

DOJ's Expedited Consideration of Second Requests: Cooperative Merger Review Comes of Age

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Introduction

On July 23, 2026, the Department of Justice's Antitrust Division (the Division) announced a return to more targeted second request investigations and issued an updated model timing agreement with an optional "expedited consideration" framework for review. This framework allows parties to produce a targeted "priority production" designed to address the Division's key competitive concerns, potentially avoiding the costs of full second request compliance.

Drawing on the authors' recent success in navigating an informal version of this new process, as well as Bill Rinner's oversight of expedited consideration reviews at the DOJ, this article provides an overview of the expedited consideration process, an assessment of when parties should seek it, lessons learned for maximizing its benefits, and considerations for structuring merger agreements in light of this new framework.

Overview of Expedited Consideration

Under the Hart-Scott-Rodino (HSR) Act, mergers exceeding specified thresholds must be reported to the Federal Trade Commission (FTC) and the Division, which may issue a "second request" for additional information. A typical second request is like encountering a cliff on the path toward closing



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a transaction. If issued, parties could be required to search the files of dozens of custodians, respond to data requests that span a wide swath of the business, and spend six to nine months on submissions and advocacy before certifying substantial compliance.

The new model timing agreement, by comparison, offers a bridge over the ravine. It formalizes the Division's targeted-review practice as an optional framework called "expedited consideration." In short, the parties must provide the Division with their most probative evidence early in the process. In return, the Division will make an expedited determination as to whether to close the investigation, modify or narrow

the second request, or proceed with full compliance without modification. For some deals, this may shorten the Second Request timeline to approximately three months.

Considerations for Seeking Expedited Consideration

Expedited consideration is best suited for transactions with a limited number of discrete issues—such as product-market definition or the likelihood of entry—that may be dispositive. In these scenarios, the Division may be able to make a final determination without full second request compliance.

If successful, the expedited consideration process can benefit these types of transactions in two ways:

- First, the review timeline may be compressed. Expedited consideration targets resolution within approximately two to three months after a second request is issued, compared with the longer timelines often associated with full second request compliance. In addition, costs may be lower because parties may avoid full second request compliance, which may reduce the need to process documents from potentially dozens of additional custodians or engage in prolonged advocacy efforts.
- Second, the expedited consideration process can clarify the issues at stake. Even if the parties' advocacy does not eliminate the need for full compliance, the process may give them earlier insight into the strength of their arguments, the Division's position, and the prospects for HSR clearance.

By contrast, the framework may be less beneficial for transactions with broad, multifaceted, or evolving competitive issues. In such instances, reviewing only a select group of priority custodians may not give the Division sufficient comfort to conclude its review without full second request compliance.

The process also has trade-offs. For instance, expedited consideration may be available only to parties that enter into the DOJ model timing agreement, which

imposes certain requirements on depositions, data production and compliance deadlines.

In addition, parties must front-load substantial economic and factual advocacy, which may offset some of the cost savings.

If expedited consideration does not result in early clearance, the process may have additional downsides. For one, the second request timeline may be longer than it would have been if the parties had focused solely on full compliance from the outset. In addition, the Division may have earlier access to the parties' most probative documents and arguments, which could be relevant if the Division later seeks to challenge the merger.

Implications for Merger Agreements

The parties and their advisers should consider whether expedited consideration can serve as a regulatory milestone in the merger agreement, including through a buffered initial termination date, extensions triggered by the Division's determination, or reverse termination fees or other deal protections that account for the two-phase process.

The parties should also consider whether the antitrust covenant should specifically require use of the expedited consideration process, and, if not, which party should decide whether to seek expedited consideration.

Lessons Learned and Best Practices

Demonstrate Transparency and Good Faith

The expedited consideration process depends on mutual trust. The parties must trust the Division to fairly assess the merits of the transaction without defaulting to full compliance, while the Division must trust that the parties and their counsel have provided the most probative documents and information needed for an informed decision on the merits.

In the expedited consideration process, Division staff and leadership will be particularly attuned to any lack of candor. Selective production, overbroad privilege claims, or misleading advocacy will erode trust,

which may be difficult to rebuild if the matter proceeds to full compliance.

Negotiate Scope and Front-Load Advocacy

Parties should negotiate the scope of both the second request and the priority production at the outset so that any transition to full compliance is driven by substantive concerns, not process disputes. The parties and their counsel should, in good faith, identify priority custodians and search specifications designed to capture the most probative documents; they should not leave the Division contending with information gaps by the time of the front office meeting with Division leadership. To make that meeting productive, the parties should front-load their affirmative case: Economic analysis, customer evidence, industry context, and entry evidence should be developed alongside the priority production.

Engage Continuously

The model timing agreement contemplates a “continuing dialogue” between staff and the parties. Practitioners should treat this as an invitation. Regular engagement and rolling productions may help narrow the issues before the front office meeting, focus advocacy on the Division’s actual concerns, and put probative documents in Division staff’s hands sooner. Waiting until the front office meeting to present the case could squander the process’s principal advantage.

Find a Path to Deal Certainty if Clearance Is Not Granted

If expedited consideration does not result in clearance, the parties should recognize that the Division has already reviewed their most probative documents and heard their best arguments yet concluded that

further investigation is warranted. That decision may provide useful insight into the Division’s enforcement posture. However, continued investigation is not the same as a lawsuit; the parties should calibrate litigation risk accordingly. Depending on the Division’s posture, remedy discussions—including structural divestitures or conduct remedies—could be a next step, even without full second request compliance.

Conclusion

The Division’s expedited consideration framework is a significant and welcome development: It offers the right transactions a faster, cheaper, and more transparent path to clearance. The framework introduces proportionality into second requests by calibrating review to the magnitude of the competitive concern and directing resources toward genuinely anticompetitive transactions. Parties who approach the process with transparency, candor, and substantive engagement may benefit substantially; those that fail to engage candidly and constructively may risk a return to a traditional, prolonged adversarial investigation.

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