Nothing to See Here! Clearing the Deal in the Initial HSR Waiting Period

Over the past ten years, over 83 percent of reportable transactions that have received Second Requests from either the Federal Trade Commission or Antitrust Division of the U.S. Department of Justice have been challenged.¹ Merger review in the United States is taking longer² and getting more expensive. In the past year, both federal antitrust enforcement agencies in the United States have recognized this increased burden on merging parties and are taking commendable and encouraging steps to address unnecessary burdens on merging parties. One way to eliminate the burden of a Second Request, however, is not to get one in the first place.

By statute, deals that trigger premerger filings under the Hart-Scott-Rodino Antitrust Improvements Act (HSR) are usually subject to a 30-day initial waiting period (certain transactions, such as cash tender offers and transactions involving assets in bankruptcy, have a shorter waiting period) during which the parties cannot consummate the pending transaction.³ At the conclusion of the initial waiting period,⁴ the reviewing agency may either close its investigation without further action or seek additional information from the parties in the form of a “Second Request.” A Second Request is a request from the reviewing agency to the transaction parties for documents, data, and other information. The issuance of a Second Request tolls the statutory waiting period under the HSR Act until 30 days after the parties “substantially comply” with the Second Request. As a practical matter, compliance can take several months and command substantial financial and management resources.

Avoiding a Second Request is not possible in all transactions, of course. Some transactions are “red lights”—highly likely to receive significant scrutiny because they involve direct competitors in industries and geographic areas served by few (or no) other competitors. On the other end of the spectrum, many other deals are unlikely to receive a Second Request in the first place. These “green light” deals, for example, may involve acquisitions by private equity firms of companies that

³ 15 U.S.C. §§ 18(a)(a), (b). This timing can be shortened if the parties request, and the FTC grants, early termination of the initial waiting period.
⁴ As discussed in more detail below, the parties may choose to extend the initial waiting period by an additional 30 days by “pulling and re-filing” the HSR form.
are not in the same or adjacent industries as the firm’s existing portfolio companies. Many deals, however, are “yellow lights”—merging firms should proceed with caution because at least some level of scrutiny is possible. These “yellow light” deals present opportunities for merging parties to proactively address potential issues to obtain U.S. merger control clearance during the initial waiting period.

Clearing one of these “yellow light” deals during the initial waiting period often requires significant advance planning. This article discusses some ways merging parties and their counsel can make efficient use of the initial waiting period to optimize the chance of obtaining clearance without the issuance of a Second Request.5

**Second Requests: Months of Work, Millions of Dollars, Business Disruption . . . and Your Deal Could Be Challenged Anyway**

The likelihood of the FTC or Antitrust Division challenging a transaction in the form of a consent decree, litigation, or the parties abandoning the transaction entirely after the issuance of a Second Request, has increased dramatically in the past ten years. During the George W. Bush administration, an average of 70 percent of adjusted reported transactions6 that received Second Requests ultimately were challenged. This number increased to over 82 percent during the Obama administration. Said another way, in just a few years, transactions were over 12 percent more likely to be challenged if they received Second Requests. Relevant data for a complete fiscal year under President Trump has not yet been released, but we expect the percentages of challenges after receipt of a Second Request to remain high.

**FIGURE 1. Combined FTC and Antitrust Division Merger Challenges as a Percent of Second Requests by Fiscal Year**

5 To the extent a Second Request has been issued, there are several strategies that parties may use to reduce the scope or burden of the Second Request. These strategies are beyond the scope of this article.

6 “Adjusted reported transactions” are those in which the agencies could issue a Second Request. “Adjusted transactions exclude transactions that are not subject to antitrust review under the HSR Act because: (1) the notification filing was incomplete or withdrawn before the start of the initial waiting period; or (2) the transaction reported was subject to review by another federal agency or later determined to be not reportable.” Andrea Zach, *Diving into the Data in the HSR Report*, FTC: News & Events, Blogs, **COMPETITION MATTERS** (Oct. 4, 2017), https://www.ftc.gov/news-events/blogs/competition-matters/2017/10/diving-data-hsr-report.
This increase occurred over a time period in which the percentage of adjusted reported transactions receiving Second Requests remained fairly constant. From fiscal year 2001 through fiscal year 2016, on average, 3.2 percent of adjusted reported transactions received a Second Request from either FTC or the Antitrust Division, with a high of 4.5 percent in fiscal year 2009 and a low of 2.5 percent in fiscal year 2008.

