



# THE THRESHOLD

Newsletter of the Mergers &  
Acquisitions Committee

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## CONTENTS

**Messages in a Bottle: Defense Perspectives  
from the *Ardagh/Saint Gobain Case***  
By Lisl Dunlop and Heather Kafele [4](#)

**Practical Lessons Learned from *United  
States v. Bazaarvoice***  
by Chul Pak and Robert Corp [21](#)

**Findings from the Second Request  
Compliance Burden Survey**  
by Peter Boberg and Andrew Dick [26](#)

**Observations on the 2013 Fiscal Year  
in Merger Enforcement**  
by Ronan P. Harty and Jesse Solomon [38](#)

**China Introduces Streamlined Notification  
Procedure for ‘Simple’ Cases**  
by Ninette Dodoo [47](#)

**International Roundup**  
by Julie Soloway, Leah Noble, Chris  
Dickinson and Brittany Shames [58](#)

**About the Mergers and Acquisitions  
Committee** [68](#)

**About the Threshold** [69](#)

## FROM THE CHAIR

To All Committee Members:

Welcome to the Summer 2014 edition of The Threshold! While the weather has been unseasonably cool in many parts of the country, our authors have been in hot pursuit of interesting and important merger antitrust developments.

We lead off with two “inside baseball” articles on recent merger challenges by the FTC and DOJ. Lisl Dunlop and Heather Kafele, who represented Ardagh in the recent FTC v Ardagh case, discuss a number of interesting issues that arose during twelve months of hard fought investigation, litigation, and settlement negotiations. They focus on relevant market, efficiencies, the FTC’s controversial double-barreled administrative and federal

court litigation process, and interplay between the ongoing litigation and concurrent settlement

negotiations. In the second inside baseball article, this one related to the DOJ,'s U.S. v. Bazaarvoice case, Chul Pak and Robert Corp, who represented Bazaarvoice, discuss practical lessons learned regarding the importance (or not) of customer testimony, the proof necessary to establish a third party as a rapid potential entrant, and the evidentiary rules in a bench trial.

Next, Peter Broberg and Andrew Dick present findings from the Antitrust Section's second request compliance survey. The survey was funded by the Section and implemented by the Mergers & Acquisitions Committee. While the number of survey responses was not as high as we had hoped, the responses we did receive demonstrate that despite some FTC and DOJ efforts to reduce burdens, second request compliance costs remain very high, averaging \$4.3 million among the 17 second requests for which we received reports. Ronan Harty and Jesse Solomon review the fiscal 2013 Hart-Scott-Rodino annual report, and discuss the interesting statistics which show, inter alia, that in the post-clearance phase of review DOJ issued second requests at almost double the rate of the FTC.

We conclude with two articles exploring international issues. Ninette Doodoo discusses China's new streamlined notification procedures applicable to so-called "simple" mergers, and concludes that while the new procedures may reduce the notoriously lengthy MOFCOM review process for some mergers, it is too early to tell how effective the new procedures will be in practice. In our International Roundup piece, Julie Soloway, Leah Noble, Chris Dickinson, and Brittany Shames discuss the increasingly important intersection between foreign investment review and merger antitrust review in the EC, China, Canada, and the United States—including an analysis of last month's groundbreaking DC Circuit decision in the Ralls Corp. case.

The committee continues to be hard at work, not only on this issue of The Threshold, but also on a new edition of the Premerger Notification Practice Manual, a new edition of the Mergers and Acquisitions book, and several changes to our committee website, including updates of our invaluable product market catalogue, the addition of a new resource base of antitrust-related merger agreement clauses, and the conversion of our website to the ABA Connect platform.

The next Threshold will be out in November. As always, we would be delighted to publish letters to the editor commenting on any past articles, and we would be doubly delighted to hear from you about any articles you would like to write yourself.

Enjoy the newsletter!

