

Frequently Asked Questions Voluntary Requests and Timing Agreements

Model Voluntary Request Letter

1. Why is the Division publishing a model voluntary request letter?

The Division sends a voluntary request letter to the parties to a transaction during the initial HSR waiting period in most investigations it opens. The letter requests information to allow the Division to quickly assess the likelihood of anticompetitive harm from the transaction.

Publishing the model voluntary request letter is intended to give parties a head start in identifying the kind of information they should be gathering for the Division, so that parties can be proactive and submit the information as early as possible during the initial waiting period.

The earlier the Division receives this information, the sooner and more effectively the Division can determine whether a competitive concern exists that may require a longer, more in-depth investigation, whether the Division can narrow the areas of inquiry, or whether the investigation can be closed following analysis of the voluntarily produced information.

2. When should parties have voluntary productions ready to submit to the Division?

Parties should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing. The sooner the Division receives this information, the sooner investigations that do not raise competitive issues can be closed. Even when a more in-depth investigation is required, the Division may be able to use the information produced voluntarily to narrow the scope of the investigation as much as possible.

3. Should parties negotiate custodians before producing responsive material?

No. Parties should produce responsive documents as soon as possible, without regard to custodian.

4. Must parties certify that they have provided a complete response?

Parties are not required to certify that they have provided a complete response to a voluntary request letter. If a more in-depth investigation is required, the Division will issue Requests for Additional Information and Documents (“Second Requests”) or Civil Investigative Demands (CIDs”). Parties are required to certify that they have provided complete responses to Second Requests and CIDs.

5. If a party does not receive a voluntary request letter, does that mean the Division will not issue a Second Request?

No, not necessarily. The Division may issue Second Requests even if it has not made voluntary requests.

6. *What production format requirements apply to documents submitted in response to a voluntary request letter?*

We encourage parties to consult with staff regarding production format in advance of any production.

7. *Are materials submitted in response to a voluntary request letter protected from disclosure?*

It is in the Division's interest to protect the confidentiality of sensitive information provided to the Division and to prevent competitively sensitive information from being shared among competitors. Accordingly, sensitive information will only be used by the Division for a legitimate law enforcement purpose, and it is the Division's policy not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose.

Sensitive information includes "confidential commercial information" which means "commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4)." *See* 28 C.F.R. 16.7(a). Exemption 4 of the Freedom of Information Act ("FOIA") protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See* 5 U.S.C. § 552(b)(4) and 28 C.F.R. § 16.7. *See also* Department of Justice, *Guide to the Freedom of Information Act, Exemption 4* (2009), available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>. Parties submitting information in response to a voluntary request letter should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

In the event of a request by a third party for disclosure of confidential commercial information under the FOIA, the Department will act in accordance with its regulation at 28 C.F.R. § 16.7. In the event of a request by a third party for disclosure of any appropriately designated confidential commercial information under any provision of law other than the FOIA, it is the Department's policy to assert all applicable exemptions from disclosure permitted by law.

Model Timing Agreement

1. *What is a timing agreement?*

Timing agreements are a mechanism to encourage an orderly process by which the parties comply with a Second Request and the Division analyzes the transaction and decides whether to clear it, seek remedies, or seek to block it.

Timing agreements are a negotiated deviation from the process that Congress outlined in the HSR Act, which sets a deadline of 30 days for the Division to reach a decision once the parties certify compliance with a Second Request. As a result, timing agreements should be mutually beneficial. The Division gets certainty on timing — which is in the parties’ control — and the parties get certainty, among other things, on the number of custodians, the number of depositions, treatment of deficiencies, and the availability of meetings with the Front Office.

2. Why has the Division published a model timing agreement?

The Division has previously used a model as the basis for its timing agreements, but had not made that model public.¹ The Division has now published its model timing agreement in order to increase transparency and facilitate reaching timing agreement with parties to a transaction more quickly and efficiently. Streamlining negotiations over timing agreements will allow Division staff to spend more of its time focusing on the substance of the investigation.

3. How does this model differ from previous timing agreements used by the Division?

The Division has made several changes to the new model timing agreement. These changes are intended to narrow potential areas of disagreement and facilitate more efficient reviews. Assistant Attorney General Makan Delrahim recently announced several of these changes:²

Fewer Custodians. The Division intends to seek documents from fewer custodians than it generally has in the past. As a general matter there will be an assumption that 20 custodians per party will be sufficient. Every investigation is different, however, and the Deputy AAG in charge of an investigation may authorize a larger number of custodians if necessary.

Fewer Depositions. The Division also intends to require fewer depositions than in the past. Again, while every investigation is different, the Division generally will not seek more than 12 depositions per party unless the Deputy AAG in charge of an investigation authorizes a greater number.

Reducing the number of custodians and taking fewer depositions will tangibly reduce the burden on parties from complying with a Second Request.

Shorter Time from Compliance to a Decision. The Division will strive to make a decision as quickly as possible after the parties certify compliance. The Division has set a

¹ The Division published a model timing agreement for use only as part of the 2006 Merger Review Process Initiative (“MRPI”). Although that model timing agreement remains on the public website, see <https://www.justice.gov/atr/merger-review-process-initiative-model-pta-letter>, it remains there for historical purposes. That timing agreement was only for use with other provisions of the MRPI.

