

Drafting, Negotiating and Reviewing Requests for Documents, Data and Other Information

Documentary Evidence

Benefits

- Good source of contemporaneous evidence
- Good source for background, information about industry
- Good source for understanding dynamics of competition (e.g., insight into how market participants view each other and compete for business)
- Reliable information (if prepared in ordinary course and before investigation)

Limitations

- May not be clear on their face
- Not interactive
- Should not be read in isolation
- Can sometimes appear contradictory

Data

Benefits

- Can provide statistical weight for theories that are otherwise difficult to prove
- Potentially less burdensome than requests for documents
- Can corroborate stories told by market participants

Limitations

- Data may not be kept in form that lends itself to a particular information request – so be flexible
- Make sure you are asking for what you want and can use
- Data may not be reliable

Written Interrogatory Responses

Benefits

- Good source for obtaining simple, objective facts (e.g., units sold, sales in a particular area, plant capacity, time to enter market)
- Potentially less burdensome than requests for documents

Limitations

- Recipient's competency on the subject
- Recipient's motive (e.g., parties interested in consummating deal)
- Recipient's bias (e.g., competitor may view merger as opportunity to raise prices)

Drafting Requests

Know the **goals** of investigation

- What information is needed to prove your case – think about legal theory and elements of proof
- What are the parties' likely defenses – think about the information that is needed to test defenses
- Use your investigation plan as a checklist

Be true to these **goals** in drafting

- Think about the different types of documents and data that may be informative (e.g., business strategy and marketing plans, scanner data) and target those most likely to advance your goals

Drafting Requests

Drafting **broadly** ensures more relevant documents, but...

- Greater burden and cost to comply
- Longer time to comply means that may not receive documents when needed
- More difficult for to find best documents within broad pool

Drafting Requests

Consider **burden** of the request on recipient (esp if a third party)

Consider ways to minimize burden:

- Time period covered
- Breadth of search (e.g., "All document relating to" versus "Documents sufficient to show" or "summaries")
- Scope of search (e.g., entire company versus key units, versus key employees, etc.)
- Types of documents (e.g., email, summaries, board documents)
- Is the information available from other (and more reliable) sources

Plan early: When drafting the document request, think about where you can narrow or discuss

Manage the relationship with third parties

- Explain why they are receiving the document request and its importance to the investigation

Drafting Requests

Choose Your Words Carefully

In general: avoid loopholes, ambiguities, and potential misunderstandings that could reduce the value of the submission

For interrogatories:

- Avoid questions that are:
 - Too broad or general
 - Leading
 - Likely to result in a yes/no answer
- Focus more on eliciting verifiable facts, and less on opinions and conclusions

For document and data requests:

- specify desired metrics and reporting period so homogenous set of documents and data can be obtained and compared
 - E.g. sales information requested in same increments (monthly, annually)

Drafting Requests

Consider applicable **time period** when drafting

- Make sure that time period includes significant events (major entry event)
- For data requests, may want longer time series
 - e.g. before and after a key event to show effect on prices
- Industry under investigation may affect choice
 - In high-tech industries, information may be obsolete after a few years

Drafting Requests

Definitions and Instructions

Instructions should clearly communicate ground rules for submissions, including any expectations you have about form for electronic production

Minimize uncertainty by defining key terms (e.g., industry specific terms)

Even simple terms can present complexities

- E.g., How to define “document”?
- E.g., How to define the recipient? When should the recipient include its subsidiaries and parent companies?

Examples

Types of documents/information requested:

- All documents relating to the transaction
- All documents relating to competition in the manufacture or sale of the relevant product
- All documents discussing the company's plans relating to the relevant product, including strategic plans, budgets and financial projections, and research and development plans
- Price lists and pricing plans
- Sales information, including largest customers
- Information about manufacturing plants, including capacity and utilization
- Organization chart
- Data

Discussing Requests

Dialogue with counsel where possible

- Requests to narrow may be helpful
- But expect affirmative efforts from opposing counsel
 - “This request is too broad.”
 - (Insufficient -- they know their documents and systems better than you; they should come forward with concrete suggestions.)
 - “We don’t have these kinds of documents, so we can eliminate this specification of the request.”
 - (Not so fast – don’t eliminate the specification. No burden in responding that the company does not have responsive documents, yet preserves your request for the information if responsive documents exist.)
 - “This request calls for a truck load of irrelevant documents.”
 - (Consider using a sample – chosen by agency staff – to test assertions as to information utility.)

Discussing Requests

Don't negotiate against yourself

- Ask questions that will lead to more information (e.g., What records does the company maintain with respect to ...? Do you have summaries?)
- Don't be afraid to defer
- Be reasonable while defending your agency's need for the information and data

Seek a rolling production

Memorialize all revisions to the request