

Client Alert

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FTC Finalizes Changes to Streamline Investigative Processes

The Federal Trade Commission (FTC) has issued final changes to agency procedure aimed at streamlining and updating the procedures for FTC investigations and clarifying the agency's procedures for evaluating allegations of misconduct by attorneys practicing before the FTC.

The changes were made regarding procedures in Parts 2 and 4 of the FTC's Rules of Practice.

Updated Procedures for FTC Investigations

The final changes to Part 2 "will expedite FTC investigations and ensure that the agency's investigatory processes continue to keep pace with electronic discovery." See the FTC press release [here](#). Specific changes include:

- Parties are now required to meet and confer with FTC staff within 14 days (with certain exceptions) to resolve e-discovery issues relating to subpoenas and civil investigative demands (CIDs), as well as any issues;
- Streamlined process for resolving disputes over FTC subpoenas and CIDs, as well as petitions to limit or quash FTC subpoenas and CIDs;
- Expediting the FTC's pre-merger review process by giving the agency's General Counsel the authority to initiate enforcement proceedings when a party fails to comply with the Hart-Scott-Rodino second request process; and
- Relieving parties of their obligations to preserve documents related to an FTC investigation after a year passes with no written communication from FTC staff (obligations to preserve documents for investigations by other government agencies, or for litigation, still apply).

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Litigation & Antitrust Practice Group

The final changes to Section 4.1(e) clarify the FTC's procedures for evaluating allegations of misconduct by attorneys practicing before the FTC.

Debate Over Mandatory Compulsory Process

According to a statement from FTC Chairman Jon Leibowitz, some commentators believe that the revisions should have gone a step further. Over the past few years, the FTC has moved toward greater use of compulsory process to conduct competition investigations. Chairman Leibowitz says that compulsory process "results in faster, more efficient investigations, especially in anticompetitive conduct matters where the recipients may not have strong incentives to cooperate quickly with FTC staff." See Chairman Leibowitz's statement [here](#). Some commentators believe that the option for FTC staff to use access letters should be eliminated in favor of compulsory process in every full-phase competition investigation. However, in his statement, Chairman Leibowitz notes that he intends to continue to provide FTC staff with at least some flexibility in choosing which method to deploy in at least some investigations.

Key Takeaways

The FTC's process revisions make negotiating subpoenas more efficient and transparent, which benefits both the FTC and private parties in an investigation.

That said, the rhetoric regarding compulsory process indicates the FTC continues to be more aggressive in investigating and challenging mergers and conduct. Parties often are able to work with FTC staff in providing documents and information on a voluntary basis, and should the FTC employ compulsory process (*i.e.*, issue subpoenas) more frequently, it may dis-incentivize parties from cooperating.

Finally, the FTC missed an opportunity to reform a far more substantial problem: the Second Request process, and despite the so-called reforms that were announced in 2006 by the FTC and the Antitrust Division of the Department of Justice, parties continue to struggle with the FTC's and DOJ's extraordinarily burdensome requests for documents and information that are issued as part of their merger investigations.

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