

Memorandum



Subject Request to Open Preliminary Investigation:
Frito-Lay, Inc.

Date March 5, 1996

60-2096-

BINGAMAN
OPERATIONS
RWF
DNK
HALE
EAG
CASE
CHRON
ARCHIVE

To Roger W. Fones
Chief
Transportation, Energy and Agriculture

From Nina B. Hale
Transportation, Energy and Agriculture

Preliminary investigation authority is requested for the following matter:

Product(s):

potato chips, corn chips and similar
snacks

SIC Code(s):

2096, 2052

Potential defendants/parties:

Frito-Lay, Inc.

Statute:

Sherman Act, Sections 1 and 2, Clayton
Act, Section 3

Description of Illegal Conduct:

exclusive dealing arrangements and
other exclusionary practices

Amount of Commerce:

[REDACTED]
nationwide or regional

Geographic Market:

Premerger Notification Transaction #:

b3

Pending FTC Clearance:

FTC CLEARANCE GRANTED/DENIED: _____
PI AUTHORITY AUTHORIZED BY: _____
ON: _____
PI AUTHORITY DISAPPROVED BY: _____
ON: _____
NEW DOJ FILE NO: _____

Issues and Analysis:

(b)(5) Frito-Lay, Inc. ("Frito-Lay") is by far the nation's largest producer of salted snack foods, a market of more than \$15 billion annually. Frito-Lay had sales of \$5 billion in 1994, giving it a [redacted] of that market. Frito-Lay is the only manufacturer of salted snack foods that distributes on a national, regional and local level. While there are numerous regional manufacturers, none has a national [redacted]. No other national manufacturer remains. Borden exited the market several years ago, and Eagle, as mentioned below, is in the process of exiting.

DD We have received complaints from [redacted] alleging that Frito-Lay is inducing retailers of salted snack foods to enter into exclusive arrangements for the purpose, and with the effect, of excluding competitors. According to [redacted] Frito-Lay uses various tools to effect its exclusionary goal, including shelf space incentives, rebates and promotional programs that persuade the retailer to drop competitors' products or to refuse to carry them. [redacted]

[redacted]

Past Investigations:

Proposed Acquisition of Certain Assets of Eagle Snacks, Inc. By Frito-Lay

The Litigation II staff is currently investigating the proposed acquisition of four manufacturing facilities of Eagle Snacks, which was the only other national brand in the salted snack foods market. We are already coordinating investigative efforts and will continue to do so.

[redacted]

[redacted]

(b)(3)

Date: 3/6/96

1. DOJ File Number: _____

2. Individual Completing Form: Nina Hale
(Name) 307-0892
(Phone No.)

3. Matter Type (Circle appropriate code)

- BR Business Review
- PI Preliminary Inquiry
- GJ Grand Jury
- CI Civil Investigation
- CIV Civil Case
- CRI Criminal Case
- SRR Statutory or Regulatory Report
- RAM Regulatory Agency Matter
- RAP Regulatory Agency Proceeding
- AOA Appeal of Other Agency Matter
- AP Appeal of Antitrust Matter
- JPI Judgment Preliminary Inquiry
- JC Judgment Contempt
- JMT Judgment Modification/Termination
- SP Special Project
- AA Administrative Activities
- OA Other Activities
- OI Omnibus Investigation
- AM Amicus Matter

4. Title:

2096 Frito-Lay, Inc. - Exclusive Dealing

5. File Information:

Open Date: _____
 Agency: _____
 Companion DOJ File Number: _____
 GJ DOJ File Number: _____
 Judge Name: _____
 Pre-merger/PL: Y / N
 Criminal/Civil Number: _____
 Blue Book: _____
 Court Code: _____

6. SIC Code(s):

(See SIC Code Book)

List Primary Code First
2096

2052

7. Is this a Special Project involving legislation or legislative proposals? Yes ___ No X

8. Investigated Parties

Name _____
Frito-Lay, Inc.

