privileged documents be separately identified and listed.

(iv) Extending the exclusion for certain law firm memoranda to exclude from the privilege log:

(a) Documents authored by in-house lawyers and not directly or indirectly furnished to business officials or to third parties;

(b) Communications among outside counsel and in-house lawyers that are not directly or indirectly furnished to company business officials or third parties;

(c) Communications among outside counsel, in-house lawyers and economists retained by counsel for analyzing the transaction;

(d) Communications between or among outside counsel or in-house lawyers and company business officials, not furnished to third parties.

(c) Counsel should note that merely copying a lawyer on a document *does not make it privileged and such documents should be produced if not otherwise privileged.*

(d) If only portions of a document are privileged, those portions can be redacted and the rest of the document must be produced.

g. Electronic documents (e-mail, spreadsheets, computer backup tapes).

(1) The definition of "document" in the model second request specifically includes electronic documents. The production of electronic documents raises special issues and can impose substantial burdens on parties because of the explosion of data kept electronically. This is particularly true with respect to computer back-up files.

(2) Staff's willingness to agree to modifications regarding the production of electronic documents depends much on the way a company does business. For example, a high-tech company may run a "paper-less" office. In such a case, the retrieval of electronic documents will be more significant than for a traditional company that uses paper files for document storage.

(3) Counsel should be prepared to provide key information about electronic backups, including:

(a) What is the company's policy regarding backing up electronic documents?

(b) Who (name, title) is responsible for backing-up files?

(c) Exactly what electronic information is backed up?

(d) How often are the files backed-up?

(e) How are the backed-up data stored (tape, disk, other medium)?

(f) Are all back-ups kept, or are back-ups kept only on a weekly, monthly, or annual basis?

(g) How long has the back-up policy been in place?

  (i) Has it been changed?

  (ii) When and why?

  (iii) Has the system been upgraded? If so, have back-ups from the previous system been retained?

(h) Is there a single back-up system for the company or are there multiple systems?

(i) Is the back-up system used or accessed by anyone at the company (*i.e.*, are documents/files sometimes restored from the back-up system)? Why?

(j) Does the company have a disaster recovery policy for electronic files?

  (i) What is the plan?

  (ii) Has it ever been used?

  (iii) What were the results of that effort?

(k) Has the back-up system been searched before in response to a document or discovery request? What was the result? The cost?

h. Another difficult issue in some second requests is the translation of foreign documents. Second requests require the translation of foreign language documents. Rarely do the agencies require the translation of all responsive foreign language documents. However, the issue of translation of foreign documents is very company specific and depends on where company decision-makers are located. Possible options to limit the volume of documents to be translated include:

(1) Translating only deal specific documents, current strategic and marketing plans, key product literature, and similar high level, big picture documents.

(2) Translating only the responsive documents of certain senior personnel. Again, reviewing an organizational chart of the foreign entity and employees' job functions with staff may be helpful.

(3) Providing brief summaries of key documents, including the author, the author's title, the title of the document and a sentence or two description of the document (similar to the log of documents withheld under a claim of privilege). Staff would then have the option of requiring more complete translations of documents of particular interest.

i. Both agencies require the parties to provide indices listing the documents submitted pursuant to the second request. The FTC requires an index listing the name of the person from whose files the documents came, the box number(s) containing the files and the Bates number ranges for the files, with the latter arranged by specification and subpart. In some cases, DOJ has created a new specification that seeks for each document the box number in which it is produced in, beginning and ending Bates number range, file source, date, author, recipients (addressees and "cc's"), title or subject matter and the specifications and subparts to which the document is responsive. Producing such an index can be extremely burdensome. Possible modifications include:

(1) If the parties are creating their own indices, show staff a sample page or two and offer to provide their indices in lieu of the required index.

(2) Provide an index that tracks what boxes a person's files are in and the Bates number ranges for that person's files; this can be offered in two versions, one indexed by custodian and the other indexed by box number.

j. Agency second request procedures require staff to memorialize in a letter to counsel any modifications to which they have agreed. It may expedite matters for counsel to draft a letter for staff. Under FTC policy, staff is to provide modification responses within five business days.[27] The DOJ policy is to provide modification responses promptly.

k. It is common for second requests to be modified on a "rolling basis" as counsel and staff become more familiar with a company and how it maintains its documents, the industry and the competitive issues involved in the transaction.

l. Both DOJ and FTC have second request modification appeal procedures.[28]

(1) At the FTC, a party may appeal to the General Counsel of the FTC if the party has exhausted reasonable efforts to obtain modification from the lead staff attorney and the Assistant Director of the Bureau of Competition.[29]

(a) The appeal is made by letter to the General Counsel.

