Complying with care: navigating Second Requests in merger approvals

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When Assistant Attorney General Gail Slater unveiled the Department of Justice Antitrust Division's new "Comply with Care" task force in August, the announcement signaled that the Division is zeroing in on its policing of corporate mergers, intending to scrutinize Hart-Scott-Rodino (HSR) filings and Requests for Additional Materials (i.e., Second Request) compliance.

In a speech at The Ohio State University Law School on Aug. 29, 2025, Slater cited "problematic tactics" and the task force's plan to "tackle abuses that arise" in Antitrust Division investigations and "take decisive action to address them."

The parties' tactics that AAG Slater characterized as "obstruction and gamesmanship" includes the questionable withholding of documents under claims of privilege, submitting incomplete information in the HSR form, and failing to include transaction documents with the HSR filing. Other than AAG Slater's speech (https://bit.ly/4ohV2NK), the Antitrust Division's website provides no insight into how the task force will conduct its work or enforce findings, but for parties desiring to close transactions, filing compliance is paramount.

Common missteps in merger clearance are no longer just costly; they may now draw direct enforcement scrutiny. Navigating the Comply with Care heightened scrutiny requires careful coordination, legal precision and robust document handling to ensure full compliance.

This article offers best practices to help merging parties meet the Comply with Care mandate.

Second Requests and substantial compliance

The HSR process requires parties planning a merger, acquisition, joint venture, or similar transaction exceeding $126.4 million to file an HSR form along with relevant transaction documents. By statute, US antitrust agencies have 30 days to review the filing. At the end of the 30 days, the antitrust agencies can take no action or request additional materials (a Second Request).

If the agencies take no action, the parties can proceed to closing the transaction subject to any other closing conditions.

If US antitrust agencies have concerns, they issue a Second Request, which extends the time for agency review to 30 days post-compliance with the Second Request. For the purposes of this article, non-US jurisdictional merger filings are not discussed but parties should be aware that many jurisdictions have independent filing rules that impact parties' ability to close.

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Preparing a complete HSR filing and responding to a Second Request to US antitrust agencies can be one of the most complex and demanding challenges for merging entities. Typically, parties must achieve substantial compliance with a Second Request within a short timeframe — often less than 90 days — or negotiate extensively with the Division over timing.

Experienced outside counsel and consultant partners typically use time-tested playbooks to manage the highly specialized forensic collections, eDiscovery, project management, and exacting production specifications to be successful in Second Request compliance.

While not defined by statute, substantial compliance is generally understood by legislative history and secondary sources as a good-faith effort to provide all responsive materials, with minor, non-prejudicial omissions excused. Competition authorities may dispute substantial compliance by going to federal court, but no court has yet ruled on the parameters of substantial compliance under the HSR Act. The new DOJ task force and limited judicial guidance require practitioners to operate within evolving standards and an uncertain framework.

Second Requests in practice

The foundation of Second Request compliance is credibility. Well before a request arrives, all interactions with DOJ or Federal Trade Commission staff should be honest, transparent and consistent. This is true equally of merging parties, outside counsel and e-discovery advisors.

Building rapport with agency personnel does not weaken advocacy; it helps staff identify key issues faster and positions counsel to address them directly. Working directly with Division staff on both merits and processes helps drive success. Often, merging parties expect a combative posture, but outside counsel and advisors should explain the value of advocating firmly but without aggression.

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Today's Second Requests are massive. Beyond detailed data demands that can span terabytes, documentary requests differ from standard litigation and may still involve five or ten million records, even after technology-assisted review. Privilege logs can run tens of thousands of entries. And there are additional steps that can require tailored workflows, like collecting and processing additional custodians — and later needing to remove extra custodian information from productions.

Until substantial compliance, the waiting period for a deal's closing remains paused; therefore counsel, merging parties and e-discovery providers must coordinate closely to finish in 60 to 90 days.

During the Second Request review process, inadvertent errors or omissions are inevitable: Lost custodian phones, missed collections, or privilege mistakes happen. Here again, credibility is critical. DOJ and FTC staff will generally forgive small lapses if the team has been forthright. As AAG Slater noted, staff are open to reasonable requests to reduce unnecessary burdens.

Recommendations and best practices

It is recommended that merging parties choose their outside counsel and e-discovery partners early in the deal timeline for assistance with obtaining merger clearances, and selecting partners with deep Second Request compliance experience is key to a smoother compliance process.

After deal signing and at the HSR Form filing stage, counsel should issue document retention guidance to potential custodians and expand both the guidance and custodian list as inquiry grows or changes.

It is also imperative parties understand the importance of mobile device communications: Parties should work with their counsel and outside partners to understand how to retain potentially responsive data within the technological limitations of today's changing communications programs. It can't be understated: Competition authorities worldwide consider these communications as generally in-scope for production and failing to preserve such communications can invite scrutiny.

If the DOJ or FTC signal ongoing compliance concerns, parties should initiate forensic collections even before the formal Second Request. Early custodial data collections, in particular, are often the deciding factor between a smooth engagement and one that results in anxiety, late nights and delays or risks in meeting compliance deadlines. Ensure the e-discovery and outside counsel partners have direct access to internal IT team members or data systems.

Non-standard data sources should be identified early, as they often require additional time to collect and process. This is particularly true for mobile collections, which are becoming more important and also more difficult as more business is conducted on mobile devices and in non-standard applications.

Skilled project managers should design a compliance map that marks deadlines backward from the date of substantial compliance; all tasks, whether for collections, review, privilege logging, interrogatory or data submissions, and white papers should be scheduled with precision. This guidance document should be shared with all stakeholders and regularly updated.

Finally, parties should develop strong and efficient quality control processes around privilege logs. Antitrust authorities require more detail than parties in civil litigation, and deficiencies are programmatically exposed. Counsel should expect post-certification deficiency notices and should be prepared for additional reviews immediately after certifying compliance to respond quickly to regulatory inquiries.

Comply with care to succeed

Given the high stakes of today's mergers, merging parties, law firms and service providers must operate as a cohesive team to demonstrate a strong commitment to compliance and precision. This collaborative approach helps minimize errors and ensures that regulatory authorities will focus on the merits of the merger instead of any potential compliance, e-discovery or production deficiencies.

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