

THE LATEST: DOJ Announces New Model Timing Agreement for Merger Investigations

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Consistent with [Assistant Attorney General Delrahim's speech on September 25, 2018](#), the DOJ released a new Model Timing Agreement which sets out that it will require fewer custodians, take fewer depositions, and commit to a shorter overall review period in exchange for the provision of detailed information from the merging parties earlier in the Second Request process than has previously been required.

WHAT HAPPENED:

- In November, the US Department of Justice (DOJ) published a new [Model Timing Agreement](#) (the Model) much like the [FTC's model](#) published earlier this year. Timing agreements are agreements between agency staff and merging parties that outline expected timing for various events (*g.*, production of documents and data, timeline for depositions and front-office meetings if needed) and help provide clarity for the agencies to conduct an orderly investigation during a Second Request.
- By providing this Model, the DOJ is signaling that it wants certainty on timing during its Second Request reviews and that this Model is a fast way for the parties and the DOJ to come to agreement on these issues.
- Some highlights of the DOJ Model include:
 - Parties must wait 60 days after substantial compliance to consummate transactions and give 10 days' notice prior to closing.
 - The Model limits the number of custodians to 20 per party and depositions to 12 per party, except in extenuating circumstances.
 - The Model reserves the DOJ's ability to add 5 more custodians at any time prior to

filing a complaint, with the requirement that parties must produce those individual's responsive documents within 15 days or the agreed timing will be tolled.

- For document productions, depending on production method (technology assisted review or linear review), all responsive, non-privileged documents must be produced approximately 30-45 days before substantial compliance. Production of potentially privileged documents ultimately deemed not privileged must be produced approximately 10-25 days before the substantial compliance certification date.
- Most data productions are required 30-45 days before substantial compliance.

WHAT THIS MEANS:

- The Model requires production of most data and documents more than a month before substantial compliance and contains timing penalties if too many potentially privileged documents withheld early in the process are later deemed responsive and produced late in the process. These requirements will provide the DOJ with good visibility on timing and reduce gamesmanship in the Second Request production process.
- In exchange for the early production of data and documents and elimination of privilege log gamesmanship, the Model reduces the burden on the parties by limiting the number of custodians from which it will collect and the number of depositions it will take.
- Though the Model does not affect the statutory expiration of the HSR waiting period, it commits the parties not to consummate the transaction for 60 days after substantial compliance, thereby extending the waiting period longer than the 30 days specified under the HSR Act.
- The 10-day notice required before the closing date means that if there is another condition in the way of closing, such as an ongoing antitrust investigation before the European Commission or in China, the parties cannot provide their notice of the anticipated closing date. The DOJ will, therefore, not be forced to litigate until the parties are in a position to complete their transaction in the near term, absent a challenge.
- While the use of timing agreements are not mandatory, practically speaking, an attempt to avoid such an agreement may encourage the DOJ to adopt a litigation stance (preparing to attempt to block a deal within 30 days of compliance) with staff attorneys focusing on a potential trial rather than focusing attention on settlement options.

[merger-investigations](#)