(b) Within two business days of receipt of the petition, the General Counsel will set a date for a

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[27] FTC Press Release 4/5/00.

[28] The revised appeals processes at both agencies are too new at the time of publication to know whether the appeals process will be effective.

[29] *See* "Requests for Additional Information: Appeal Procedure" (available on the FTC's website).

conference with the petitioning party and the investigating staff.

(c) The conference will take place within 7 business days of the receipt of the petition.

(d) The General Counsel will render a decision on the appeal within 3 days after the conference.

(2) At the DOJ, a party may appeal to the Chief of the Legal Policy Section.[30]

F. Staff may seek to depose and/or interview company officials during the pendency of the second request investigation.

1. Unlike in private litigation, it is the practice of the FTC not to provide the party with a copy of the deposition until all depositions have been taken. Both counsel and the witness, however, may review the witness' testimony at the FTC. Counsel should attempt to secure an agreement by staff to provide counsel with copies of the depositions once all depositions are completed. DOJ, except in unusual circumstances, will enable parties to obtain copies of transcripts.

2. Counsel will be allowed to take extensive (and *verbatim*) notes during the deposition.

3. Objections during agency depositions may only be based upon privilege and, at the FTC, that the question is beyond the scope of the compulsory process notice. Witnesses and their counsel may also ask to have questions clarified. FTC depositions are taken before an FTC attorney designated as the hearing officer.

G. Counsel should be aware that a full Second Request investigation typically will include issuing CIDs to third parties to obtain information necessary to compute market shares and documents (and possibly deposition testimony or interviews) necessary to assess the relevant markets and competitive significance of the transaction. The information provided to the agency by third parties is not available to the parties and counsel.

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30 DOJ Press Release 4/6/00.

H. Counsel should take advantage of opportunities to discuss the issues with staff during the second request investigation. In addition, counsel may choose to meet with more senior personnel within the agency section to discuss the issues. Meetings with senior "front office" or Bureau management are likely to occur only following a staff recommendation.

VI. DURING THE SECOND REQUEST PRODUCTION

A. Engage the staff in ongoing discussions, both substantively and procedurally.

1. *Substantively* – discuss with staff the antitrust issues and staff's competitive concerns.

2. *Procedurally* - discuss with staff the mechanics of complying with the second request and timing issues.[31] Staff's concerns with procedural issues stem in large part from the short second waiting period (20 days after substantial compliance with the second request for most transactions; 10 days after substantial compliance for cash tender offers).

a. Most staff will request that the parties to provide 10 days advance notice before closing the transaction.

b. It is becoming increasingly common for staff to ask the parties to provide advance notice of compliance with the second request.

3. While complying with the second request, counsel is likely to identify areas where further modifications will be useful and/or necessary. As staff becomes more familiar with the transaction, it may be more likely to agree to additional modifications.

4. Seek clarifications of the second request where necessary.

B. Follow the directions and instructions in the second request, as modified through negotiation or appeals. The standard to be met is "substantial" compliance with the second request. The ultimate arbitrator of "substantial" compliance is a federal district court judge in an action brought by the agency to enforce substantial compliance. As a practical matter, however,

[31] For further details, *see* THE MERGER REVIEW PROCESS, Ch. 4.

the issue of substantial compliance has only been litigated once in a case in which a key marketing manager's office was not fully searched.[32] The government prevailed.

1. Recognize that the second request process differs from the rules in private discovery.

2. The more closely the document production and interrogatory responses comport with the second request's instructions, the less likely staff will be to raise substantial compliance issues.

3. The better the production, the less likely staff is to challenge it for substantial compliance.

4. Counsel should not try to take the risks posed by false economics in second request document productions. Any time or money initially saved by doing so is likely to be exceeded by the expenses required to fix problems or get into substantial compliance.

