

## RECENT ANTITRUST DIVISION AND FTC STEPS TO EXPEDITE THE REVIEW OF MERGERS AND OTHER ANTITRUST INVESTIGATIONS

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Three commonly asked questions in planning transactions which raise potential antitrust issues are: Which agency, the Federal Trade Commission or the Antitrust Division of the Department of Justice, will likely review the transaction? How quickly will we know to which agency the transaction has “cleared” so that, if we choose to do so, we can talk with the staff about the competitive implications of the transaction? How can we best manage that process?

Two recent announcements bear on these questions. On March 5, 2002, the FTC and the DOJ jointly announced changes concerning the “clearance” of antitrust matters between the two agencies, and earlier this year the DOJ publicized its initiative to expedite the merger review process itself. This memorandum outlines some of the more significant aspects of these two announcements.

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### NEW “CLEARANCE” PROCEDURES

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#### GENERAL PROVISIONS

The DOJ and FTC have parallel jurisdiction over virtually all civil antitrust investigations. Historically, they have allocated matters, including merger reviews, between themselves through an informal process in which transactions “cleared” to one agency or the other, typically based upon which had accumulated the most experience in addressing specific types of industries. This approach led to bureaucratic delays and occasionally to protracted disputes over which agency would receive clearance to review a particular matter.

The agencies have recently announced a new agreement that overhauls the clearance process. While the agreement does not limit the jurisdiction of either agency, it formally allocates primary areas of responsibility on an industry-wide basis.<sup>1</sup> The breakdown of allocated industries is attached.

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<sup>1</sup> The Antitrust Division retains exclusive jurisdiction over all investigations concerning possible criminal violations of U.S. antitrust law. The new procedures provide that if there is reason to believe that such criminal conduct has occurred, the matter will be cleared to the Antitrust Division regardless of whether the matter was already under investigation by the FTC. If, upon resolution of

The public announcement of these industry allocations resolves much of the uncertainty concerning the clearance of transactions and other antitrust matters. For example, while pharmaceutical industry matters have long been cleared to the FTC, and airline matters have cleared to the Antitrust Division, there has been substantial debate concerning the allocation of various media and technology matters. They will now be allocated to the DOJ.

While the agencies anticipate that this allocation will resolve most clearance issues going forward, there still will be situations, such as transactions involving multiple product markets, where clearance will not be entirely predictable. The agencies' agreement establishes procedures to ensure a speedy allocation of such matters.

#### TIMING

Where the clearance decision is obvious due to an express allocation of an affected industry, the agencies anticipate that clearance will be straightforward and fast: once an agency requests clearance, the matter will be deemed cleared to the requesting agency if the other agency does not request clearance within 48 hours of the initial clearance request. Where both agencies request clearance, the agencies must submit written statements of their position to each other within 96 hours following receipt of the initial clearance request, and a mechanism is set up to address and resolve those matters promptly.

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**THE DEPARTMENT OF JUSTICE  
MERGER REVIEW PROCESS INITIATIVE**

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These new clearance procedures come on the heels of an announcement by the Antitrust Division of an initiative designed to make more efficient use of the first 30-day waiting period of the Hart-Scott-Rodino Act. The intent is to get to the core antitrust issues quickly, so that the staff and the parties may reach closure on most or all issues before the end of this initial waiting period. While the announcement does not create new procedures, it does signal a commitment to find practical ways to identify, address and resolve issues within the initial 30-day waiting period or, if closure is not reached, to narrow the scope of any Second Request which may follow.

Specifically, the staff is encouraged to tailor its investigative plans and strategies to the specific issues posed by each transaction, rather than relying on standardized procedures or boilerplate models. The parties may expect the DOJ to be more proactive during the initial 30-day waiting period and may find it to their advantage to reciprocate by proffering key documents beyond those required by a Hart-Scott-Rodino Act filing, anticipating requests for information and availing themselves of opportunities to meet with staff to discuss issues raised

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its criminal investigation, the Division determines no criminal acts have been committed, the matter will be cleared back to the FTC if that matter was, or would have been, originally cleared to that agency.

by their transaction. While the practical effectiveness of the initiative remains to be seen, it is clear that its success is dependent on the willingness of both the Antitrust Division and the parties to engage in candid discussions during the initial 30-day period.

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**ALLOCATION OF MERGER REVIEWS  
AND NON-MERGER ANTITRUST INVESTIGATIONS**

<b>FEDERAL TRADE COMMISSION</b>	<b>ANTITRUST DIVISION OF DOJ</b>
Airframes	Agriculture and Associated Biotechnology
Autos and Trucks	Avionics, Aeronautics, and Defense Electronics
Building Materials	Beer
Chemicals	Computer Software
Computer	Cosmetics and Hair Care
Energy	Financial Services/Insurance Stock and Option, Bond, and Commodity Markets
Healthcare	Flat Glass
Industrial Gases	Health Insurance, Health Products and Services Over Which the FTC Determines It May Lack Jurisdiction
Munitions	Industrial Equipment
Operation of Grocery Stores and Grocery Manufacturing	Media and Entertainment
Operation of Retail Stores	Metals, Mining and Minerals
Pharmaceuticals and Biotechnology	Missiles, Tanks and Armored Vehicles
Professional Services	Naval Defense Products
Satellite Manufacturing and Launch, and Launch Vehicles	Photography and Film
Textiles	Pulp, Paper, Lumber, and Timber
	Telecommunications Services and Equipment
	Travel and Transportation
	Waste

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