![Figure 2. Percentage of Adjusted Reported Transactions Receiving Second Requests by Fiscal Year](https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports)

https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

Many companies are unwilling to play these odds, especially given the additional expense, time, and deal disruption that comes with Second Request compliance. Assistant Attorney General Makan Delrahim recognized that, even though the Antitrust Division issued Second Requests in less than 1 percent of reported transactions, “[t]hat 1%, however, is expensive [and] resource intensive.”7 A 2014 survey of antitrust practitioners reported a median cost of Second Request compliance of $4.2 million, with a reported range of $2 to 9 million.8 This same survey reported, on average, production of documents from 26 document custodians, typically employees of the merging parties.9

The duration of merger reviews is also increasing. One U.S. law firm compiles statistics regarding the length of review of public transactions. While their reporting metrics cannot account in all instances for some non-public aspects of merger review, such as the dates when HSR filings are made, Second Requests are issued, and parties comply with those requests, they provide directionally relevant information showing that the duration of merger reviews is increasing steadily.10

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7 Delrahim, supra note 2.
8 See Peter Boberg & Andrew Dick, Findings from the Second Request Compliance Burden Survey, THE THRESHOLD (ABA SECTION OF ANTI TRUST LAW COMM. NEWSL.), Summer 2014, at 33.
9 Id. at 31.
10 DAMITT 2017, supra note 2. The DAMITT report uses publicly available information to analyze trends in U.S. and EU merger enforcement, and is updated quarterly. Not all of this delay is attributable to the reviewing agency—reviewing parties may have reasons of their own to slow down the U.S. review process, particularly if they are trying to match up timing in other jurisdictions. However, both the Antitrust Division and the FTC have taken steps to shorten the parts of the review they can control. Delrahim, supra note 2; Bruce Hoffman, Dir. Bureau of Competition, Fed. Trade Commission, Timing Is Everything: The Model Timing Agreement, FTC: News & Events, Blogs, COMPETITION MATTERS (Aug. 7, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement.
In addition to the cost and delay, merging parties also must consider business practicalities when their transactions receive Second Requests. While the deal is pending, employees from both sides of a transaction may have concerns about their positions post-acquisition and may seek other employment, risking corporate “brain drain.” Customers may have concerns about the effects of the transaction and may cancel or not enter contracts due to the lack of certainty. The stock market may react with lower share valuations for companies whose deals are caught up in antitrust review, which could, in turn, affect deal valuation if any part of the deal consideration is paid in stock of the acquiring party. The issuance of a Second Request, and the associated delay and uncertainty, can result in these and other business ramifications well beyond the expense and labor required to respond.

Second Requests also increase the risk of a non-public deal or other confidential information of the merging parties becoming public. The contents of HSR filings generally are confidential and exempted from Freedom of Information Act requests by statute. 11 Likewise, the HSR Act and regulations and the Antitrust Division Manual contain detailed practices and safeguards to ensure confidentiality of ongoing investigations. 12 For example, the HSR Act states that

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. 13

But in the course of investigating a “yellow light” transaction, the agencies likely will reach out to non-party market participants to gather additional information. 14 The reality is that discretion on the part of the agencies does not prevent non-parties from figuring out the subject of the agencies’ inquiries. The mere act of being contacted by an investigating staff attorney may be enough for a non-party witness to infer that its competitor (or customer, or supplier) is involved in a non-public transaction.

Both the FTC and the Antitrust Division often conduct non-party interviews during the initial waiting period, but the agencies likely will contact even more non-party witnesses after the issuance of a Second Request, further increasing the chances of the fact of a deal becoming public. Moreover, although the Antitrust Division takes the position that “HSR material produced by a party should not be shown to another party or third party during a CID [civil investigative demand] deposition or otherwise,” 15 the Antitrust Division Manual is clear that “CID material may be disclosed to third parties without the consent of the producing party” in some circumstances, including in connection with the taking of oral testimony. 16

All of these burdens and risks associated with a Second Request provide strong incentives for parties and their counsel to attempt to convince the reviewing agency that the deal does not warrant investigation beyond the initial waiting period.

