



## DOJ Announces Merger Process Reforms: Déjà Vu All Over Again?

### IN SHORT

**The Situation:** Between 2013 and 2017, the average length of a U.S. Department of Justice ("DOJ") Antitrust Division merger review increased 65 percent to 10.8 months.

**The Response:** DOJ announced reforms to improve efficiency and transparency in DOJ merger reviews. Acknowledging the increasing delay as a "problem," DOJ is setting a goal to resolve most merger investigations in six months.

**Looking Ahead:** Merging parties understandably welcome any reforms that decrease the duration and burden of merger reviews. However, the antitrust agencies have tried similar reforms in the past that have proved difficult to implement, and DOJ's plans for stricter enforcement of third-party subpoenas may significantly increase the cost and burden to third parties.

#### Initial Investigation Reforms

DOJ plans to publish a model voluntary request letter and encourages parties to provide, early in the investigation, key information such as business plans, competition documents, and customer contacts, consistent with current practice.

DOJ will study the use of "pull and refile," a tool parties use to provide the agencies with more time to investigate and in the hope of avoiding a Second Request. DOJ staff must have an "investigative plan" in place to use the additional time.

#### Increased Transparency

In contrast to the FTC's recently announced "one meeting policy," DOJ leadership is open to meeting with the parties, including key executives, at an early stage of the review to hear from them about transaction rationale and key facts.

DOJ will release statistics about the duration of its merger reviews, including investigations that do not result in a Second Request.



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#### Second Request Process Reforms

DOJ plans to implement a model "timing agreement" that will limit the parties' obligations under a Second Request in exchange for:

- Faster and earlier production of documents and data;
- Elimination of privilege log "gamesmanship";
- An agreement not to close the transaction for an additional 30 days beyond the statutory 30-day waiting period following Second Request compliance; and
- A longer post-complaint discovery period, should the DOJ contest the transaction in litigation.

DOJ will not seek documents from more than 20 custodians or 12 depositions unless DOJ leadership authorizes an exception. In practice, few DOJ matters involve more than 12 depositions.

DOJ plans to improve coordination with non-U.S. enforcers conducting parallel investigations and encourages the parties to align review periods. Although we support coordination with these enforcers to reduce duplicative burdens, in practice, the pendency of other non-U.S., state, or regulatory approvals often slows the federal agency's own investigation and response to its own procedural obligations, as we detailed in our [Alert on the FTC challenge to Tronox's proposed acquisition of Cristal earlier this year](#).

#### Impact on Third Parties

During investigations, DOJ often issues subpoenas to customers, competitors, or other industry third parties. DOJ says it will ensure that third parties comply with its subpoenas in a timely manner, including

by enforcing its subpoenas in federal court.

The cost and burden on third parties to comply in full with overbroad subpoenas is a growing problem that would increase if DOJ pursues enforcement in a large number of cases. In the past, it has been difficult for agency staff to take time from the main investigation to compel more robust subpoena responses from third parties. As a better route, we believe DOJ should narrow its third-party requests to key information that it needs to complete its investigation and work with third parties to obtain these materials in a timely and cost-effective manner. DOJ's new policy is likely to substantially increase the cost and burden on companies that may receive—through no fault of their own—multiple third-party inquiries from DOJ in a year.

### Remedies

DOJ withdrew its 2011 Policy Guide to Merger Remedies and indicated the 2004 Policy Guide to Merger Remedies will be in effect until it releases an updated policy. DOJ plans to review its remedy policies because remedy negotiations also extend reviews.

### Looking Ahead

**Net Effect of Reforms.** Past efforts to reform the merger process have failed to yield significant results. In practice, individual investigative staff often resist reforms, given that each investigation presents unique circumstances. Some reforms involve DOJ leadership in decisions that traditionally reside with staff, making it necessary to change staff's historical practices. As we have seen in other areas, such as approvals of remedy documents, bottlenecks can develop that slow rather than speed reviews.

**Timing Agreements.** Within the last 10 years, timing agreements have evolved from targeted extensions of the statutory 30-day post-Second Request compliance waiting period near the end of an investigation to expansive agreements that govern the parties' Second Request compliance, interactions with the agencies, depositions, advocacy, and litigation. The antitrust agencies now leverage modifications to their increasingly burdensome Second Requests to obtain concessions in timing agreements that often slow down reviews and require the parties not to certify compliance before a specific date. A serious reform would eliminate timing agreements as a condition for limiting the scope of a Second Request.

**Divergence with the FTC.** If successful, these reforms may lead to further divergence with the Federal Trade Commission on merger process issues, increasing the stakes of the clearance decision that determines which agency will review a transaction. Both agencies' processes can be improved, as the length and burden of a merger review should not depend on which agency handles an investigation.

### THREE KEY TAKEAWAYS

1. Acknowledging the increase in the duration of merger reviews, the DOJ Antitrust Division has announced reforms intended to shorten reviews and increase transparency.
2. Highlights of the Antitrust Division's reforms include a model voluntary request letter, fewer document custodians and depositions, early-stage meetings, a model "timing agreement," improved coordination with non-U.S. enforcers, and increased enforcement of third-party subpoenas.
3. Past efforts at reform have proved difficult to implement; however, if successful, these reforms are likely to increase the cost and burden on third parties and lead to further divergence from the FTC on merger process.



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