

## Responding To Second Requests In The Era Of Big Data

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Despite reforms undertaken by both the U.S. Department of Justice and the Federal Trade Commission (collectively the “agencies”), complying with a second request remains a costly and time-intensive process. A recent survey found that the median cost of compliance was \$4.3 million, although this likely understates the true cost because it does not capture the costs associated with employees of the merging parties being distracted from their usual business duties as they work to comply with the agencies’ requests.[1] Although second requests require the production of large volumes of both documents and data, compliance with the data-intensive specifications can be particularly challenging. The sheer volume and scope of data demanded in a second request can be staggering, but this burden can be managed effectively by engaging with the legal and economics staff at the agencies.



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### Managing Big Data in Merger Reviews

In an attempt to reduce the burden placed on parties responding to second requests, the DOJ and FTC introduced reforms to the merger review process in 2006, which the agencies recently revisited in 2015.[2] The reforms recognized that the cost of compliance with a second request had grown over time as the agencies’ reviews of transactions became more detailed and data driven, relying more on direct analysis of competitive effects rather than market shares and other structural indicators.[3] This shift in agency practice is also reflected in the 2010 merger guidelines, which are generally viewed as giving increased attention to direct testing for merger effects and less emphasis on structural indicia such as market shares and HHIs.[4] At the same time, technological advances had improved the ability of both the agencies and merging parties to store and analyze larger volumes of data, a trend that has only accelerated. In short, both the demand for and the supply of “big data” have increased markedly over the last decade.[5]

Absent a dialogue with the agencies early in the second request process, particularly with the agencies’ economists, these factors can dramatically increase the cost and extend the time frame of a merger review for both the government and the merging parties. By retaining economists to assist with second request compliance, counsel for the merging parties may be able to better control the costs of compliance and avoid problematic data errors while at the same time preparing affirmative arguments to more efficiently and effectively address the competitive concerns the agencies may have.

### Understanding Data Systems

In the ordinary course of business, companies may rely on several interconnected databases, each capable of creating tremendously large amounts of data. For instance, the FTC's model second request includes specifications that request data related to a company's sales, shipments, production, margins, costs, customers and business opportunities (for example, bidding or win/loss data).[6] It is not unusual for each of these types of data to be housed in a separate database that may or may not be interconnected with other databases. Each of these databases can include hundreds or thousands of unique data tables, so even narrowing a single database to the subset of information that is responsive to a second request requires a strong understanding of a company's data systems. An economist retained by a merging party's counsel can gain an important understanding of a company's data systems through discussions with the company's staff. In most instances, these discussions will be necessary for the economist to understand the data that may be available for any affirmative analyses that will be presented to the agencies. Additionally, these discussions can allow the economist to interact with the agencies' economists to narrow the scope of the data-intensive specifications of a second request to only those subsets of a company's data systems that are most responsive.

### **Determining the Probative Value of Data**

Without the assistance of economists, merging parties may sometimes identify data as responsive to a second request when, in reality, the data are of little probative value to economists at the FTC or DOJ. For instance, data retained by the merging parties in the ordinary course of business may have important limitations that are not readily noticeable without closer examination. This may include fields that are missing information or databases that only retain a subset of records (for example, a company's sales database may not include internal sales).

There may also be instances where the nature of the data recorded is a byproduct of how it is entered into a company's systems. As an example, some companies require their sales personnel to record the winning competitor for each lost business opportunity by selecting an entry from a prepopulated drop-down menu rather than allowing the entry of free text. An entry mechanism like this would preclude some competitors from being recorded in a company's competitive intelligence database while at the same time would likely overstate the significance of various other competitors, which is an important limitation to be aware of when assessing the probative value of the data. Producing data like these without first vetting it may delay second request compliance due to follow-up questions from the agencies' economists. It also risks leading the agencies to develop theories based on incomplete or misleading information.

### **Is the Data Responsive to the Request?**

An economist retained by counsel can also be helpful in simply compiling the data that is to be shared with the agencies. The data extracts required by a second request are large, and in many instances the staff at a merging party are not used to providing such large extracts from complicated databases in the ordinary course of business. Databases maintained by companies are typically large collections of interrelated data tables. As a general matter, it usually is not advisable, and often it is not practical, to simply submit large or complex databases in their native form.

Typically, a company will provide the agencies extracts from these databases in the form of "flat files" (e.g., spreadsheets). Creating this flat files involves writing computer queries that can take several days to complete and may involve restoring archived data from earlier time periods. If a company's staff is not used to providing such large extracts, they may be ill-suited to evaluate whether the extracts are providing sensible information. An economist who is experienced with working with large data files, and who has participated in conversations about a company's business and data systems, is often in a better position to

check whether the data pulled from a company's databases are responsive to the agencies' requests.