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14 ANTITRUST DIVISION MANUAL, supra note 12, § III.D.2.h (As part of the investigation, “staff should outline its provisional theory of anti-competitive harm and should begin contacting customers, trade associations, competitors, and other relevant parties.”).
15 Id. § III.D.1g.iii.
16 Id. § III.E.6.a.
Is There Something to See Here? Staff Assessments During the Initial Waiting Period

In order to optimize chances of avoiding a Second Request, parties and their counsel must understand the reviewing agency’s objectives for the initial waiting period and, to the extent possible, predict the reviewing staff’s likely topics of inquiry and concern to respond quickly.

At the most basic level, the initial waiting period gives reviewing staff a limited time to conduct a preliminary investigation to determine whether the transaction warrants additional investigation through a Second Request.17 The initial waiting period also provides a sense of certainty to merging parties that their transaction will be reviewed promptly. As the legislative history shows, prior to the passage of the HSR Act, merging parties were concerned about the lack of a definitive timetable for merger review.18 By implementing a 30-day initial waiting period, Congress weighed the agencies’ need to review mergers against the business interests of the merging parties, as a longer waiting period could “kill an acquisition just as effectively” as a court order.19

The “short, 30-day waiting period”20 created by the Act, however, provides staff usually only about two weeks to review a proposed transaction before having to make a decision whether to recommend the issuance of a Second Request. After HSR reports are filed, staff at the FTC’s Premerger Notification Office ensure the filing is complete. The deal must then be “cleared” to either the FTC or the Antitrust Division for investigation, which may take a few days (and sometimes may take significantly longer).21

In our experience, absent any unusual issues, approximately a week to ten days will pass from the time a transaction’s HSR filings are submitted until the file lands on the desk of agency staff with clearance to investigate the transaction at issue. This leaves only about three weeks until the statutory end of the initial waiting period. This entire three-week period, however, is not always available for staff’s investigation. In the event staff have concerns about a transaction, they typically need at least a few business days to prepare a recommendation for the reviewing agency to issue a Second Request, and a few more business days for that recommendation to be reviewed through internal reporting chains and for the Second Request to be issued. As a practical matter, parties should assume that reviewing staff may not contact them until seven to ten days post-filing and that the parties will only have until about day 23 or 24 of the initial waiting period to convince staff not to issue a Second Request—reducing the time period for substantive advocacy on behalf of merging clients to only about two weeks.

Staff at both the FTC and the Antitrust Division have several investigative tools for the preliminary initial waiting period inquiry. In addition to consulting public resources, agency staff may seek

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17 Antitrust Division Manual, supra note 12, § III.D.2.d.
18 Merger Oversight and H.R. 13131, Providing Premerger Notification and Stay Requirements: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary, 94th Cong. 133 (1976) (statement of Rep. Romano Mazzoli, Member, H. Comm. on the Judiciary) (“[I]t has been brought up by some of the witnesses that because of the lack of a time certain, there appears to be at this point kind of an open-ended aspect to the premerger waiting period. There were some suggestions that a definite time be set, some say 60, 90, or 120 days, within which action will have to be taken, or the merger will be permitted to go through.”).
19 Id. at 192 (letter from Thaddeus Holt, attorney and former Deputy Undersecretary for the U.S. Dep’t of the Army).
21 See, e.g., Jenna Ebersole & Leah Nylen, DOJ, FTC Jockeying for Deals Is Dragging Out Merger Reviews, MLEX (Nov. 30, 2018); cf. Antitrust Division Manual, supra note 12, § VII.A.1.a.iii (“[N]o attorney of either agency should contact any filing party or any other private person or firm in connection with a premerger filing without first having obtained clearance”); id. § VII.A.1.c. (Although the agencies generally try to resolve clearance disputes via phone calls and emails, a “small number of matters are resolved through written Contested Matter Claims,” which are more in-depth than standard requests for clearance.).
voluntary submissions from merging parties in a variety of forms, such as informal discussions or written explanations, or more formal methods, such as issuing a CID.\textsuperscript{22} Staff may also “begin contacting customers, trade associations, competitors, and other relevant parties to determine whether there are likely competitive concerns in any relevant markets.”\textsuperscript{23} As the initial investigation takes place, staff will develop a preliminary understanding of the likely relevant markets at issue, the competition in those markets, and even potentially run preliminary economic screens.\textsuperscript{24}