Type
(circle one)

Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other
 Corp / Ind / Other

9. Staff Assigned

SSN and Last Name
 Lead [Redacted] Hale PH
 Assisting _____
 Assisting _____
 Assisting _____

SSN and Last Name

Assisting _____
 Assisting _____
 Assisting _____
 Assisting _____

10. Sections

Section/Office
 Organization Code Responsibility
TEA 3500 Handling
 _____ Assisting

Section/Office
 Organization Code Responsibility
 _____ Assisting
 _____ Assisting
 _____ Assisting

11. Geographic Description

WorldWide/MUltistate/NationWide (circle one). State (Enter two-character abbreviation): _____
 City (Enter name of city and state abbreviation): _____
 Additional description: _____

12. Aggregate Annual Dollar Volume of Commerce of Defendants (circle one)

Year: 1994

- | | | |
|--------------------------------|-----------------------|--------------------------------|
| A Under \$300 thousand | D \$2-3.999 million | H \$50-149.999 million |
| B \$300-599 thousand | E \$4-9.999 million | I \$150-499.999 million |
| C \$600 thousands-1.99 million | F \$10-24.999 million | J \$500 million or over |
| | G \$25-49.999 million | K Unknown |

13. VIOLATION CATEGORIES

1. Indicate with a "P", the primary violation code.
2. Starting with the number "1" for order of importance, rank the secondary violation codes.

