New Voluntary Pathway in US Antitrust Review Process

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Action: The Department of Justice (DOJ) announced a new "Priority Production" process for more targeted merger reviews under which the merging parties may provide a limited set of documents and information responding to specific issues raised by the DOJ's Antitrust Division and potentially avoid a broader "Second Request" investigation.

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- Under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, merging parties in mergers that exceed certain financial thresholds must submit information to the DOJ and Federal Trade Commission (FTC), the "Agencies" in a premerger filing. The Agencies typically then have 30 days in which to review the information during which they may issue a "Second Request" for more documentation and data.
- Though Second Requests are relatively rare – in FY 2025, the Agencies issued Second Requests for only 41 of the 1,944 transactions that could be subject to one – they can be costly and time-consuming for merging parties. As a result, parties typically negotiate a "timing agreement" for targeted reviews and a timeline for the merger process, but also a commitment not to close the merger during regulatory review.
- According to the DOJ's announcement, merging parties will be able to opt in to an accelerated process involving working with DOJ to scope an initial review called "Priority Production." Once the parties have satisfied the requirements of the Priority Production, DOJ will typically notify the parties of the next phase of the investigation within 35 days.
- This responds to several changes under the last Administration.[1] In 2021, for example, the FTC expanded the range of issues that Second Requests could investigate to include labor-market and cross-market effects among other issues.[2] In 2023, the Agencies also released updated merger guidelines outlining a broader set of issues to be considered during merger reviews.[3]
- Further changes to the HSR process are likely forthcoming. Earlier this year, for example, the Agencies sought public comment on other revisions to the merger reporting requirements.[4]
- **What this means for CEOs:**
  - **Deal planning and risk allocation:** Despite the streamlined procedures, parties should still model both a successful targeted review and a full Second Request, addressing the consequences for outside dates, financing commitments, interim operating covenants, termination rights, and any reverse termination fee.
  - **Priority-production readiness:** Companies anticipating significant antitrust scrutiny should identify likely competitive overlaps, critical custodians, and relevant pricing, sales, bidding, capacity, customer, entry, and win-loss data before filing, even if they choose filing the new system.
  - **Early substantive engagement:** The process places a premium on identifying potentially determinative issues at the beginning of an investigation. Parties should be prepared to explain their competitive theory (including the definition of the relevant market), support it with transaction-specific evidence, and address weaknesses directly. Where appropriate, early discussion of transaction modifications may also help determine whether concerns can be resolved without a full investigation.
  - **Multijurisdictional coordination:** A targeted DOJ investigation may be only one component of the antitrust review process. Parties should coordinate Federal review with requirements of state attorneys general, sector-specific approvals, and foreign merger-control filings so that accelerated filings and review in one jurisdiction do not lead to inconsistent submissions or leave another lengthier review as the controlling constraint to closing the merger.

[1] https://www.congress.gov/crs-product/LSB11418

[2] https://www.ftc.gov/enforcement/competition-matters/2021/09/making-second-request-process-both-more-streamlined-more-rigorous-during-unprecedented-merger-wave

[3] https://www.justice.gov/atr/2023-merger-guidelines

[4] https://www.ftc.gov/news-events/news/press-releases/2026/03/federal-trade-commission-department-justice-seek-public-comment-premerger-notification-report-form