Developing a sufficient understanding of these topics in a compressed timeframe is easier in some industries than others. For example, staff at the Antitrust Division have significant experience assessing the competitive implications of transactions in such industries as insurance, banking, agriculture, and telecommunications, among others. Similarly, FTC staff have significant experience reviewing transactions in such industries as retail, consumer products, hospital and other health care providers, supermarkets, chemicals, oil and gas, and pharmaceuticals, among others. If a transaction falls in an area in which the reviewing agency has significant experience, reviewing staff may be able to get up to speed on the current competitive dynamics and the specific competitive interaction (or lack thereof) of the merging parties quickly. For better or worse, staff may also come into the investigation of these transactions with some preliminary ideas on the potential competitive issues to investigate. Many transactions, however, present issues or industries of first impression and may take longer for reviewing agency staff to understand and develop theories of potential harm to test through the investigative tools available during the initial waiting period, such as non-party witness telephone interviews.

**Strategies for Making the Most of the Initial Waiting Period**

Given the very limited time that merging parties and their counsel have during the initial waiting period to educate reviewing staff regarding the merging parties, the products and services at issue, the competitive dynamics at play, and potential consumer benefits of the transaction, parties must carefully plan to maximize the impact of their advocacy efforts.

In this section we provide practical guidance for merging parties and their counsel for optimizing the chances of avoiding a Second Request during the initial waiting period.

**Tip 1: Stack the Deck in Your Favor.** Optimizing the chances of avoiding a Second Request during the initial waiting period requires significant advance preparation. As early as possible, parties and their counsel should work together to develop a game plan for the entire antitrust review. This plan should incorporate strategies to respond to all possible areas of agency inquiry quickly and efficiently.

Antitrust review in the United States has no “one-size-fits-all” approach. Each deal’s game plan will vary. In developing the strategy, however, parties and their counsel generally should consider the following:

\textsuperscript{22} Antitrust Division Manual, supra note 12, §§ III.D.2.h, III.D.2.i.

\textsuperscript{23} Id. § III.D.2.h.

\textsuperscript{24} These initial screens often include calculating the relevant market’s Herfindahl-Hirschman Index (HHI) and performing Gross Upward Pricing Pressure Index (GUPPI) analyses. HHIs are used to calculate the market concentration of a given market, and are derived by summing the squares of the individual firms’ market shares. U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 5.3 (2010), [hereinafter Merger Guidelines], http://ftc.gov/os/2010/08/100819hmg.pdf. GUPPI analysis helps determine whether a post-merger firm could raise prices on one product to divert sales to different products, thus increasing profits. Diversion analysis looks to the “number of units diverted to that product multiplied by the margin between price and incremental cost on that product.” Merger Guidelines § 6.1.
Survey the playing field. As early as possible, and optimally significantly in advance of submitting HSR or other merger control filings, parties’ counsel should survey all available public materials relating to U.S. antitrust agencies’ review of other transactions in the same or adjacent industries. This research will inform:

- What agency/office likely will review the proposed transaction at issue;
- Whether the reviewing agency staff likely already has a working knowledge of the industry and relevant players (or whether and to what extent the parties are likely to need to spend time educating the reviewing staff about the industry and parties);
- Whether the parties should anticipate complaints from market participants, and potential arguments and strategies to counter any complaints; and
- Whether the transaction likely will be investigated by one or more state attorneys general or foreign competition authorities in parallel with the federal antitrust enforcer. If so, counsel should discuss with their client the possibility of confidentiality waivers and whether to grant them so the parties are not spending valuable initial waiting period time making these decisions. Further, foreign premerger review may alter the overall pre-closing timeline for the parties.