² Makan Delrahim, “It Takes Two: Modernizing the Merger Review Process” (Sept. 25, 2018), available at <https://www.justice.gov/opa/speech/file/1096326/download>.

goal of making a decision in no longer than 60 days — sooner, if possible — again with the proviso that a Deputy AAG can authorize more time if necessary.

In exchange for these benefits, to the Division has also modified what is expected from the parties:

Faster and Earlier Production of Documents. The Division expects to receive documents and other information earlier in the compliance period than has been common in the past. If the parties employ traditional document review, this will mean a more robust rolling production, with the parties producing tranches of documents in roughly evenly spaced increments early in the compliance period, with certain documents due well in advance of certifying compliance. For parties employing technology assisted review, it will mean completing the bulk of the production a certain number of days in advance of certifying compliance.

Earlier Production of Data. Data is increasingly important. In the view of the Division, there is no reason that data called for in a Second Request cannot be produced substantially earlier than parties have produced it in the past. The Division will expect to receive early cooperation on identifying relevant data for Division economists to analyze. The Division will further expect production of useable data substantially before the Second Request compliance date.

No More Privilege Log Gamesmanship. The Division is committed to eliminating gamesmanship on privilege issues. The Division respects the attorney-client privilege and the work product doctrine, but too often parties game the process, withholding large numbers of documents as privileged, only to de-privilege and produce many of these documents much later in the process, often on the eve of a particular deposition. In the Division's experience, while some of the de-privileged documents might be close calls, most never should have been withheld in the first place. The new model timing agreement endeavors to protect the Division from this practice of over-withholding. This will require parties to be pro-active, organized, and diligent in their review of potentially privileged materials.

Longer Post-Complaint Discovery Period. The Division will be doing its part to streamline and shorten the merger review process by agreeing to significant limitations on documents custodians and depositions and by committing to try to resolve most investigations within sixty (60) days after compliance with Second Requests. Because of these limitations on the scope and length of the Division's investigations, parties must acknowledge that the Division will require a reasonable period to conduct post-complaint discovery in the event of contested litigation.

4. Do the timing milestones outlined in the model timing agreement allow the Division to complete an investigation within six months?

Yes, if the parties do their part. The timing milestones allow for completion of an investigation within six-months if the parties also work to produce responsive data, documents, and information quickly. A party that does not comply with its Second Request within six months cannot expect the Division to complete its investigation in six months. The timing of an investigation often is driven by the parties, because they control when documents and information are produced to the Division. In some cases, the parties may prefer a longer investigation rather than a quick decision by the Division, and other parties may wish to extend the timing for various reasons. If the parties seek a resolution within six months, however, the Division shares that goal and is committed to working towards it.

5. Are provisions in the model timing agreement negotiable?

The Division considers the provisions in the model to be standard provisions, and does not intend to deviate from them under most circumstances. Extended negotiations over deviations also would run counter to the Division's goal of streamlining and shortening the negotiations over timing agreements. The Division recognizes, however, that the individual circumstances of a transaction may warrant deviation in some cases. Parties should be aware, however, that substantial deviation will require approval from the Deputy AAG in charge of the investigation.

6. What are the benefits of entering into a timing agreement?

Both the Division and the parties benefit from timing agreements. Some of these benefits include:

Time to complete the investigation. It is in both the Division's and the parties' interest to allow the Division sufficient time to complete its investigation. In many investigations, the Division is able to resolve potential competitive concerns and close its investigation, allowing parties to proceed with their transaction. When time is short and competitive concerns remain, however, the Division must devote its resources to preparing for litigation.

Narrowed discovery. Timing agreements provide the parties with an agreement by the Division to narrow document discovery during the Division's investigation phase to a certain number of custodians and to take only a limited number of CID depositions. Timing agreements can also provide the Division with time to engage in the investigation necessary to further modify or narrow a Second Request, leading to decreased burdens and costs to parties. Timing agreements ensure that the Division will have the time and resources to fully engage with the parties in these discussions. Parties should be prepared to provide company executives, managers, or other specialized employees to answer staff's questions during discussions regarding Second Request modifications.

Increased certainty. The valuable certainty provided by timing agreements applies to the overall length of the Division's review as well as the timing of significant interim steps, including meetings with staff, section management, and the Front Office. Knowing the timing of each of these events enables parties to better plan for the preparation of their own legal and economic analyses, presentations, and white papers. Timing agreements also provide parties with valuable certainty with respect to the number and timing of depositions. With this information, parties can better prepare their deponents and ensure their availability during the agreed-upon time period.

Prompt identification of deficiencies. An important benefit to parties with a timing agreement is that the Division will agree to identify deficiencies in a party's Second Request response within a specified time period. The model timing agreement provides parties the additional certainty that if the Division fails to formally assert a deficiency within the agreed-upon time period, the claimed deficiency is waived and will not be a basis to challenge its certification of compliance at a later date. Parties will be required to produce the information that should have been produced, but the timing will not be extended.