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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT**

**-- United States --**

**15 June 2010**

*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.*

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## 1. Introduction

1. The United States has two antitrust enforcers – the U.S. Department of Justice (“DOJ”), through its Antitrust Division (“Division”), and the Federal Trade Commission (“FTC” or “Commission”) (together, “Agencies”). DOJ is part of the executive branch, while the FTC is an independent agency. Of the three primary antitrust statutes in the United States, DOJ enforces one, the Sherman Act;<sup>1</sup> the FTC enforces another, the FTC Act;<sup>2</sup> and both enforce the third, the Clayton Act.<sup>3</sup>

2. The Agencies use different enforcement procedures, both of which comport with fundamental fairness. To enforce the statutes assigned to it, the DOJ must initiate an action in an appropriate U.S. district court, which determines whether the law has been violated and, if so, orders appropriate remedies. By contrast, to enforce the FTC Act, the FTC may use its own administrative processes, codified in its rules. Under this process, the FTC, following a full investigation, issues an administrative complaint, which initiates an enforcement proceeding that is overseen and resolved by an administrative law judge, subject to review by the full Commission, and, ultimately, a U.S. court of appeals. Thus, unlike DOJ, the FTC exercises both prosecutorial and judicial functions.<sup>4</sup> The FTC also may seek a preliminary injunction in U.S. district court in aid of the administrative proceeding, *e.g.*, to block a merger before it is consummated. In cases in which the FTC seeks monetary relief, the FTC may, like DOJ, seek final relief in a court proceeding and forego the administrative process. Whether DOJ is enforcing the law in court or the FTC is enforcing the law administratively, the processes offer respondents similar procedural rights.

3. The submission of the United States for the February 2010 roundtable on procedural fairness<sup>5</sup> addressed issues related to transparency, including: how substantive standards and agency policies and procedures are made transparent; how frequently and openly the Agencies have a dialogue with firms under investigation; how the Agencies inform parties of the allegations against them; what opportunities parties have to respond to agency concerns and to be heard prior to an adverse decision; and how the Agencies publicize their decisions. This submission focuses on the Agencies’ decision-making processes, information requests to targets, confidentiality protections for information submitted to them, opportunities for settlement, and the availability of independent judicial review and interim relief.

## 2. Decision-making process

4. The Agencies are both law enforcement agencies with the authority to investigate and enforce U.S. antitrust statutes. Both Agencies conduct a thorough pre-complaint review that considers all available evidence and legal issues, including any submissions by the parties. The FTC has the discretion either to adjudicate antitrust actions itself, which is appealable to federal court of appeals, or to seek relief from a federal district court. The DOJ ultimately is required to prove any case it files in federal court before a district judge, who will examine the matter *de novo*. Given the potential for independent judicial review, there is a strong incentive throughout the Agencies’ review processes to consider all relevant evidence and

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<sup>1</sup> 15 U.S.C. § 1, *et seq.*

<sup>2</sup> *Id.* § 45, *et seq.* Section 5 of the FTC Act encompasses violations of the Sherman Act. *Id.*

<sup>3</sup> *Id.* § 12, *et seq.*

<sup>4</sup> As our February submission to the OECD pointed out, Rep. James Covington, who authored the bill that led to the FTC Act, emphasized that the agency would have specialized experience and expertise, and should have both prosecutorial and judicial functions. *See* 51 CONG. REC. 14,931-33 (Sept. 10, 1914).

<sup>5</sup> *See Submission of the United States to the OECD Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings*, DAF/COMP/WP3/WD(2010)24, available at [http://www.ftc.gov/bc/international/docs/transparency\\_us.pdf](http://www.ftc.gov/bc/international/docs/transparency_us.pdf).

remain open to persuasive arguments by parties and third parties. In addition, the Agencies employ many internal practices and procedures to promote sound decision-making.

5. First, both Agencies' policy is to seek regular informed substantive input from the parties at all stages of an investigation in an effort to ensure that the agency is fully aware of counter-arguments and evidence that might support factual and legal theories inconsistent with enforcement action. Thus, agency staffs at both FTC and DOJ routinely encourage companies under investigation to present evidence or arguments, both orally in informal meetings and through written submissions sometimes known as "white papers."<sup>6</sup> While this procedure does not involve formal witness testimony, business executives and industry or economics experts, as well as the parties= lawyers, often participate to explain their views directly to agency officials.

6. These discussions are a two-way street. As discussed in detail in the U.S. submission on procedural fairness for February's roundtable, the Agencies' civil staffs are quite open with the parties regarding how an investigation is proceeding and when major landmarks are approaching, and the subjects of civil investigations have ample opportunity to interact with staff and senior officials to discuss the theories the agency is pursuing during the investigational stage. This openness enhances the ability to investigate and prosecute successfully by focusing energies on the real areas of dispute. More important, this type of transparency ultimately contributes to making the right enforcement decision.<sup>7</sup>

7. Second, management at both Agencies, including senior decision-makers, is actively involved at all key stages of an investigation. At both Agencies, staff is required to present memoranda to management that include the factual, legal, and theoretical bases for the action it is recommending, with information on expected arguments by the parties and how they will be countered, at key decision points, such as the opening of a preliminary investigation, the issuance of compulsory process to obtain information, and the filing of a court case. Senior agency officials closely monitor the progress of