Prepare for advocacy. Parties’ counsel should replicate, to the extent possible, the preliminary analysis in which the agency staff will engage during the initial waiting period. During this short time frame, agency staff initially will have access to limited sources of information, primarily consisting of the parties’ HSR filings (and, in particular, the Item 4(c) documents—materials prepared by or for officers or directors that discuss competition-related issues, such as markets, competitors, or potential product/geographic expansion opportunities presented by the deal), customers and other non-party witnesses, and other publicly available and/or internet sources. Parties should survey this information and view it through the lens of a skeptical antitrust enforcer to understand what initial impressions reviewing staff may have. Working through this lens, parties’ counsel can anticipate the likely early questions and prepare materials (ideally with ordinary course business documents as support) to respond to those questions consistent with the deal’s procompetitive story.

These advocacy materials may take different forms: for example, maps demonstrating geographic constraints (such as major roadways or bodies of water) may allay agency concerns about post-merger concentration in local geographic markets. Alternatively, if the parties are involved in an industry in which the agencies do not have much experience, preparing base-level educational presentations may help agency staff get up to speed on key aspects of the industry at issue.

Know your Item 4 documents. Item 4 documents may contain language that can raise the eyebrows of a reviewing staff attorney—even if the actual underlying meaning is innocuous. When parties and their counsel identify these types of unhelpful documents, they should discuss these statements with their authors to fully understand the intention and context in which they were made and to develop a strategy to address them with reviewing staff. For example, the authors once had to explain to agency staff why statements about the client achieving “market dominance” were puffery and in fact impossible for the post-merger firm to achieve, given market realities in the specific industry. But because these statements were identified in the process of reviewing potential Item 4 documents, the client was able to explain the statements soon after agency staff asked...
Anticipate a voluntary access letter and the parties’ responses. Shortly after opening the investigation, agency staff often will send parties an “access letter” asking for the parties voluntarily to submit materials to assist in the agency’s initial investigation. Voluntary access letters present an opportunity for parties and their counsel to rebut any “bad” or “unhelpful” facts or statements that may be among the first the agency staff see about the deal at hand and to help begin to tell the deal’s positive, procompetitive story.

Both the FTC and Antitrust Division have posted model “voluntary access letters” describing the types of information they regularly seek from merging parties at the outset of a merger investigation.26 Parties should begin collecting this information early both to understand what the requested documents say about competition and other key issues, but also to be able to quickly provide the reviewing agency materials that show their initial concerns may be unwarranted. Based on the model voluntary access letters, parties should be prepared to produce organizational charts, strategic plans and marketing plans for the past three years, information regarding products currently sold and in development, lists of the top ten customers for products that overlap with the other side of the transaction, lists of competitors, and market share information.

Know your customers. Both the FTC’s and Antitrust Division’s model access letters request information regarding the customers of the merging parties. Often collecting the requested information regarding the top customers can take several days. Parties and their counsel should collect the requested information from clients in advance. The parties should think carefully about the points of contact they will provide to the agency for top customer/supplier interviews—giving the main telephone line for a company may create delays in agency staff getting on the phone with the appropriate individuals, whereas giving the cell phone number of the head of sales/purchasing (if that person is open to providing that to the agency) may expedite the reviewing agency’s investigation.

In addition, parties should consider giving their customers a “heads up” in advance of turning their names and contact information over to the investigating agency. In the authors’ experience, it is helpful for the client to explain to the customer in a matter-of-fact way that the Antitrust Division and FTC routinely contact customers as a normal part of their antitrust review process, and to encourage the customer to answer their questions if they are comfortable doing so. These outreach calls can also help gauge whether the customer/supplier is likely to be supportive, neutral, or hostile to the deal.

Anticipate non-party witness concerns and issues. In addition to the customers whose contact information reviewing agency staff will request from the parties, reviewing agency staff may also have discussions with other non-parties about the deal under review. These other non-parties could include competitors, trade associations, other industry experts, suppliers or other firms at different levels of the supply chain, and others. These non-parties may be contacted by the reviewing agency staff or may affirmatively reach out to staff to express their views of the potential deal. Parties and their counsel should, to the extent possible, anticipate the likely issues and concerns that may be raised by these other non-party witnesses. In our experience, counsel

can sometimes identify potential complainants through discussions with their client’s business team. Suppliers or vendors who have recently lost sales to one or both of the merging parties, customers who have been less than satisfied about quality or service or who have recently pushed back on pricing or other terms may be among the most likely parties to raise concerns about the proposed transaction with the reviewing agency staff.

