

**FTC ANNOUNCES REFORMS  
TO THE SECOND REQUEST MERGER REVIEW PROCESS**

The Federal Trade Commission (“FTC”) has issued reforms to the second request merger review process. See [http://www.ftc.gov/opa/2006/02/merger\\_process.htm](http://www.ftc.gov/opa/2006/02/merger_process.htm). The reforms became effective on February 17, 2006. The intent of the reforms is to streamline the second request merger review process, reduce associated costs, and provide FTC staff and parties more flexibility to address issues as they arise. The reforms apply only to FTC investigations. The Department of Justice has said that it is independently evaluating its own second request process but has not announced any changes.

Each year, more than 95% of all Hart-Scott-Rodino (“HSR”) transactions are cleared during the initial 30-day waiting period. The remaining transactions are subject to second requests, which sometimes cost millions of dollars and can take six to nine months (or more) to complete. While several factors have contributed to those costs and extended review periods, two are significant: (1) the FTC’s increasing interest in detailed and empirical market analyses, and (2) the recent explosion in electronic document volume.

To address the growing second request burden, the FTC has announced the following reforms:

**1. File searches will be presumptively limited to 35 custodians.**

The FTC will not require a party to search the files of more than 35 of its employees provided that certain conditions are met. The 35-person presumption does not apply to requests for information contained in corporate or central files. In addition, the Director of the Bureau of Competition may, after conferring with the party, authorize a larger search group when necessary to analyze the transaction.

To benefit from the presumption, the party must comply with several organizational, data, and timing requirements, which may be found at [http://www.ftc.gov/opa/2006/02/merger\\_process.htm](http://www.ftc.gov/opa/2006/02/merger_process.htm). One such requirement obligates the party to agree to produce materials responsive to the second request 30 days before certifying substantial compliance (or to agree to an alternative timing arrangement) and to propose a 60-day discovery period if the FTC challenges the transaction in an adjudicative forum.

**2. The relevant time period for the production of documents will be presumptively limited to two years.**

The period within which second requests will seek the production of documents and information will be presumed to be from two years prior to the date the FTC issues the second request until 45 days prior to the date that the party certifies substantial compliance with the second request.

The previous relevant time period was typically three years (and sometimes longer). The two-year presumption does not apply to requests for data (see below). In addition, the FTC may enlarge the relevant time period when a longer time period will be necessary to analyze the transaction.

**3. A formal process will encourage the early provision of empirical data.**

The FTC will inform the party of the competitive effects theories under consideration and the types of empirical analyses that may prove useful. The FTC will strongly encourage, but not require, each party to provide the FTC with: (1) a written description of how the party maintains responsive data; (2) a proposal to limit the data request and data samples to support the proposal; and (3) access to an employee who serves as a Data Specialist.

**4. There will be an option for producing a partial (rather than full) privilege log.**

The preparation of a detailed list of documents withheld from submission in response to a second request on the ground that they are attorney-client communications or otherwise privileged is often a particularly burdensome and costly aspect of second request compliance. The reformed procedures will allow a party to provide a partial privilege log for the employees in its search group and to submit a complete privilege log only for a small subset of those employees. A partial privilege log consists of the name of the employee and the total number of documents (and attachments) contained in that employee's withheld files.

To produce a partial privilege log, the party must submit a signed statement acknowledging that: (1) the FTC retains the right to serve discovery requests regarding documents withheld on privilege grounds in the event of a judicial or administrative proceeding; (2) the party will produce a complete privilege log for all employees in the search group no later than 15 calendar days after such a discovery request is served; and (3) the party waives its objections to such discovery, including the production of a complete privilege log, except for any objections based strictly on privilege.

\* \* \* \* \*

The full text of the FTC's announcement of the second request reforms runs 31 pages. Other reforms and clarifications in addition to those highlighted above have been adopted, including reforms regarding technical and logistical issues (*e.g.*, preservation protocols for backup tapes, use of de-duplication software).

Although the reforms will not eliminate the substantial cost and burden of responding to second requests, they should reduce somewhat the time and money required to complete a merger review and promote the more consistent use of "best practices" by FTC staff and parties.

If you have questions about these reforms, please contact Barry Nigro (202-303-1125, [bnigro@willkie.com](mailto:bnigro@willkie.com)), Ted Whitehouse (202-303-1118, [twhitehouse@willkie.com](mailto:twhitehouse@willkie.com)), Bill Rooney (212-728-8259, [wrooney@willkie.com](mailto:wrooney@willkie.com)), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).

February 22, 2006

Copyright © 2006 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information.