FTC issues updated “best practices” guidance for merger investigations

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On August 4, 2015, the FTC’s Bureau of Competition issued updated “Best Practices” guidance for parties engaged in merger investigations. It addresses voluntary submissions of information, use of the Withdraw and Refile process, and Second Requests. Not much is new, but the guidance does highlight areas where the agency believes parties can take steps to positively impact the timing and efficiency of merger investigations.

— Providing Information Early and Voluntarily: The guidance suggest that providing information during the initial HSR waiting period—or even before the filing—can potentially either eliminate the need for a Second Request or allow the agency to better tailor a Second Request. The FTC identifies categories of “key information” it finds helpful including recent strategic and marketing plans, product lists, top ten customer lists, competitor lists, and market share information.

— Use of “Withdraw and Refile”: The guidance notes that if open issues remain as the initial HSR waiting period draws to a close, the parties can opt to withdraw and refile without incurring a new filing fee if the proposed transaction has not changed and the notification is refiled within two days. Recognizing that resetting the 30-day clock does not guarantee a Second Request will not be made, the FTC does note that use of the “withdraw and refile” process has historically (a) reduced the likelihood that a Second Request will issue, and (b) resulted in narrowed and more-tailored Second Request if the agency chooses to issue one.

— Meaningfully Negotiate the Second Request: The FTC asserts that early, substantive negotiation of Second Requests has proven to be important in reducing the burden of such requests on the parties involved. Keys to a meaningful negotiation, in the FTC’s view, include:

— Involving in the discussions employees who are knowledgeable about operations, data, storage, and document retention;
— Explaining the organizational structure and decision-making structure of the business early in the negotiation process; and

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— Having early, substantive discussions of the competitive issues raised by the transaction, the potential document custodians, the potential or desired modifications to the Second Request, the search terms proposed to be used, and timing.

— **Quick Look Reviews:** The FTC acknowledges that, in some cases, a quick look review may resolve competition concerns without the need for full compliance with a Second Request. Under the 2006 Merger Process Reforms, before a quick look review could be conducted, the parties and the agency had to negotiate a formal agreement, which, as the FTC notes, was often a long and protracted process. Now, under the new guidance the FTC can skip the formal agreement, and instead work with the parties to identify key custodians and prioritize the search and production of materials, which should help move the investigation forward more swiftly.

— **Modifications to Second Requests:** The new guidance suggests that to speed up the process of modifying the specifications enumerated in a Second Request, the parties should submit by e-mail draft modification language for the staff to review. However, as the guidance notes, final modifications still always require a formal letter from the staff. Now, however, those letters will not require the signature of division management.


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