**Prepare for an agency roadshow.** Reviewing agency staff often ask for parties to identify a business executive or other knowledgeable employee with whom staff can discuss the parties, the industry, competition, and the rationale for the deal, among other possible topics. Parties should anticipate this interview request and be prepared to put these individuals quickly in front of agency staff, sometimes even before being requested to do so by reviewing staff.

Clients may hesitate to have their executives speak to government enforcers. These are busy individuals who often have broader deal team responsibilities, in addition to maintaining their regular “day jobs.” Preparing for and participating in these government interviews can take several hours, and could take an executive out of commission for a day or more if the interview is done in person at the reviewing agency’s offices rather than by telephone.

This executive participation, however, can be a critical piece of the agency review process. Often the client’s executives are the best advocates for your deal. In the authors’ experience, having agency staff hear about a company’s business directly from management is often viewed by agency staff as more genuine and credible than the same arguments submitted by the parties’ counsel.

These interviews also can help shape the nature of the agency’s investigation. By telling their procompetitive affirmative story of the deal, the executives can identify facts for agency staff to verify during their calls to non-party witnesses. If the non-party witnesses, and customers in particular, respond to staff’s questions with facts that are consistent with what the staff has heard from the parties, this significantly improves the chances of clearance during the initial waiting period.

Parties should also carefully consider whether agency interview requests should take place by phone or in person. This decision will, again, depend on a number of factors including the timing of the deal and antitrust review and the physical location of the client. Several years ago, one of the authors represented a party before the FTC in a merger involving high-tech consumer products. The parties’ CEOs came to the Commission with examples of products to show agency staff and used them to explain how the deal could accelerate R&D in certain product lines. The deal was granted early termination the following week and staff told counsel that the ability to talk directly to the CEOs and hear the CEO’s vision for the company directly was a significant factor in their decision to close the investigation.

**Tip 2: Play the Hand You’re Dealt.** Even the most experienced counsel cannot always predict with certainty the likely questions and concerns of reviewing agency staff. For example, in a recent matter, the authors anticipated that the reviewing agency would likely focus on a small subset of products produced by both parties. The agency did exactly that—except they drew the scope of competing products in a way that was not anticipated. When these unexpected avenues of investigation arise, merging parties and their counsel should be prepared to quickly pivot to tell a pro-competitive story of the deal through the lens applied by staff. Parties and their counsel may respectfully disagree with staff regarding the staff’s view of competition, but unless parties have independently verifiable facts that they can use to quickly show staff that another view is more consistent with business realities, debating with staff over complex issues like market definition will often simply eat up a large chunk of the precious little time available during the initial waiting period.
As parties and their counsel are considering whether to push back on the reviewing staff’s market views, they must carefully evaluate which arguments are likely to resolve staff concerns without raising additional issues for investigation. As a general rule, the initial waiting period is not the time to engage in protracted disagreements with staff about the definition of the relevant market or other complicated antitrust issues. Parties must distinguish between arguments to make during the initial waiting period (IWP arguments) and which arguments are best saved for after the issuance of a Second Request (Second Request arguments), if staff have expressed concerns about the deal.

IWP arguments are those that make it easy for staff to close their investigation. These are based on facts that can be quickly and easily demonstrated by the parties’ ordinary course documents and, most importantly, reviewing staff can independently verify with non-party witnesses and/or public sources. For example, an IWP argument might be that a large number of companies provide competitive products or services to those offered by the merging parties. To support this argument, the parties can point to internal business planning documents naming many of these other competitors, third-party industry publications describing them, and the competitors’ own webpages describing their similar products. The reviewing agency’s staff can verify that these other competitors are, in fact, viable competitive options through customer calls.

