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Antitrust & Competition Law Update September 24, 2026

FTC Amends Rules of Practice for Modifying Second Requests

The rule change is intended to bring greater transparency and predictability to the Second Request modification process during premerger review.

On September 24, 2026, the Federal Trade Commission published a final rule in the Federal Register amending its Rules of Practice to clarify the procedures governing modifications to Second Requests during premerger review. The amended rule, which took effect immediately upon publication, enumerates specific factors that FTC Staff may consider when determining whether to modify a Second Request. The rule change is intended to bring greater transparency and predictability to the Second Request modification process.

Background: The Second Request Process

Transactions subject to reporting under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 cannot close until 30 days after the parties file an HSR form notifying the DOJ and FTC of the transaction. The reviewing agency may ask the parties to voluntarily pull and refile their HSR form, giving the agency an additional 30 days to evaluate the transaction. If at the end of the statutory waiting period, the reviewing agency is unable to resolve its competition concerns, it may issue a broad and extensive request for additional documents and information known as a "Second Request." The transaction cannot close until 30 days after both parties have substantially complied. Substantially complying with a Second Request typically takes several months and comes at significant expense to the parties, requiring the production of large volumes of documents and data, as well as detailed narrative responses.

Timing agreements are one of the avenues by which parties receiving a Second Request may seek modifications. Parties may enter into a timing agreement with the reviewing agency to modify or limit compliance obligations in exchange for extending the waiting period following substantial compliance beyond the statutory 30 days, thereby giving the agency more time to evaluate the transaction.

FTC's Clarifications of Procedures for Modifications of Second Requests

The amended rule revises 16 CFR § 2.20, which sets forth procedures for Second Requests, to clarify the factors FTC Staff may consider in determining whether to modify a Second Request. Previously, § 2.20 provided only that the FTC's authorized representative could modify or recommend modifying the Second Request upon a determination "that a less burdensome request would be consistent with the needs of the investigation." Under the amended rule, the authorized representative may now consider "all relevant factors," including: (1) timing agreement negotiations, (2) the competitive issues involved, (3) the manner in which information and documents are maintained by the recipient, (4) the type of information available to the recipient, (5) the relative burdens to the recipient(s) of producing the requested information, and (6) whether a less burdensome request would be consistent with the needs of the investigation.

Key Takeaways for Dealmakers

Greater Transparency in Second Request Negotiations. The amended rule codifies factors FTC Staff may consider when negotiating Second Request modifications, providing parties with a clearer framework for engaging with Staff on scope and burden. Notably, the amended rule now expressly states the linkage between modifications and timing agreements—a concept that has long been applied by FTC Staff but had not been codified until now. Parties and their counsel can now point to the enumerated factors—including the relative burden of production and timing agreement negotiations—when advocating for modifications that narrow the scope of a Second Request.

Proactive Engagement with FTC Staff Remains Critical. Parties receiving Second Requests should engage FTC Staff early and proactively regarding the scope of production. The codified factors, particularly those relating to how information and documents are maintained and the relative burdens of production, may provide avenues for productive dialogue about narrowing or tailoring requests.

The Amended Rule Took Effect Immediately. Because the amendments concern agency procedure and practice only, the FTC was not required to provide notice and comment. The rule took effect upon publication in the Federal Register on September 24, 2026, and the FTC may apply the amended rule in investigations pending on the date of publication and going forward.

The Amended Rule Applies Only to FTC Investigations But Is a Continuation of Updates to Second Request Procedure by Both Agencies. The amended rule revises the FTC's own rules of practice (16 CFR § 2.20), which govern only FTC-issued Second Requests. Parties whose transaction is under DOJ review should not assume the same framework applies when negotiating modifications to a DOJ Second Request. Relatedly, however, DOJ recently announced a "targeted" Second Request procedure, whereby the transacting parties would have the opportunity to enter into a timing agreement with DOJ that prioritizes the submission of certain information and documents that could resolve DOJ's questions prior to full compliance or modify the Second Request to reduce burden. And this week, FTC Bureau of Competition Director Dan Guarnera nodded to a similar "phased" Second Request process, allowing transacting parties in suitable cases to prioritize potentially dispositive information and documents and avoid full compliance when those materials resolve the agency's competition concerns.

The Substantive Standard Has Not Changed. The amended rule clarifies what factors FTC Staff may consider in the modification process, but it does not expand or alter the scope of information the FTC may seek through Second Requests. The underlying statutory authority under the HSR Act remains unchanged.

Gibson Dunn attorneys are closely monitoring these developments and are available to discuss the implications. For further details, see our previous Client Alerts and related resources on the firm's Antitrust and Competition page here.

The following Gibson Dunn lawyers prepared this update: Rachel Brass, Jamie France, Kristen Limarzi, Bradley Smith, Logan Billman, and Kunal Jhaveri.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Antitrust and Competition, Private Equity, or Mergers and Acquisitions practice groups:

Antitrust and Competition:
Rachel S. Brass – San Francisco (+1 415.393.8293, rbrass@gibsondunn.com)
Jamie E. France – Washington, D.C. (+1 202.955.8218, jfrance@gibsondunn.com)
Sophia A. Hansell – Washington, D.C. (+1 202.887.3625, shansell@gibsondunn.com)
Caeli A. Higney – San Francisco (+1 415.393.8248, chigney@gibsondunn.com)
Julian W. Kleinbrodt – San Francisco (+1 415.393.8382, jkleinbrodt@gibsondunn.com)
Kristen C. Limarzi – Washington, D.C. (+1 202.887.3518, klimarzi@gibsondunn.com)
Samuel G. Liversidge – Los Angeles (+1 213.229.7420, sliversidge@gibsondunn.com)
Michael J. Perry - Washinton, D.C. (+1 202.887.3558, mjperry@gibsondunn.com)
Cynthia Richman – Washington, D.C. (+1 202.955.8234, crichman@gibsondunn.com)
Bradley P. Smith – New York (+1 212.351.5376, bpsmith@gibsondunn.com)
Daniel G. Swanson – Los Angeles (+1 213.229.7430, dswanson@gibsondunn.com)
Stephen Weissman – Washington, D.C. (+1 202.955.8678, sweissman@gibsondunn.com)

Private Equity:
Richard J. Birns – New York (+1 212.351.4032, rbirns@gibsondunn.com)
Ari Lanin – Los Angeles (+1 310.552.8581, alanin@gibsondunn.com)
Michael Piazza – Houston (+1 346.718.6670, mpiazza@gibsondunn.com)

John M. Pollack – New York (+1 212.351.3903, jpollack@gibsondunn.com)

Mergers and Acquisitions:
Robert B. Little – Dallas (+1 214.698.3260, rlittle@gibsondunn.com)
Saee Muzumdar – New York (+1 212.351.3966, smuzumdar@gibsondunn.com)
George Sampas – New York (+1 212.351.6300, gsampas@gibsondunn.com)