To the extent that the various data extracts provided by a company are each provided by different staff (for example, one department may be responsible for extracts from a company's sales database while another department may be responsible for data extracts from the shipments database), an economist can evaluate whether each data extract is consistent with others provided by the company. This reduces the cost (and duration) of compliance for the merging parties by reducing the likelihood that large extracts will need to be re-pulled to correct deficiencies or errors, and by minimizing the degree to which the parties' employees who are assisting in responding to the data specifications of the second request are distracted from their ordinary course duties.

### **The Lessons From Blockbuster**

Beyond increasing the costs of compliance, errors in data extracts provided to the agencies in response to a second request can have serious consequences. Such was the case in Blockbuster's failed attempt to purchase Hollywood Entertainment in 2004. In the course of its investigation, the FTC issued Blockbuster a second request that, among other data specifications, "required Blockbuster to produce specific categories of data for each company store relating to, inter alia, each store's pricing, non-price terms, incentive programs, late fees, membership fees, discounts, and other benefits offered to customers." [7]

The FTC's economics staff relied on the data Blockbuster produced in response to this specification to model the likely competitive effects of the transaction and assist the commissioners in their decision-making. However, after the FTC's economists began using these data, it was discovered that more than half of the 120,000 records in Blockbuster's response to this specification contained inaccurate rental fees. In addition to this error, which Blockbuster's counsel attributed to a "programming error," the FTC also found that Blockbuster originally provided late fee data for fewer than 10 percent of its stores. [8] In its complaint seeking a temporary restraining order enjoining Blockbuster from closing the transaction until after substantially complying with the Clayton Act's premerger notification requirements, the FTC explained that "[t]he type of econometric analyses that the Commission's staff have applied in this investigation are complex, and require substantial Commission resources," and Blockbuster's initial submission of erroneous data greatly reduced the time that the FTC had to perform this analysis. [9] Retaining an economist to review data responses to a second request may help avoid similar errors.

### **Anticipating an Argument with Data-Driven Analysis**

Finally, although it may at first seem that efforts to comply with a second request are a distraction from preparing affirmative arguments for a transaction, the compliance process may be a way to further engage the agencies with data-driven analysis. By working with an economist, the parties can develop affirmative empirical analyses to be shared with the agencies alongside the data called for by the second request. Furthermore, an economist retained by counsel for the merging parties can review data as it is submitted to the FTC and DOJ in order to better anticipate the arguments that the agencies may put forward based on their own empirical analyses. This will allow the parties to be better prepared to engage with the agencies in substantive discussions of the possible competitive effects of the transaction once compliance with the second request is complete.

While the data demands of a second request are substantial and only can be expected to grow as companies analyze and store larger volumes of data, they can be managed with proper planning and by opening a dialogue involving the agencies' legal and economics staff. The agencies have expressed interest in reducing the burden of second request compliance, but they will not do so if it risks harming the integrity

of their investigations. At the same time, there are costs to the FTC and DOJ of receiving data with no probative value. Therefore, in most transactions, agreements can be reached where both the merging parties and the agencies reduce the cost of complying with the data specifications of a second request.

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[1] Peter Boberg and Andrew Dick, “Findings from the Second Request Compliance Burden Survey,” The Threshold: Newsletter of the Mergers & Acquisitions Committee, September 2014, available at <http://www.crai.com/publication/findings-second-request-compliance-burden-survey>.

[2] For a discussion of the 2015 merger review reforms, see Debbie Feinstein, Director of Bureau of Competition, Federal Trade Commission, “A fine balance: toward efficient merger review,” Aug. 4, 2015, available at <https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/fine-balance-toward-efficient-merger-review>.

[3] Deborah Platt Majoras, Chairman, Federal Trade Commission, “Reforms to the Merger Review Process,” Feb. 16, 2006, available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf>, p. 2.

[4] As the 2010 Horizontal Merger Guidelines explain, “[t]he measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects.” U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>, § 4. For a discussion of the evolution of the Merger Guidelines over time, see Carl Shapiro, “The 2010 horizontal merger guidelines: From hedgehog to fox in forty years,” *Antitrust Law Journal* 77.1 (2010): 49–107.

[5] The average duration of a “significant merger investigation” in 2015 was 9.6 months, up from 7.1 months in 2013 and 7.7 months in 2014. Paul T. Denis and Michael L. Weiner, “Merger Investigations Set Records In 2015,” *Law360*, Jan. 25, 2016.

[6] Federal Trade Commission, “Model Request for Additional Information and Documentary Material,” August 2015 Revision, available at <https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf>.

[7] Complaint for Injunctive Relief Pursuant to Section 7A(g)(2) of the Clayton Act and Section 13(b) of the Federal Trade Commission Act, *FTC v. Blockbuster Inc.*, No. 1:05CV00463, 2005 (D.D.C. 2005).

[8] *Id.*

[9] *Id.*