--Paul B. Hewitt

# FINDINGS FROM THE SECOND REQUEST COMPLIANCE BURDEN SURVEY

Peter Boberg and Andrew Dick<sup>1</sup>

Negotiating the scope of a Second Request is a familiar exercise because the costs and burdens of compliance with overbroad requests can be substantial. Practitioners routinely ask the Federal Trade Commission (FTC) or the Department of Justice (DOJ) for dispensations to spare their clients undue burden, measured in both time and expenditures. The agencies have undertaken general steps to reduce this burden, including the issuance of best practices guides and merger review process initiatives,<sup>2</sup> but evaluating the practical efficacy of those steps has proven difficult. With notable exceptions, recent reports of compliance costs that have made it into public antitrust discourse tend to be sparse and anecdotal.<sup>3</sup> The last systematic effort to collect information on Second Request compliance burdens was undertaken by the ABA Section of Antitrust Law and submitted to the Antitrust Modernization Commission in February 2007.<sup>4</sup> The Section sent a survey to law firms to collect quantitative and qualitative information on the compliance burden in Second Requests issued over a several-

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<sup>1</sup> Andrew Dick and Peter Boberg are vice presidents with Charles River Associates. The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the authors and do not reflect or represent the views of Charles River Associates or any of the organizations with which the authors are affiliated.

<sup>2</sup> In February 2006, the FTC announced reforms to “streamline the merger review process by formalizing well-defined best practices. [The reforms were] designed to facilitate rapid identification of the relevant issues, preparation of more focused second requests, and use of consistent investigation timetables.” See <http://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf>. In December 2006, the DOJ followed with its own initiative to “streamline the merger investigation process to improve the efficiency of the Division’s investigations while reducing the cost, time and burdens faced by parties to transactions that are reviewed by the Division.” See <http://www.justice.gov/atr/public/220237.htm>.

<sup>3</sup> One notable exception to the largely anecdotal reports is the article by Joe Sims, Robert C. Jones and Hugh M. Hollman, *Merger Process Reform: A Sisyphean Journey?* 23 ANTITRUST 60, 60-68, (Spring 2009), available at <http://www.jonesday.com/files/Publication/2b1280d6-4240-404c-9b46-260a50aee4b4/Presentation/PublicationAttachment/14fb43c1-7cca-4095-874a-9551d8459a1b/Spring09-SimsC.pdf>.

<sup>4</sup> Letter from Joseph Angland to the Antitrust Modernization Commission re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007) available at [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/merger\\_pdf/070222\\_aba\\_mergers.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_aba_mergers.pdf).

year period. The merger reviews covered by that survey occurred roughly 10 years ago, making it a timely anniversary to update our knowledge about the actual costs associated with Second Request compliance.

In late 2013, the Mergers & Acquisitions Committee authorized an updated survey of practitioners to collect information on Second Request compliance burdens. The survey was issued to approximately 400 practitioners. Counselors were asked to assemble and provide information about their experience in complying with Second Requests for mergers that were reviewed between 2011 and 2013. Charles River Associates collected the survey responses and prepared summary findings.<sup>5</sup> The summary findings mask all identifying information and individual respondent data to preserve confidentiality of the Second Request compliance process.

A total of 17 responses to the Second Request questionnaire were collected, with greater representation coming from mergers reviewed by the DOJ (11) than by the FTC (6).<sup>6</sup> Notwithstanding the different survey response rates, the quantitative and qualitative information reported by respondents was relatively similar between the two antitrust agencies. Where possible, we compare findings from the current survey with those found by the Section roughly a decade ago. Overall, this comparison suggests that improvements in compliance costs have been isolated or uneven, despite the adoption of extensive merger review process initiatives by both agencies. As some commentators have noted, this stasis may reflect two countervailing phenomena: pressure exerted by practitioners (and indirectly by the business community) on the antitrust agencies to take steps to limit the scope of Second Requests versus the explosive growth in electronic document and data production and storage, meaning that each

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<sup>5</sup> Sam Giller and Annie Pemberton at CRA provided invaluable assistance in compiling and summarizing the survey responses.

