

CLIENT ALERT

More Changes to Merger Review at the FTC – Parties Should Expect a “More Rigorous” Second Request Process

September 29, 2021

The Federal Trade Commission (“FTC”) announced several significant changes to the second request merger review process in a blog post by Holly Vedova, who was appointed yesterday as the Director of the FTC’s Bureau of Competition. This September 28, 2021 announcement comes on the heels of Chair Khan’s September 22, 2021 “Vision and Priorities for the FTC” Memorandum in which she outlined strategic priorities, including the need to address “rampant consolidation” by “finding ways to strengthen [] merger enforcement work as well as generally focusing [FTC] resources on scrutinizing dominant firms, where lack of competition makes unlawful conduct more likely.” The announcement of the changes to the second request process cites this year’s record-breaking “merger wave,” projecting that there may be as many as 3,500 merger notifications filed with the FTC and DOJ by the end of 2021. The post states that the high number of filings, along with stagnant funding, low full-time employee counts, and declining resources, has prompted the FTC to modify its practices regarding second requests for information and documentary material. These changes almost surely mean additional time and expense for merging parties with transactions under extended review by the FTC, and it will be important for companies engaged in M&A activity to proactively address these issues, both in their agency strategy and in their merger agreements.

Second Request Process Changes

1. “More Comprehensive and Analytically Rigorous” Reviews

To ensure that merger reviews no longer take “an unduly narrow approach ... [that] may have created blind spots and enabled unlawful consolidation,” the FTC will bring “heightened scrutiny” to a broader set of factors, including “how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete.” Parties should expect that second requests will include detailed questions regarding employee hiring, recruitment, and compensation, and deals involving private equity will face additional questions.

2. Requests for Modification Only After Certain “Foundational Information” Is Provided

Consistent with what is already common practice both at FTC and DOJ, companies under investigation will have to provide certain foundational information before requests for modification of the second request will be entertained by the FTC. Companies must “identify and describe the business responsibilities of employees and agents responsible for relevant lines of business, as well as those employees responsible for negotiating, analyzing, or recommending the transaction.” They also must provide basic information about how the company maintains responsive data.

3. Companies Must Provide Information Regarding Use of E-Discovery Tools Before Review

The FTC will now require companies to provide information on how they will use e-discovery tools to identify relevant information before they can begin to apply those tools to identify responsive material. The post notes that this change will more closely align with the DOJ's approach.

4. Full Privilege Logs Will Be Required

Previously, the FTC at times accepted partial privilege logs in which the company identified the total number of withheld documents per custodian, subject to follow-up requests for additional specific details. Going forward, the FTC will require full privilege logs, including the author of each document and basis for withholding the document, subject to modifications in "appropriate circumstances."

5. All Commissioners Will Have Access to All Second Requests

In the past, according to the post, second requests were available to Commissioners only at the Chair's discretion. The FTC, perhaps in response to Commissioner Wilson's recent tweets indicating that she had to ask merging parties for second requests issued by the FTC, has now put in place a process to share all second requests and voluntary access letters with all Commissioners and relevant agency offices through a secure system.

Practical Implications

These changes are consistent with other recent actions and announcements by Chair Khan, Acting Assistant Attorney General Powers, and the White House promising more rigorous scrutiny of mergers. In addition to investigations becoming broader in scope, the FTC is issuing more second requests and these changes will extend the overall timeline and cost of securing compliance. These changes also are likely to increase the risk and scope of remedies, and potentially increase the risk of merger challenges. Some of these changes will undoubtedly also increase the burden and workload of FTC staff, at a time when the agency's resources are stretched thin by its own account.

Crowell & Moring LLP will continue to monitor these and related developments. Please contact us if you have any questions or would like to know more about the implications of the FTC's announcement.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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