Second Request arguments, on the other hand, require more analysis. These are the types of arguments that may be based on detailed econometric analysis or would require compilations of documents from multiple sources to verify. A Second Request argument might be that, despite a small number of competitors in an industry, the merging parties would lack the financial incentives to raise prices. This may be supported by merger simulations, analyses of natural experiments, or economic or other evidence that would require the collection of data by the reviewing agency from multiple parties and significant work by the agency’s economists to verify. Even if the staff ultimately could verify the parties’ statements, this type of analysis likely would take longer than the limited time available in the initial waiting period.

Finally, in advocating for a merger, statements about potential efficiencies of the transaction are rarely as compelling as showing how the transaction will benefit consumers. For example, simply stating that the deal will result in substantial cost savings may carry little weight with a reviewing staff attorney, particularly if there is no support to show the cost savings are merger-specific, verifiable, or cognizable. By contrast, showing how the cost savings will directly benefit consumers, whether through lower prices, new product development, or increased competition, is more likely to sway an investigating agency. And sometimes, explaining the rationale behind the deal can help to show the positive aspects of a combination in the broader context. For example, showing a strong procompetitive rationale for the deal, supported by business documents, can help tell the story that the parties’ intent is fundamentally procompetitive and will benefit consumers, and not that it is being done to harm competition.

Tip 3: Know When to Hold ‘Em and When to Fold ‘Em. A party’s playbook may have outlined a plan to obtain merger clearance during the initial 30-day waiting period. Part of effective and efficient counseling, however, is knowing when to change course.

In some investigations, agency staff may need more than the statutory 30-day waiting period to complete their preliminary investigation. Staff may have received the file later than usual in the

27 Merger Guidelines, supra note 24, § 10.
28 Miriam Carroll, Program Summary: “Economic Analysis of Partial Acquisitions, JVs, and Alliances,” ABA TRANSP., ENERGY & ANTITRUST NEWSL. Fall 2018, at 22.
initial waiting period due to delays at the Premerger Notification Office or in obtaining clearance to review the deal.\textsuperscript{29} In one recent matter, the authors were not contacted by the reviewing agency until day 17, giving reviewing staff only 13 days to conduct their review during the initial waiting period. If reviewing staff are not familiar with the industries, products, or services at issue, staff may need additional time to learn the competitive landscape. Staff may also need additional time if the transaction at issue involves a large number of products and/or geographic markets.

Parties can provide staff with additional time to complete their reviews in a number of ways. If the parties have already filed their HSR notice, the parties can “pull and refile” to restart the HSR waiting period. The acquiring person must formally withdraw the initial HSR filing in writing, and include the fact that it intends to refile.\textsuperscript{30} The acquiring person must also state the date when the refile is expected.\textsuperscript{31} Finally, the refile must include new affidavits, and update any responsive Item 4(c) or 4(d) materials that may have been generated since the initial HSR filing was submitted.\textsuperscript{32}

Pull and refile can be effective where agency staff are unlikely to have substantive concerns but they need additional time to complete their investigation. As described above, the parties should have a sense as to whether agency staff will need additional time by week three of the initial waiting period. If the parties think staff merely need additional time to process the filing, it may make sense to “refresh” Item 4 collections during the final week of the first waiting period in anticipation of a potential pull and refile.

Giving the agency staff early assurances that they will have additional time to review the transaction can allow them to focus on the deal specifics rather than on preparing a Second Request. In one recent deal, the authors represented a company whose filing was likely delayed in the clearance process. The staff attorney responsible for the investigation did not receive the parties’ filings until day 17 of the initial waiting period. Due to the late start to the investigation, staff were unable to complete their customer and competitor interviews before the expiration of the first initial waiting period. The authors provided written notice of the buyer’s intent to pull and refile several days in advance of the expiration of the first initial waiting period, noting the specific date and time at which the filing would be effectively withdrawn to give the agency staff assurances that they would not be “crunched” and have to issue a Second Request to ensure they would have time to complete their investigation. In this matter, the “pull and refile” decision was a successful one: the reviewing agency granted early termination a few weeks into the second initial waiting period.

Whether this type of “pull and refile” strategy makes sense may depend on a number of factors. For example, deal practicalities, such as any antitrust risk shifting or efforts provisions in the parties’ merger agreement, may govern whether parties could “pull and refile.” For instance, an agreement may include a “drop dead” date at which point one or both of the parties can walk away from the deal. If that date is approaching, the parties may choose to see if they can get the deal cleared. But, on the other hand, if that date is months away, the parties may want to comply

\textsuperscript{29} Recent press articles have discussed the potential increase in the time for an agency to obtain clearance. See, e.g., Ebersole & Nylen, supra note 21.