<sup>6</sup> While the survey questionnaire was sent to counsel for both the “A” and “B” sides of transactions, the survey data suggest that the 17 responses received covered 17 unique Second Requests. Thus, we refer interchangeably to the sample as 17 responses or 17 Second Requests.

custodian covered by a Second Request now yields vastly more material that must be reviewed and analyzed by the merging parties and the assigned agency.

*Transaction size and review process.* The 17 Second Request responses included transactions ranging in size from \$85 million to \$7.4 billion, with a median value of \$1.0 billion. In roughly one-quarter of the transactions (4 out of 17), the merging parties provided the agency with informal notice of the transaction before making the HSR filing, and on average four weeks of advance notice were given. About one-third of the Second Requests (6 out of 17) were preceded by pulling and refiling the HSR, confirming that this strategy is not a fail-safe means to avoid an extended investigation. Parties certified substantial compliance in the majority of the Second Requests (11 out of 17). In the remaining instances, early termination was granted prior to substantial compliance (4 out of 17) or the parties did not certify compliance (2 out of 17). Eight of the 17 Second Requests led to the acquisition ultimately being cleared, while in the remaining 9 cases a settlement was negotiated with the agency.

The median investigation length was 5.9 months from the issuance of the Second Request until the investigation was closed or an action was taken by the reviewing agency. Investigations ranged from as short as 1.25 months to as long as 11 months. These findings are generally comparable to those from the 2007 survey, which reported a median investigation length of 7 months and a range of 3 to 12 months.

Question	Number of Responses	Qualitative Responses		Quantitative Responses	
		Value	Frequency	Median	Range
Transaction value	17			\$1 B	\$85 M – \$7.4 B
Was the agency informally notified before the HSR filing?	17	Yes No	4 13		
If so, how many weeks in advance of the HSR filing?	3			4 weeks	1 – 4 weeks
Was the initial HSR filing pulled and refiled?	17	Yes No	6 11		
Did the company certify substantial compliance?	17	Yes No Early termination granted prior to substantial compliance	11 2 4		
Length of the investigation in months, from issuance of Second Request through closure of investigation (including consent acceptance or complaint authorization)	17			5.9 mos	1.25 – 11 mos

**Relevant markets.** The Second Requests ranged in scope from as few as one market to as many as 18 separate relevant product markets (median = 3) and from one to eight relevant geographic markets (median = 1). The size of the broadest geographic markets identified by the agencies ranged from as small as a state (n = 1), to the entire U.S. (n = 4), to North America (n = 2) to worldwide (n = 10).

Question	Number of Responses	Qualitative Responses		Quantitative Responses	
		Value	Frequency	Median	Range
Number of relevant product markets	17			3	1 – 18
Number of relevant geographic markets	17			1	1 – 8
Scope of the broadest relevant geographic market	17	State	1		
		United States	4		
		North America	2		
		Worldwide	10		

**Data and document production.** Merging parties produced very large volumes of data and documents in all cases. The median data production totaled 28.8 GB. Most often, merging parties provided data to the agencies in the form of summary reports generated in response to specific agency requests (10 instances) and in only three cases did the parties provide entire databases to the agencies. In an average investigation, slightly more than 300,000 documents—comprising more than 1,600,000 pages—were produced to the reviewing agency. These materials were collected from an average of 26 custodians, and never fewer than eight custodians. This represents a significant decline from a decade ago, as the earlier survey reported a median of 94 custodians whose files were searched. However, there continue to be notable outliers: in the current survey one respondent reported that 171 custodians were searched as compared to a maximum of 126 custodians in the 2007 survey. The current survey found that the median number of physical locations searched for documents and data was two, although this ranged as high as 24 locations in one instance. Thus, while the data suggest there has been some progress towards narrowing the scope of custodian searches, such progress has been uneven.



