

# Following the E-Paper Trail: Responding to Second Requests

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# Following the E-Paper Trail

- ◆ Premerger Review
- ◆ The Second Request
- ◆ Document Collection and Production
- ◆ Negotiating the Electronic Production
- ◆ Program Topics
  - Collection/Review of Electronic Materials
  - Electronic Production of Documents

# Premerger Review

- ◆ Substantive Review

- Section 7 of the Clayton Act

- ◆ Procedural Review

- Hart-Scott-Rodino (“HSR”) Act  
(Section 7A of the Clayton Act)

# Premerger Review

## ◆ Substantive Review

### ■ Section 7 of the Clayton Act

- ◆ Prohibits acquisitions “where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition . . .”

# Premerger Review

## ◆ Procedural Review

- Hart-Scott-Rodino (“HSR”) Act (Section 7A of the Clayton Act)
  - ◆ Premerger notification and waiting requirements
    - Applies to certain transactions above \$50 million
    - Civil penalties for failure to comply

# Premerger Review

## ◆ Procedural Review

- Hart-Scott-Rodino (“HSR”) Act  
(Section 7A of the Clayton Act)
  - ◆ Majority of filings receive only an initial review based on the HSR filing
  - ◆ Minority of filings get full-phase review using the Second Request process

# The Second Request

## ◆ Procedural Review

- HSR Act strictly prohibits closing on covered transactions unless notification is made and a waiting period is observed
  - ◆ “[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . file notification . . . and the waiting period . . . has expired” (15 U.S.C. § 18a(a))

# The Second Request

## ◆ Procedural Review

- Second Request tolls the waiting period
  - ◆ For most transactions, until 30 days after certification of “substantial compliance”  
(15 U.S.C. § 18a(e)(2))
    - Different waiting period for cash tender offers and transactions in bankruptcy



# The Second Request

## ◆ Procedural Review

- Only limited procedural opportunity to challenge issuance of Second Request
  - ◆ Preparing to close without “substantial” compliance with Second Request can lead the Government seek an injunction under the HSR Act (15 U.S.C. § 18a(g)(2))
    - See *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,979 (D.D.C. 1988)

# The Second Request

## ◆ Procedural Review

- Only limited procedural opportunity to challenge issuance of Second Request
  - ◆ FTC and DOJ maintain in-house review procedures for those wishing to challenge staff positions on matters relating to Second Request compliance

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ Responding to Second Request interrogatories may require in-depth excavation of company records
- ◆ But the document production specifications tend to be viewed as presenting an even greater challenge

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ The logistics of processing, copying and producing documents in response to a Second Request impose burdens apart from the antitrust substance of the merger review

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ 10-12 years ago, a Second Request production of 100 boxes would have been considered large
- ◆ Today, Second Request productions of 1,000 or more boxes have become commonplace
- ◆ One reason for the proliferation of documents appears to be widespread use of email and other electronic document formats

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ The Second Request requires a search of the entire “company”  
(Model Second Request, Definition A)

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ The number of persons whose files are to be searched for responsive documents is often high and typically includes:
  - officers and directors
  - high-level managers
  - employees involved in product development, marketing, and sales

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ To ascertain compliance, the Second Request requires production of organization charts (Model Second Request, Specification i)
- ◆ The Second Request requires the responding company to identify each person responsible for searching each file custodian's files (Model Second Request, Specification xviii)



# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ All modifications must be in writing
- ◆ Copies of document retention policies called for (Model Second Request, Specification xvi)
- ◆ Missing documents required to be identified (Model Second Request, Instruction R)
- ◆ An officer or director must certify under oath that the response is complete (16 C.F.R. § 803.6(b))

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ Highly technical production requirements
  - Read the Second Request carefully
  - The literal terms of the individual Second Request control, not the published Model or other extrinsic authority
    - Look for transaction-specific document requests, interrogatories, and instructions

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ Highly technical production requirements; for example:
  - All files required to have been searched within 30 days of certification of compliance
  - Some files required to have been searched within 14 days of certification of compliance
    - The “14-day freshness rule”
  - See Model Second Request, Instruction N

# Document Collection and Production

## ◆ Document Collection and Production

### ■ In General

- ◆ Given the technicalities, any Second Request response tends to become an ongoing process of negotiation
  - Standard plot with recurring themes
  - The choice of electronic versus paper production simply adds a theme to the standard plot