- | | |
|--|--|
| <input type="checkbox"/> 10A S1 -Intellectual Property Abuses | <input type="checkbox"/> 399 Tax Evasion |
| <input type="checkbox"/> 100 S1 -Price Fixing—Horizontal | <input type="checkbox"/> 3210 Robinson-Patman Act |
| <input type="checkbox"/> 101 S1 -Price Fixing—Vertical | <input type="checkbox"/> 400 Section 6 Clayton Act—Agriculture |
| <input type="checkbox"/> 102 S1 -Bid Rigging | <input type="checkbox"/> 401 Capper—Volstead Act |
| <input type="checkbox"/> 103 S1 -Customer, Territorial or Market Allocation—Horizontal | <input type="checkbox"/> 4010 False Claims Act: Offense—Perjury |
| <input type="checkbox"/> 104 S1 -Customer or Territorial Allocation or Restrictive Resale Practice | <input type="checkbox"/> 402 Agriculture Couperative Marketing Act of 1926 |
| <input type="checkbox"/> 105 S1 -Boycotts or Refusals to Deal—Horizontal | <input type="checkbox"/> 403 Agricultural Adjustment Act of 1935 |
| <input type="checkbox"/> 106 S1 -Boycotts or Refusals to Deal—Vertical | <input type="checkbox"/> 404 Webb-Pomerene Export Trade Association Act |
| <input type="checkbox"/> 107 S1 -Agreements Not to Compete | <input type="checkbox"/> 405 McCarran-Ferguson Act |
| <input type="checkbox"/> 108 S1 -Agreements to Restrict Production | <input type="checkbox"/> 406 Merchant Marine Act |
| <input type="checkbox"/> 109 S1 -Reciprocity | <input type="checkbox"/> 407 Section 12 Clayton Act—Labor |
| P 110 S1 -Exclusive Dealings and Requirements Contracts | <input type="checkbox"/> 408 Norris-Laguardia Act of 1932 |
| <input type="checkbox"/> 111 S1 -Predation | <input type="checkbox"/> 409 Fishermens Collective Marketing Act |
| <input type="checkbox"/> 112 S1 -Tying Agreements | <input type="checkbox"/> 410 Defense Production Act |
| <input type="checkbox"/> 113 S1 -Technology Restrictions | <input type="checkbox"/> 411 Newspaper Preservation Act of 1970 |
| <input type="checkbox"/> 117 S1 -Other Restraint of Trade | <input type="checkbox"/> 412 Sports Broadcasting Act of 1961 |
| <input type="checkbox"/> 117A S1 -Resale Price Maintenance | <input type="checkbox"/> 413 Small Business Act |
| 1 118 S2 -Monopolization | <input type="checkbox"/> 500 Bank Merger Act |
| <input type="checkbox"/> 119 S2 -Attempt to Monopolize | <input type="checkbox"/> 501 Bank Holding Company Act |
| <input type="checkbox"/> 120 S2 -Conspiracy to Monopolize | <input type="checkbox"/> 502 Federal Deposit Insurance Act |
| <input type="checkbox"/> 121 S3 -Restraint on Trade—Territorial, D.C. | <input type="checkbox"/> 503 Communications Act of 1934 |
| <input type="checkbox"/> 122 C3 -Tying Agreements | <input type="checkbox"/> 504 Section 337 of the Tariff Act of 1930 |
| <input type="checkbox"/> 123 C4A -Damage Action | <input type="checkbox"/> 505 Trade Act of 1974 |
| <input type="checkbox"/> 124 C7 -Horizontal Merger | <input type="checkbox"/> 506 Wilson Tariff Act |
| <input type="checkbox"/> 125 C7 -Vertical Merger | <input type="checkbox"/> 507 Department of Energy Organization Act |
| <input type="checkbox"/> 126 C7 -Conglomerate Merger | <input type="checkbox"/> 508 Atomic Energy Act |
| <input type="checkbox"/> 127 C7 -Joint Venture | <input type="checkbox"/> 509 Deepwater Port Act of 1974 |
| <input type="checkbox"/> 128 C7 -Partial Control Acquisition—Horizontal | <input type="checkbox"/> 510 Energy Policy and Conservation Act of 1975 |
| <input type="checkbox"/> 129 C7 -Partial Control Acquisition—Vertical | <input type="checkbox"/> 511 Federal Coal Leasing Amendments Act of 1976 |
| <input type="checkbox"/> 130 C8 -Interlocking Directorates and Officers | <input type="checkbox"/> 512 Outer Continental Shelf Lands Act |
| <input type="checkbox"/> 131 C10 -Purchases by Commercial Carriers—Interlocking Directorates | <input type="checkbox"/> 513 Interstate Commerce Act |
| <input type="checkbox"/> 132 Failure to File Hart-Scott Rodino | <input type="checkbox"/> 514 Federal Aviation Act |
| <input type="checkbox"/> 300 False Claims Act | <input type="checkbox"/> 515 Shipping Act of 1984 |
| <input type="checkbox"/> 301 Conspiracy to Defraud United States (18 USC §371) | <input type="checkbox"/> 516 Railroad Revitalization and Regulatory Reform Act |
| <input type="checkbox"/> 302 False Statements | <input type="checkbox"/> 517 Federal Property and Administrative Services Act |
| <input type="checkbox"/> 303 Mail Fraud | <input type="checkbox"/> 525 Depository Institutions Deregulation and Monetary Control Act |
| <input type="checkbox"/> 304 Wire Fraud | <input type="checkbox"/> 526 Commodity Exchange Act |
| <input type="checkbox"/> 305 Obstruction of Justice | <input type="checkbox"/> 527 Export Trading Company Act of 1982 |
| <input type="checkbox"/> 306 Obstruction of Proceedings Under the Civil Process Act | <input type="checkbox"/> 528 Postal Reorganization Act |
| <input type="checkbox"/> 309 Organized Crime Control Act | <input type="checkbox"/> 601 Federal Trade Commission Act |
| <input type="checkbox"/> 310 Racketeering | <input type="checkbox"/> 603 Hazardous Substances Act |
| <input type="checkbox"/> 311 Criminal Contempt | <input type="checkbox"/> 614 Packers and Stockyard Act, 1921 |
| <input type="checkbox"/> 312 Aiding and Abetting | <input type="checkbox"/> 888 Not Applicable |
| <input type="checkbox"/> 313 Bribery | <input type="checkbox"/> 900 Miscellaneous |
| <input type="checkbox"/> 314 Split Agreement | <input type="checkbox"/> 9010 Other Offenses: Perjury |
| <input type="checkbox"/> 316 Concealment, Removal, or Mutilation of Records; generally—18 USC §2071(b) | <input type="checkbox"/> 9030 Other Offenses: Decree Violation—Contempt—Civil |
| <input type="checkbox"/> 317 Conspiracy to Defraud Govt. with respect to Claims—18 USC §286 | <input type="checkbox"/> 9040 Other Offenses: Decree Violation—Contempt—Criminal |
| <input type="checkbox"/> 318 Transportation of Stolen Goods, etc.—18 USC §2314 | <input type="checkbox"/> 9050 Other Offenses: Decree Violation—Other |
| <input type="checkbox"/> 319 Sale/Receipt of Stolen Goods, etc.—18 USC §2315 | <input type="checkbox"/> 9060 Other Offenses: Compliance Proceeding |
| <input type="checkbox"/> 320 Fraud and False Statements HUD/FHA 18 USC §1010.2 | <input type="checkbox"/> 9070 Other Offenses: Judgement Modification Proceeding |
| | <input type="checkbox"/> 9080 Other Offenses: Judgement Interpretation Proceeding |
| | <input type="checkbox"/> 9090 Other Offenses: Acts Not Elsewhere Classified |
| | <input type="checkbox"/> 999 No Violation Assigned |