5. Counsel should not "shuffle" the documents being produced to the government. The model second request notes that DOJ requires that files be produced in the order in which they are maintained by the company. For the FTC, in contrast, files must be produced by person and by specification. If counsel shuffles the documents, counsel risks being "bounced" and being found not in substantial compliance. If this happens, the 20 day (or 10 day for cash tender offers) clock does not start running until the parties get into substantial compliance.

6. If Item 4(c) documents are produced to the government for the first time in the second request, the party producing such documents for the first time risks being "bounced" and the initial waiting period restarted. If such documents are found while responding to a second request, they should be produced promptly.

C. In any situations where a party is unable substantially to comply with a particular specification or interrogatory, counsel should clearly explain the reasons for noncompliance.

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[32] *FTC v. McCormick & Co., Inc.,* 1988-1 Trade. Cas. (CCH) ¶ 67,976 (D.D.C. 1988) (while it is not clear from the opinion, the issue involved whether or not a marketing manager's office had been fully searched).

D. If there are business reasons that the transaction needs to close by a specific date, counsel should inform the staff as early as possible of those reasons and the specific timing desired by the parties. The staff will attempt to accommodate legitimate, business-driven deadlines, but will not respond well to artificial deadlines.

VII. CERTIFICATION AND DISPUTES

A. The investigating agency typically requires the party to certify that it has substantially complied with the second request.

B. The certification should not be taken lightly by counsel or the parties. The agencies have become more aggressive in scrutinizing second request productions and certifications. If an agency believes that a party has unlawfully withheld documents and/or information and certified that it is in substantial compliance, an agency may:

1. Allege that the parties have engaged in obstruction of justice;[33] or

2. Open a grand jury investigation; or

3. Impose civil penalties. [34]

C. Outside counsel should carefully review the document production and response to interrogatories with in-house counsel or a senior business person before the company certifies that it is in substantial compliance.

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[33] 18 USCA § 1505 (2000).

[34] At the request of the FTC, the DOJ recently sought and the court imposed a $2,785,000 civil penalty on a party for an inadequate Item 4(c) search for the initial HSR filing. In the same matter, an individual was fined a $50,000 civil penalty for certifying that the Hart-Scott-Rodino filing was complete when he "knew or should have known that it was not." "New York Merchant Banking Fund to Pay $2,785,000 Penalty for Violating Antitrust Premerger Notification Requirements," press release dated March 30, 1999 (available on DOJ website). *See also U.S. v. Blackstone Capital Partners II Merchant Banking Fund L.P.,* Civ. Action. No 1:99CV00795 D.D.C. (1999).

D. Set forth below are some issues that staff sometimes raises and that counsel should consider prior to certifying substantial compliance (however, this should not be construed as establishing legal standards for substantial compliance).

1. If a party cannot answer an interrogatory question or produce documents pursuant to a specification, then the party should clearly explain why it is unable to respond.

2. If it is possible for a party to provide an estimate in response to an interrogatory, the party should provide the estimate, explain how it was calculated and note that it is an estimate only.

3. Documents must be produced in the order and condition (*i.e.*, stapled, clipped, bound, etc.) that they were found in the client's files. Documents may not be shuffled or rearranged, except as required by FTC instructions.

4. Parties should immediately suspend normal document destruction policy for both hard copy and electronic files upon issuance of the Second Request until the investigation ends or staff grants modification allowing certain files to be destroyed (*e.g.*, routine recycling of daily back-up tapes of computer system).

5. Identify, search and review (unless otherwise modified):

   a. any central departmental files or off-site storage sites for both hard-copy (archives, warehouses, storage companies) and, unless modified, electronic documents (back-up tapes);

   b. any relevant proprietary information or other material subject to nondisclosure agreements or protective orders;

   c. any large collections of FCC/FERC/SEC/other government-related filings;

   d. secretary or assistant files (incorporated into files of more senior personnel);

   e. files of former employees in the possession of the company or current employees who have been promoted/demoted to other

positions;

f. all responsive sites (*e.g.*, regional sales offices, satellite affiliates, major manufacturing or production sites) in the U.S. or overseas;

g. files of all members of the Board of Directors.

6. Ensure, if not modified by staff to be a "document-only" subpart, that there is a narrative response detailing oral statements (made to any officers of the client identified by staff as having to recreate any such statements) by third parties about the transaction.