# Document Collection and Production

## ◆ Negotiating the Electronic Production

### ■ Electronic Documents

- ◆ Submit “all documents . . . .”  
(Model Second Request, Specifications vi, vii, viii, x, xi, xii, xiv, xv)
- ◆ “The term ‘documents’ means all computer files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the company”  
(Model Second Request, Definition C)

# Document Collection and Production

## ◆ Negotiating the Electronic Production

### ■ Electronic Documents

- ◆ “[T]he company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises”

(Model Second Request, Definition C)

# Document Collection and Production

## ◆ Negotiating the Electronic Production

### ■ Electronic Documents

- ◆ “Computer files shall be printed and produced in hard copy or produced in machine-readable form . . . together with instructions and all other materials necessary to use or interpret the data”

(Model Second Request, Definition C)

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Second Request responses tend to become processes of bilateral negotiation
  - ◆ Only limited opportunity to bring disputes to a court or other disinterested party prior to Second Request compliance
- It is useful, therefore, to consider the relative bargaining positions of the two sides to the negotiation



# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- The Parties to the Proposed Transaction
  - ◆ The Parties control the timing of their certification of compliance
    - Puts the Government under the gun by restarting the tolled Second Request clock
  - ◆ But the parties may find the Second Request as issued to be extremely costly and time-consuming to comply with

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- The Government (FTC or DOJ)
  - ◆ Controls the terms of the Second Request which must be complied with
    - The Second Request is drafted by the Government
    - Modifications must be in writing and signed on behalf of the Government

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Pressure on Both Sides

- ◆ The Parties are under pressure to conclude the HSR review in a timeframe that permits reasonably prompt closing

- Commercial value of the transaction may be threatened by unduly prolonged antitrust review

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Pressure on Both Sides

- ◆ The Government is under pressure to complete its post-compliance review within the statutory waiting period

- Integrity of the Government's merger enforcement mission may be viewed as on the line in some circumstances

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Pressure on Both Sides

- ◆ Sometimes the result is brinksmanship

- Not clear whether this is ever a productive use of either side's resources

- Past experiences with brinksmanship exercises may make either side reluctant to experiment

# Negotiating the Electronic Production

- ◆ Relative Bargaining Positions
  - Relevant Interests of the Parties
    - ◆ Cost of producing documents
    - ◆ Speed of compliance
    - ◆ Efficiency of review

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Relevant Interests of the Government
  - ◆ No net disadvantage to the Government
  - ◆ Efficiency of review
  - ◆ Integrity of the process
  - ◆ Technology

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Interests of the Parties

- ◆ Cost of producing documents

- Costly to copy and ship millions of pages of paper

- Can double when production is made to both Federal and State antitrust enforcers



# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Interests of the Parties

- ◆ Cost of producing documents

- Cost avoidance may or may not weigh in favor of electronic production

- Cost-benefit calculus is case-specific

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Interests of the Parties

- ◆ Speed of compliance

- May or may not be accelerated by producing electronically
- Increase in speed of handling documents may be offset by time required to prepare an electronic production
- But the technology is constantly changing

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Parties

#### ◆ Efficiency of review

- At least under some circumstances, handling documents in electronic format may improve the efficiency of the document review

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Parties

#### ◆ Efficiency of review

- Flipping paper pages may be faster than paging through a document electronically
- But eliminating inefficiencies of crowded workspaces piled high with boxes of documents may compensate for losing the speed of flipping through paper pages
- And the technology is constantly changing

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

- Interests of the Parties

- ◆ Efficiency of review

- Review of documents in electronic format can more readily be distributed over multiple locations, making it possible to use resources more efficiently

- Without having to ship documents around the country

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Government

#### ◆ No net disadvantage to the Government

- Faster production may be viewed as reducing the Government's advantage of controlling the terms of the Second Request without affecting the Parties' advantage of controlling the timing of compliance

- Have to overcome this in negotiations

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Government

#### ◆ Efficiency of review

- Government merger reviewers often review documents in inadequate spaces
- Resource allocation issues may lead the Government to seek to review documents in multiple locations
- Both concerns may be addressed by producing documents in electronic format

# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Government

#### ◆ Integrity of the process

- Ultimately, the Government's paramount concern is to make sure that any change in the manner of producing documents contributes to the integrity of the process
- The Government's interest in receiving paper is diminishing as the Government becomes more experienced in receiving electronic productions



# Negotiating the Electronic Production

## ◆ Relative Bargaining Positions

### ■ Interests of the Government

#### ◆ Technology

- Government merger enforcers tend not to have access to cutting edge information technology
- Any electronic production should make it possible for the Government to review documents using existing equipment
  - E.g., browser-based solutions