14. Additional Information:

CONFLICT OF INTEREST CERTIFICATION

Frito Lay - Snack Food
Investigator

60-296-0002

Identification of Matter (Case Number, Name, etc.)

I, Bill Plank, hereby certify that to the best of my knowledge, neither I nor my spouse, dependent child, general partner, or any organization which I am serving as an officer, director, trustee, general partner or employee, or any person or organization with whom I am negotiating or have an arrangement concerning prospective employment has a financial interest in this matter.

I further certify that this matter will not affect the financial interests of any member of my household. Also, no member of my household; no relative with whom I have a close relationship; no one with whom my spouse, parent or dependent child has or seeks employment; and no organization with which I am seeking a business relationship nor which I now serve actively or have served within the last year are parties or represent a party to the matter.

I also acknowledge my responsibility to disclose the acquisition of any financial or personal interest as described above that would be affected by the matter, and to disclose any interest I, or anyone noted above, has in any person or organization that does become involved in, or is affected at a later date by, the conduct of this matter.

Bill Plank

Signature

4/15/96

Date

Attorney

Position

CONFLICT OF INTEREST CERTIFICATION

Frito-Lay

Identification of Matter (Case Number, Name, etc.)

60-2096-0002

I, Nina Hale, hereby certify that to the best of my knowledge, neither I nor my spouse, dependent child, general partner, or any organization which I am serving as an officer, director, trustee, general partner or employee, or any person or organization with whom I am negotiating or have an arrangement concerning prospective employment has a financial interest in this matter.

I further certify that to the best of my knowledge, this matter will not affect the financial interests of any member of my household. Also, to the best of my knowledge, no member of my household; no relative with whom I have a close relationship; no one with whom my spouse, parent or dependent child has or seeks employment; and no organization with which I am seeking a business relationship nor which I now serve actively or have served within the last year are parties or represent a party to the matter.

I also acknowledge my responsibility to disclose the acquisition of any financial or personal interest as described above that would be affected by the matter, and to disclose any interest I, or anyone noted above, has in any person or organization that does become involved in, or is affected at a later date by, the conduct of this matter.

Nina Hale
Signature

Attorney
Position

4/15/96
Date

CONFLICT OF INTEREST CERTIFICATION

Frito-Lay, 60-2096-0002
Identification of Matter (Case Number, Name, etc.)

I, Nina Hale, hereby certify that to the best of my knowledge, neither I nor my spouse, dependent child, general partner, or any organization which I am serving as an officer, director, trustee, general partner or employee, or any person or organization with whom I am negotiating or have an arrangement concerning prospective employment has a financial interest in this matter.

I further certify that this matter will not affect the financial interests of any member of my household. Also, no member of my household; no relative with whom I have a close relationship; no one with whom my spouse, parent or dependent child has or seeks employment; and no organization with which I am seeking a business relationship nor which I now serve actively or have served within the last year are parties or represent a party to the matter.

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Nina Hale
Signature

7/8/96
Date

Attorney
Position