Question	Number of Responses	Qualitative Responses		Quantitative Responses	
		Value	Frequency	Median	Range
<i>Volume of data produced</i>					
Gigabytes	9			28.8 GB	1 – 746 GB
Documents	13			300,487	5,700 – 908,000
Pages	12			1,632,038	28,000 – 5.47 M
Number of documents custodians produced	17			26	8 – 171
# of shared hard drives/network locations	5			9	5 – 31
Volume of data from shared network or cloud space was searched and reviewed	9			9.5 GB	1.9 – 62.2 GB
<i>Entities searched within the company and number of entities within each category</i>					
Divisions	9	Yes	9		
Number	6			1.5	1 – 10
Regional Offices	7	Yes	7		
Number	5			4	1 – 8
Local Offices	6	Yes	6		
Number	5			4	1 – 16
Foreign Offices	3	Yes	3		
Number	2			2	1 – 2

*E-mails and electronic documents.* Not surprisingly, e-mail and other electronic documents were a major source of information collected by the reviewing agencies. On average, responding parties reviewed 47 GB of emails

and other electronic documents using review tools. These materials were estimated to represent in excess of 4.8 million pages (including attachments). This compares to an average of about 1.1 million page-equivalents of e-mail and other electronic documents per Second Request investigation a decade ago.

Interrogatory responses covered an average of 64.5 pages per Second Request, with some responses ranging upwards of 300 pages in length. These interrogatory responses were accompanied by an average of 1 GB in electronic production. Interestingly, the current survey suggests that not only has the average length of interrogatory responses declined considerably (down from a median of 275 pages) but so has the accompanying electronic production (down from a median of 13 GB).

Question	Number of Responses	Responses	
		Median	Range
Volume of e-mail and other electronic documents loaded into the review tool	12	47 GB	7.8 – 906.7 GB
Equivalent pages of electronic materials (including attachments)	13	4,810,075	1.2 M – 21.1M
Pages of narrative interrogatory responses produced	16	64.5	10 – 300
Volume of electronic data produced in response to interrogatories	6	1 GB	1 – 2.6 GB

**Discovery tools.** All survey respondents stated that they used an e-Discovery service to conduct their electronic document production. Keyword searches were commonly used during electronic document review (14 out of 17 Second Requests), but in only a minority of instances were predictive coding (4 instances) or e-mail threading (3 instances) used. In every Second Request,

metadata were produced as well as native files. In all instances, parties were required to search backup and storage archives.

Question	Number of Responses	Responses	
		Value	Frequency
Was an e-Discovery service used?	17	Yes	17
		No	0
<i>Tools or processes used in preparing Second Request response</i>			
Keyword Searches	14	Yes	14
		No	0
De-Duplication	17	Yes	17
		No	0
E-Mail Threading	3	Yes	3
		No	0
Predictive Coding or Technology Assisted Review	4	Yes	4
		No	0

**Compliance costs.** The median estimated cost of compliance was \$4.3 million, with a range of \$2 million to \$9 million.<sup>7</sup> As a percentage of the value of the transaction, compliance costs were about 0.45%, with a range of 0.05% to 5.5%. On a per month basis, the median compliance cost was \$996,000 per month, and ranged from \$286,000 to \$1.8 million per month. Expressed on a per custodian basis, the average compliance cost was about \$151,000, and ranged from \$27,000 to \$500,000 per custodian.

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<sup>7</sup> Survey respondents were asked to provide their own total cost estimate as well as estimates of each major cost component. The median total compliance cost of \$4.3 million represents the sum of each cost component, and is slightly higher than the overall median estimate of \$4.0 million.

Major line items of cost included attorney and paralegal fees (median of \$2.49 million), electronic review (\$830,000), data processing (\$358,000), economist fees and disbursements (\$300,000), and attorney and paralegal disbursements (\$200,000). Attorney fees ranged from a low of \$955,000 to a high of \$8.0 million.

