



Department of Justice

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DOJ AND FTC ANNOUNCE NEW CLEARANCE PROCEDURES FOR ANTITRUST MATTERS

Memorandum of Agreement Allocates Industry Sectors Between Agencies

WASHINGTON, D.C. – The nation's two federal antitrust enforcement agencies, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), today announced that they have entered into a new agreement concerning clearance procedures for merger reviews and other antitrust matters. The Memorandum of Agreement overhauls the clearance process and for the first time formally allocates primary areas of responsibility, on an industry-wide basis, between the DOJ and the FTC. The agreement does not purport to limit the jurisdiction of either agency.

Assistant Attorney General Charles A. James and FTC Chairman Timothy J. Muris explained that the clearance system needed to be overhauled to arrest the trend toward more frequent and time-consuming clearance disputes that delay the initiation of investigations, and to allow the agencies to concentrate expertise and resources to investigate more effectively.

The agreement, originally scheduled to be announced on January 17, 2002, was put on hold when there was a Congressional request to review its terms. In response to this request, during the last six weeks the Department and the FTC have provided extensive data and information concerning clearance procedures, delays imposed by clearance disputes, and the historical allocation of matters between the two agencies.

The Department and the FTC remain firmly convinced that the agreement will in fact reduce the time spent on clearance disputes, and thereby allow both agencies to enforce the antitrust laws more effectively.

“This agreement will improve our law enforcement efforts,” said Charles A. James, Assistant Attorney General in charge of the Department’s Antitrust Division. “Allocating industry sectors in a more rational manner will enable the Department to investigate more efficiently possible anticompetitive conduct affecting consumers and will provide greater certainty to the business community, all of which is good for consumers.”

The DOJ/FTC clearance process was formally established in 1948; refinements were implemented in 1963, 1993, and 1995. The traditional methodology for allocating matters between the agencies has emphasized historical experience in addressing specific commercial sectors. As the boundaries that separate individual sectors have blurred in the face of rapid technological change, and as deregulation measures have allowed firms to diversify, this clearance methodology has begun to break down. In a growing number of important economic sectors of mutual concern to the DOJ and the FTC, the effectiveness of the experience-based allocation methodology that has anchored past clearance agreements has been diminished significantly.

“We see this agreement as a means of increasing the effectiveness, efficiency, and cooperation of our agencies’ law enforcement activities,” stated Muris. “The new clearance process will enable the agencies to determine much more quickly which agency will handle the matter, and therefore to begin and conclude investigations sooner. Consumers will benefit from the more efficient use of taxpayer money. This agreement is a good government initiative, and good government benefits everyone.”

James and Muris pointed out that delays in resolving clearance disputes can result in uncertainty and increased costs for businesses, and in increased harm for consumers when possible competitive problems remain unaddressed during the clearance process. Clearance disputes have caused significant delays in both merger and non-merger antitrust enforcement efforts, and have

redirected scarce agency resources away from substantive investigations. Before either agency begins an investigation, it must obtain clearance from the other agency.

An analysis of clearance delays released by the FTC on February 28, 2002, indicates that, since the beginning of fiscal year 2000, the 136 matters in which the agencies formally contested clearance took an average of three and a half weeks to resolve. In another 164 matters during this period, clearance took more than one week to resolve, although no formal clearance dispute occurred. On average, these 300 matters – 24 percent of all matters for which clearance requests were filed during this period – imposed delays of three weeks. In some instances, clearance disputes have delayed investigations for several months. Under the terms of the agreement announced today, more than 80 percent of these 300 matters would have been resolved within two business days.

James and Muris agreed that even if the clearance process worked without friction, a more rational distribution of responsibility was needed. Citing design and production of automobiles and trucks as an example, the agency heads noted that these related areas of activity traditionally have been split between the DOJ (trucks) and the FTC (cars). The agreement adopted today implements a more sensible arrangement that makes the best use of the agencies' resources by combining cars and trucks under the FTC's umbrella of product groups. Numerous similar groupings appear in the agreement's industry allocations.

For example, the agreement allocates media and entertainment, an area in which both the DOJ and the FTC have experience, to the DOJ. Muris noted, "The agreement allocates primary responsibility for antitrust enforcement in the media and entertainment industry to the DOJ, because its expertise in this area far outweighs that of the FTC. A comparison of the relative expertise of the agencies within specific sectors of this industry further demonstrates that the DOJ is better situated to conduct these investigations. For example, the FTC's expertise in multi-

channel video distribution programming – including cable and satellite – is more limited than the DOJ's. Although the FTC has investigated numerous cable transactions, most of its expertise in this area is too old to count in the clearance dispute process. In any event, the majority of the FTC's cable investigations involved only horizontal issues, and did not present the complex vertical issues raised by media mergers in the last few years."

The agreement allocates to the DOJ aeronautics; agriculture and associated biotechnology; avionics; beer; computer software; cosmetics and hair care; defense electronics; financial services, insurance, and stock, option, bond, and commodity markets; flat glass; health insurance; industrial equipment; media and entertainment; metals, mining, and minerals; missiles, tanks, and armored vehicles; naval defense products; photography and film; pulp, paper, lumber, and timber; telecommunications services and equipment; travel and transportation; and waste.

The agreement allocates to the FTC airframes; autos and trucks; building materials; chemicals; computer hardware; energy; grocery manufacturing; the operation of grocery stores; healthcare; industrial gases; munitions; pharmaceuticals and biotechnology; professional services; the operation of retail stores; satellite manufacturing and launch vehicles; and textiles.

Other provisions of the agreement address:

- the development of a clearance manual that will be posted on each agency's web site;
- the maintenance of a common database to track Hart-Scott-Rodino filings and clearance matters;
- the designation of a dedicated clearance officer at each agency;
- weekly meetings and reports to review the clearance process and ongoing matters;
- expedited time frames for review, together with "negative option" provisions that prompt each agency to act quickly on clearance disputes or forfeit those matters to the other agency;
- clearly designated levels of review for clearance disputes;

- provisions for obtaining input from a neutral evaluator in the rare instances in which the agencies are otherwise unable to resolve a clearance dispute; and
- ongoing review of the agreement, and specifically the allocation of industries.

Letters received in recent weeks from former antitrust enforcement officials, the Chair and Ranking Member of the Senate Judiciary Committee's Antitrust Subcommittee, the Section of Antitrust Law of the American Bar Association (ABA), and the business community (The Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce), reflect broad and bipartisan support for the effort to improve the clearance process by allocating primary responsibility for industries in which both agencies have expertise. For example, a joint letter to James and Muris from Senators Herb Kohl (D-WI) and Mike DeWine (R-OH), respectively the Chairman and the Ranking Member of the Senate Judiciary Committee's Antitrust Subcommittee, acknowledges the "need for reform of the present Clearance Procedure" and states that the agreement "has the potential to greatly improve [the existing] situation."

Likewise, a letter signed by 11 former heads of the nation's antitrust agencies from the last four Administrations - Terry Calvani, David A. Clanton, Joel I. Klein, Sanford M. Litvack, A. Douglas Melamed, James C. Miller, III, John M. Nannes, Robert F. Pitofsky, James F. Rill, Charles F. Rule, and John H. Shenefield - characterizes the effort to "clarify historical allocations of industries and products between the agencies, and introduce clear procedures for processing those few matters that do not clearly fall within existing allocations" as "desirable objectives" that could be "a real contribution to good government."

A copy of the Memorandum of Agreement is attached.

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