# Negotiating the Electronic Production

## ◆ Some Observations

- Current technology does not allow electronic collection/production to be as flexible as paper collection/production
  - ◆ Specialized equipment required
  - ◆ Processing time may be significant
  - ◆ But technology changes

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ The same issues arise in paper productions
  - ◆ But reduced flexibility makes prompt resolution more important with electronic productions
    - Ability to resolve such issues promptly may determine whether electronic production is a viable alternative in a given case

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Scope of search
    - Typically the first thing to be discussed
    - Electronic production has longer lead time
      - Makes prompt resolution of scope of search issues important

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Scope of search
    - Because electronic productions are equipment-intensive, it may not be practical to begin searching a facility without coming to closure on scope of search issues

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Scope of search
    - Only one way for the Parties to resolve this:
      - Be prepared immediately to meet with Government attorneys and go through the company's organization charts and discuss which employees do what

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Time period
    - Default time period requires production of documents going back three years (Model Second Request, Instruction M)
    - Identify whether this raises issues

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Rolling production
    - Model Second Request disfavors it
    - Files must have been searched with a certain period of time prior to compliance
      - “14-day freshness rule”  
(Model Second Request, Instruction N)



# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Rolling production
    - Government prefers rolling production, especially in large document submissions, because of the pressure to complete its review within 30 days of compliance

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Rolling production
    - Especially with an electronic production, the Parties may benefit from solutions such as relaxing the “14-day freshness rule” as part of a rolling production arrangement

# Negotiating the Electronic Production

## ◆ Some Observations

- Key issues have to be dealt with soon after issuance of the Second Request
  - ◆ Other technical issues
    - Any issues that are impacted by the relative inflexibility of electronic collection and production methods must be identified in advance and dealt with as soon as possible

# Program Topics

## ◆ Collection/Review of Electronic Materials

### ■ Collecting Electronic Materials

- ◆ This is a technology issue
  - And the technology is constantly changing
- ◆ Important to make sure all of the data can be collected in such a manner that it can be reviewed and produced promptly
- ◆ Should not have to go back to the source

# Program Topics

## ◆ Collection/Review of Electronic Materials

### ■ Collecting Electronic Materials

- ◆ This is a technology issue
  - And the technology is constantly changing
- ◆ Internet-based solutions may permit review by teams working in multiple locations with minimal additional software
- ◆ Document coding can be done electronically

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Backup or Archive Tapes
    - ◆ “Electronic mail messages should also be provided, even if only available on backup or archive tapes or disks”  
(Model Second Request, Instruction C)

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Backup or Archive Tapes
    - ◆ Costly to search
    - ◆ Value to the Government may be lower in a merger review than in a conduct investigation
      - Merger review focuses on market conditions rather than specific acts or conduct

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Backup or Archive Tapes
    - ◆ Resolve this issue promptly
    - ◆ Government likely to be flexible
    - ◆ Consider preserving monthly backup tapes in case a reason to search backups emerges



# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Metadata: Data that describes other data
    - ◆ In some cases, metadata will be an integral part of a document
    - ◆ In other cases, metadata will be part of a separate document or system which may or may not be responsive to the Second Request

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Metadata: Data that describes other data
    - ◆ Impossible to make blanket statements as to whether metadata is or is not privileged or responsive
      - Case-by-case issue

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Production of Non-Identical Duplicates
    - ◆ “The term ‘documents’ includes . . . copies of documents that are not identical duplicates of the originals”  
(Model Second Request, Instruction C)

# Program Topics

- ◆ Collection/Review of Electronic Materials
  - Production of Non-Identical Duplicates
    - ◆ Case-specific question whether one electronic document is a non-identical duplicate of another

# Program Topics

- ◆ Electronic Production of Documents
  - Litigation Versus Second Request Practice
    - ◆ In litigation, there is a court to resolve disputes
    - ◆ In Second Request practice, disputes are for the most part a matter of bilateral negotiation

# Program Topics

- ◆ Electronic Production of Documents
  - Producing in Searchable Format
    - ◆ May be practical only for electronic documents that are searchable in native format without OCR or other conversion

# Program Topics

## ◆ Electronic Production of Documents

### ■ Converting to Searchable Format

- ◆ Check the cost and reliability of available technology

- The technology is constantly changing

- May be more efficient to produce in a non-searchable electronic format

# A Final Word

## ◆ The Paperless Second Request

- Paperless Second Request productions will eventually become the norm rather than the exception



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