

**FTC Announces Merger Review Reforms:  
Reforms Designed to Ease Burden of “Second Requests”**

**February 17, 2006**

Clients contemplating mergers that have potential antitrust issues should be aware of some significant reforms to the merger review process announced yesterday by the FTC. The reforms, which take effect for FTC investigations resulting from Hart-Scott-Rodino filings submitted starting today, are intended to reduce the burgeoning time and cost associated with complying with so-called “Second Requests,” the often burdensome government demand for documents and information in the investigation of transactions that raise antitrust issues. The merger review process authorized by the Hart-Scott-Rodino Act permits the FTC or the Department of Justice (DOJ) to review the competitive effects of transactions over a certain size before the parties can close. DOJ has not yet issued a similar set of reforms but is widely expected to do so in the near future.

In part because of the explosion in the use of email and other electronic documents, the size of Second Request document production has increased exponentially, often resulting in months of delay and many millions of dollars in costs. The reforms announced yesterday should substantially reduce the time and cost for transactions that receive detailed antitrust review at the FTC.

The most significant change is the reduction of the number of people whose files will have to be searched. In the past, the antitrust agencies often required the search of hundreds of “document custodians.” Under the reforms, the FTC will, in most cases, limit the search to 35 custodians. Exceptions can be made, but only by the Director of the Bureau of Competition after giving the parties a chance to be heard. Because the cost of production rises almost linearly with the number of custodians, this change alone could cut the cost of production significantly.

In addition, the reforms provide a rebuttable presumption that parties will only need to produce documents going back two years—rather than three—from the date on which the FTC issues the Second Request. Also, the production need only be current up to 45 days before the production is complete, minimizing the need for additional sweeps of files searched earlier in the process.

Additional reforms deal with the process of determining what numerical data must be supplied, the preservation of backup tapes, the creation of privilege logs, electronic document de-duplication and the presumptive elimination of the need to produce certain documents, such as tax documents.

The merger process reforms have the potential to reduce greatly the time and cost of complying with a Second Request. Past reform efforts have foundered in part due to the tendency of agency staff to “backslide” after the initial burst of attention surrounding a reform announcement. The latest reforms hold more promise, however, because they rely less on the experience, skill and goodwill of the particular staff assigned to a case and more on simple numerical rules of thumb that are easy to apply

and deviations from which are easy to detect. They are also much more specific about the cooperation that the parties' counsel must provide in order to make the reforms work, thus making it more difficult for a few "bad apples" in the private bar to spoil the process for those who are able to work effectively with the agencies.

The FTC noted in its announcement that it continues to work on other changes to streamline the merger review process. Yesterday's changes, therefore, represent a first, but highly significant, step toward what may be a less costly and burdensome merger review process.

Morgan Lewis partner Willard Tom co-chaired an ABA Antitrust Section task force that worked with the agencies on this subject in the period leading up to the reforms.

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