

Empirical Analysis of 2006 Merger Process Reforms Bureau of Competition - August 2015

Second Requests are essential to the merger review process as they provide the FTC access to business documents and data from the merging parties that discuss how they compete in the product and geographic markets impacted by the merger. This information helps explain how the industry works, and how key executives analyze, respond, and react to their competitors and customers. By reviewing this information, along with other evidence gained during the investigation, the agency can more effectively assess whether a proposed transaction is likely to result in anticompetitive effects and, ultimately, whether to challenge the transaction.

While Second Requests provide vital information to the agency, they also impose significant costs and delays on the merging parties. Companies' increased use of electronic means of capturing and storing information, as well as the agency's need for detailed data necessary to undertake modern economic analysis, can add to those costs and delays. With all of this in mind, former Chairman Majoras requested a study, and ultimately announced specific changes to the FTC's review process in her February 16, 2006 Reforms to the Merger Review Process.¹ The 2006 Reforms established presumptions that the FTC would: (1) limit the number of employees required to provide information in response to a Second Request, provided the party complies with specified conditions; (2) reduce the time period for which a party must provide documents in response to the Second Request; (3) allow a party to preserve far fewer backup tapes and produce documents on those tapes only when responsive documents are not available through more accessible sources; and (4) significantly reduce the amount of information parties must submit regarding documents they consider to be privileged. In her announcement, Chairman Majoras noted that the 2006 Reforms were not the conclusion of the Commission's work in addressing the merger review process at the Commission or concerns about Second Requests.

Since then, the volume of documents and data companies keep in the ordinary course of business has continued to grow. As such, the Commission has been collecting increasing in 2014 to examine how Second Requests have been crafted, and how parties have responded to them since the 2006

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Reforms. The Task Force examined whether and how FTC staff and parties addressed the concerns expressed in the Reforms in actual investigations.

As part of this review, we designed an empirical survey of merger investigations at the FTC from fiscal year 2006 (Fall 2005) to fiscal year 2013. We generated a list of

responding to 23 FTC and DOJ Second Requests had searched 94 custodians or more.⁴ Our study found much smaller custodian totals. On average, acquiring parties searched 30 custodians, and acquired parties searched 22 custodians. Examining our data in other ways also revealed a lower burden. For example, for investigations in our broad sample, almost 72% of merging parties responding to Second Requests searched fewer than 35 custodians. In 81% of these investigations, at least one of the parties searched fewer than 35 custodians. In 62% of these investigations, both parties searched fewer than 35 custodians. The reason for this apparent reduction might have been that the 35 custodian presumption, even if seldom triggered formally, served as a mental anchor for modification discussions. Merging parties would often raise the 35 custodian limit, without mentioning the specified conditions. FTC staff would typically dismissfa 12 489.84. ou

documents and data from beyond 2 years for isolated specifications. Reasons for departing from the default two-year time period included the need to collect information prior to exits, entries, acquisitions, or key contracts (especially in bid or lumpy markets). Other reasons included seeking information on prior patent litigation, on a relevant product that involved longer-term testing and development, and on pipeline construction and reversal plans. In addition, information requests