In the 2007 survey, the Section found that the median total compliance cost was \$3.30 million. Of this total, attorney and paralegal fees and disbursements made up the largest share (\$2.42 million). Thus, over the last decade, it appears that legal costs have stayed relatively constant while other cost items have contributed to roughly a \$1 million increase in the total compliance cost per Second Request.

Question	Number of Responses	Responses	
		Median	Range
Calculated total cost of complying with the Second Request	16	\$4,312,509	\$2 M – \$9 M
Total compliance cost per value of the transaction	16	0.45%	0.05% – 5.5%
Total compliance cost per month of investigation	16	\$996,442	\$285,700 – \$1.8 M
Electronic review cost	14	\$830,484	\$356,000 – \$2.2 M
Data processing cost	7	\$358,000	\$130,000 – \$1.6 M
Third-party hosting costs	7	\$48,851	\$0 – \$146,000
Costs of economists (fees and disbursements)	7	\$300,000	\$0 – \$1 M
Costs of other consultants' fees (e.g., industry experts)	1	\$70,000	\$70,000
Attorney/paralegal costs (fees)	16	\$2,492,648	\$955,000 – \$8.0 M
Attorney/paralegal costs (disbursements)	13	\$200,000	\$10,000 – \$1.2 M
Costs of copying or other reproduction of documents and information	11	\$22,259	\$1,100–\$526,000

**Staffing and in-house resources.** On average, merging parties assigned eight regular attorneys and 60 temporary attorneys to a merger review. In some cases, this ranged as high as 55 regular attorneys plus 195 temporary attorneys for document review. Paralegals were used more sparingly, with a median of two and range of one to 15 regular paralegals, and a median of zero and range of zero to 55 temporary paralegals. Antitrust counsel supplemented their own (or contracted) resources with assistance from in-house counsel, paralegals, and

management. The median investigation consumed 550 hours of assistance from in-house counsel (at an estimated cost of \$90,000) plus 20 in-house paralegal hours. The average burden on in-house management and other (non-legal) personnel was 500 hours per investigation.

According to the 2007 survey, the median number of regular staff attorneys per investigation was nine (with a range of three to 78) and the median number of temporary attorneys was 45 (with a range of three to 385). In-house counsel devoted a median of 300 hours per investigation and in-house management and other (non-legal) personnel spent an average of 1,550 hours working on Second Requests.

Question	Number of Responses	Responses	
		Median	Range
<i>Number of regular and temporary attorneys and paralegals working on the review</i>			
Attorneys (Regular)	16	8	4 – 55
Attorneys (Temporary)	16	60	24 – 195
Paralegals (Regular)	13	2	1 – 15
Paralegals (Temporary)	12	0	0 – 55
<i>Total hours spent by the client</i>			
In-house counsel	2	550	500 – 600
In-house paralegals	1	20	20
Management and other non-legal personnel	2	500	400 – 600

*Summary.* Over the last decade, together the FTC and DOJ issued 46 Second Requests in a typical year.<sup>8</sup> If the average Second Request compliance cost is roughly \$4.3 million per party per investigation, then total compliance costs in a typical year are on the order of \$400 million. This burden does not include costs borne by the agency (staffing and computing resources), internal costs incurred by merging parties (time and attention paid by in-house counsel and management), or compliance costs associated with extraordinary outlier transactions. Nor do these costs include the delayed realization of merger efficiencies and synergies. Even a relatively modest percentage reduction in these compliance costs, therefore, holds the potential to save “real money” and produce “real benefits” to both merging parties and consumers.

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<sup>8</sup> Federal Trade Commission and Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2013, Appendix A, available at [http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/140521hsreport.pdf?utm\\_source=govdelivery](http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/140521hsreport.pdf?utm_source=govdelivery).