\textsuperscript{30} 16 C.F.R. §§ 803.12(a), (c).

\textsuperscript{31} 16 C.F.R. § 803.12(c); see also Fed. Trade Comm’n, Tips on Withdrawing and Refiling an HSR Premerger Notification Filing (Sept. 15, 2017) [hereinafter Tips on Withdrawing and Refiling], https://www.ftc.gov/system/files/attachments/hsr-resources/withdraw_and_refile_procedures_tip_sheet_updated_091517.pdf. If the refile is made more than two business days after the filing is withdrawn, the parties are required to pay a new filing fee.

\textsuperscript{32} 16 C.F.R. § 803.12. See also Tips on Withdrawing and Refiling, supra note 31.
with the Second Request before that time period runs. Whether to “pull and refile” may also depend on the nature of the questions or concerns from the reviewing agency staff. Generally, if the reviewing agency likely only needs a few additional weeks in order to confirm a certain set of facts that would allay their concerns about a proposed transaction, it may make sense to extend the initial waiting period to avoid the issuance of a Second Request. However, in some matters, the agency’s concerns may not be likely allayed during the initial waiting period and so “pulling and refiling” the HSR to give the agency more time may simply delay the inevitable Second Request.

**Additional Options.** Even before submitting the initial HSR filings, parties may consider “going in early” to staff at the likely reviewing agency to give them time to start their investigation prior to starting the official HSR initial waiting period clock. A strategy of going in early, however, is not without risk and should be carefully considered. This approach risks flagging a deal for additional scrutiny that may have otherwise not been the subject of inquiry. On the other hand, if parties and their counsel believe that reviewing staff may use some additional time to either get comfortable that the transaction will not likely result in anticompetitive effects or to limit the scope of the issues that will be subject to a Second Request, approaching agency staff prior to submitting HSR filings may be beneficial.

Finally, in the event that the staff’s concerns relate to a specific product line or business unit, the parties may consider approaching staff with a remedy that would resolve all concerns without the need to comply with a Second Request. Even if the parties are proposing a complete remedy, the investigating staff may well issue the Second Request anyway in order to prevent the parties from closing.

**Conclusion**

The issuance of a Second Request can inject significant uncertainty, delay, and burden into a proposed transaction. Staff inquiries during the initial waiting period, however, do not automatically mean that a Second Request is forthcoming. Parties can mitigate (or at least prepare for) these risks by proactively approaching the antitrust review and being ready to respond efficiently and effectively to staff inquiries and concerns.

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33 Donald G. Kempf, Deputy Ass’t At’y Gen., U.S. Dept of Justice, Antitrust Div., Remarks Before Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-donald-g-kempf-jr-delivers-remarks-american-bar (“[I]f you are aware of competitive issues from the get-go, meet with us early and often. . . . I would urge the parties to provide relevant information early in the investigation.”).

34 Post-consummation challenges of transactions that were subject to the HSR Act are rare, but not impossible. In one recent example, the Antitrust Division challenged Parker-Hannifin’s consummated acquisition of CLARCOR, Inc. eight months after the expiration of the HSR waiting period. See Complaint, United States v. Parker-Hannifin Corp. and CLARCOR, Inc., at 1–4 (Sept. 26, 2017), https://www.justice.gov/atr/case-document/file/999341/download.

35 If parties anticipate divestitures, they can also consider a “fix it first” approach in which the parties carve the potentially problematic assets or business units from the transaction such that the acquiring party does not buy them in the first place. See, e.g., Dissenting Statement of Commissioner Joshua D. Wright, Reynolds American Inc. and Lorillard Inc., FTC File No. 141-0168 (May 26, 2015), https://www.ftc.gov/system/files/documents/public_statements/644991/150526reynoldsjdwstatement.pdf (no anticompetitive effects of proposed transaction due to parties’ proactive finding of a divestiture buyer before even approaching FTC with the deal, effectively making a three-way transaction).