7. Handle the 14-day and 30-day cut-off periods (*e.g.*, collect and review documents placed in redweld folders left in offices after initial search for subsequently created or received responsive documents). *See* § V.E.7.f.8 *supra.*

8. Identify and, if necessary, contact all "agents and representatives" of the client (outside counsel, investment bankers, economists, distributors, sales agents, consultants, etc.) to determine whether or not they qualify as agents or representatives and, if so, if they have nonduplicative documents responsive to the Second Request. If they have such documents, produce from each such entity either its responsive nonduplicative documents or a letter from the entity declining to respond to the Second Request or stating it has no such documents.

9. Contact all entities in which the client has a minority position (25%+) that by definition are deemed part of the "company" and that have been identified by staff as having to be searched to comply with the Second Request and, if so, produce from each such entity either its responsive nonduplicative documents or a letter from the entity declining to respond to the Second Request or stating it has no such documents.

10. Interview and search all people identified as likely to have responsive documents on submitted organizational charts.

11. Identify all attorneys, both in-house and retained, to assist in identifying privileged documents; make certain that all

authors/addressees on privileged documents are identified in the privilege log with titles, affiliations, etc.

12. Translate all foreign language documents into English, per any modifications granted by staff, and attach the foreign language document to the translation.

13. Ensure that all responses to narrative specifications marked with an asterisk are provided in both hard copy and electronic form.

14. Ensure that box labels have the correct information on them:

    a. FTC: source, specification, box number, Bates number range and filing date;

    b. DOJ: source, box number, Bates number range and filing date.

15. Remove all cover sheets and tracking sheets from the production before submission.

16. Comply with document indexing requirements, as modified by staff. At a minimum, prepare two versions of a final box log, one indexed by custodian and the other indexed by box number, and submit in both hard copy and electronic form.

17. Record and submit all Bates-range gaps.

18. Insert into the final specification a table of all persons/entities searched and those persons contributing to the interrogatories.

19. Ensure with client that appropriate measures are in place to prevent the inadvertent destruction of data and/or documents for all archives, backed-up e-mail, etc., that staff has deferred searching.

20. Make certain that the person signing the certification is appropriately knowledgeable of the steps taken to respond to the Second Request.

21. For DOJ, file a copy of the certification with the Director of Operations.

22. Call staff a day or two before submission to reserve access to loading docks, elevators, etc. on the day of submission and to learn of any

odd building rules (*e.g.*, only X number of boxes in any 24-hour period).

23. Determine if a separate submission is necessary to any state attorneys general's offices.

E. "Bouncing" second request productions

1. An agency may "bounce" a second request filing if it deems it insufficient or inadequate. An agency may informally or formally bounce a production. However, the result is the same — the agency does not deem the second waiting period (20 days; 10 days in cash tender offers) to have commenced until a party is in substantial compliance.

   a. A production may be informally bounced by a call or letter from staff to counsel informing him/her that the production is inadequate and is being bounced.

   b. Counsel may receive a formal deficiency letter from the FTC Premerger Notification Office.

2. Until the deficiencies in the production have been rectified, staff will not agree that the 20 day clock has started.

3. The three most common reasons for the agencies to bounce a production are:

   a. Item 4(c) documents were found in the production which were not included with the HSR filing. The agencies could require the parties to refile, go through the initial waiting period again and re-issue the second request. These situations are handled on a case-by-case basis. The agencies are becoming increasingly concerned about the scope of searches for Item 4(c) documents.

   b. Not searching the offices of certain employees the agencies believe may have relevant documents based on a review of the party's organizational chart.

   c. Failure to respond fully to interrogatories.

4. On occasion, counsel may believe that staff is asserting that a production is deficient in order to obtain more time to review the documents. In a large or complicated transaction, the 20 day waiting period may not be adequate to allow the agency to complete its review. If counsel suspects that this is the case, counsel should inquire whether providing staff with more time would address the problem. This issue can often be avoided by agreeing to a schedule or a rolling closing deferral date at the time the second request is issued.

5. If counsel believes that the second request certification was "bounced" improperly, counsel should consider an appeal within the agency (*see* § V.E.7.l *supra*).