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<sup>6</sup> For example, the DOJ's Antitrust Division Manual provides that "in civil matters, staff should engage the parties in discussion early in the investigation, obtain the parties' substantive evaluation of the matter, and share its own substantive evaluation with the parties." ANTITRUST DIVISION MANUAL III-14 (4th ed. July 2009), available at (*hereinafter* "DIVISION MANUAL"). Similarly, the DOJ's Merger Review Process Initiative provides that "[b]oth the Division and the parties to a transaction benefit from the frank exchange of ideas and evidence . . . . In appropriate circumstances, the Division may agree to meetings or teleconferences with the parties on a regular basis (*e.g.*, every other week) throughout the investigation to promote a continuing dialogue and provide a regular opportunity to discuss progress made on both sides." MERGER REVIEW PROCESS INITIATIVE IV.A.1-2, available at <http://www.justice.gov/atr/public/220237.htm> (*hereinafter* "MRPI"). Also, the FTC has long "encourage[d] the parties to engage the staff in a dialogue on substantive issues, beginning at the earliest possible date," including on "the theories and issues that are being considered" by the Commission's staff, and these discussions are "on an ongoing basis as the investigation proceeds and concerns evolve, change, or are refined." *Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations* (Dec. 11, 2002), available at <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>; see also *Best Practices for Data, and Economic and Financial Analyses in Antitrust Investigations* (Nov. 7, 2002), available at <http://www.ftc.gov/be/ftcbebp.pdf> ("In the early stages of an investigation . . . [Bureau of Economics] staff will discuss with the parties and their economic consultants, economics, financial, and data issues, including theories that are being considered . . . . This conversation should begin a dialogue (generally conducted with the presence of attorneys) between the FTC economists and the parties that can continue throughout the investigation.").

<sup>7</sup> Christine A. Varney, Assistant Attorney General, *Procedural Fairness, Remarks as Prepared for the 13th Annual Competition Conference of the International Bar Association* (Sept. 12, 2009), available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

investigations and periodically obtain detailed briefings from the investigative staffs throughout the investigation.

8. Prior to filing a case, senior Division officials, including the Assistant Attorney General, typically meet with the companies and individuals under investigation, explain the Division's concerns, and provide an opportunity for the companies and individuals to present their best arguments. It is not unusual for the agency to alter or refine its thinking in response to those meetings.

9. Similarly, during an FTC investigation, respondents are free to request meetings with the agency management, and ultimately, Commissioners of the FTC, to express concerns and present their positions. Once the FTC files an administrative complaint against a respondent, the agency's Part 3 rules ensure that the respondent continues to have the opportunity to present its arguments and views formally into the record of the enforcement proceeding for consideration by the administrative law judge and any review by the full Commission or a court. For example, as explained in our prior submission, pursuant to the Part 3 rules, respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."<sup>8</sup> In short, from investigating staff to the highest levels of agency decision-makers, the FTC's investigatory process is open and transparent and designed to give respondents every opportunity to develop and present their views on relevant issues in an investigation.

10. The Agencies employ a number of additional informal practices to ensure that the arguments opposing enforcement action, as well as the arguments in favor of it, are always seriously considered and evaluated. For example, in the most significant investigations, DOJ assigns a group of staff attorneys and economists to argue the parties' case internally before a final enforcement decision is taken.<sup>9</sup> The FTC has also used this practice in several of its merger investigations.

11. Third, staff economists at both Agencies are involved at all stages of all antitrust investigations, except for some DOJ criminal investigations involving hard core cartels.<sup>10</sup> In a competition matter before the FTC, investigating staff typically includes members from both the Bureau of Competition (professional staff consisting mostly of lawyers) and the Bureau of Economics (professional staff consisting mostly of Ph.D. economists); the staff in these bureaus coordinate and work with one another during an investigation, bringing their own expertise to the decision-making. While the attorneys evaluate the investigation from a legal perspective, the economists both assist in the investigation and provide an independent view regarding the economic circumstances of the investigated conduct and potential actions by the FTC.

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<sup>8</sup> 16 C.F.R. § 3.41(c).

<sup>9</sup> When staff recommends the filing of a merger case, "it should be prepared to demonstrate mock closing statements for the government and the defense and mock direct and cross examination of the government's expert economist." DIVISION MANUAL III-122.

<sup>10</sup> According to the Division Manual, "[s]taff should include the economist assigned to the investigation in all relevant aspects of the investigation, such as interviews, team meetings about the direction of the investigation, and the distribution of 'hot' documents." *Id.* III-40. "The Division's Economic Analysis Group assigns one or more economists to each merger and civil nonmerger matter to assist the legal staff in investigating, developing, and analyzing the competitive effects of the proposed acquisition or other conduct being investigated. Among other things, the legal staff in civil matters should include such Division economists as participants in formulating theories to investigate, drafting HSR Second Requests and interrogatory and document CIDs, creating an investigatory plan designed to maximize the potential of developing a triable case, and drafting and asking interview and CID deposition questions. Also, Division economists should participate fully in developing and implementing quantitative analysis of anticompetitive effects of mergers and other business conduct and in providing or securing expert economic testimony." *Id.* III-115-16.

12. In the DOJ process, an economist is assigned at the beginning of every civil investigation. Very early in the investigation the economist writes an issues memorandum that anticipates competitive concerns and arguments the parties will likely make. The memorandum also proposes methods for securing data and other information that will bear on those concerns and arguments. The views of both staff economists and management economists are included in recommendations forwarded to senior decision-makers.

13. In addition, investigative staff at both Agencies retain outside experts, including non-agency economists, technology experts, and other individuals as potential witnesses at trial and to provide additional assistance during the investigation and valuable independent assessments of the strength of the case.

### **3. Request for information from firms under investigation**

14. The Agencies are always available to discuss a respondent's concerns about the scope of a particular request. They also seek to obtain the information they need without imposing an undue burden on a respondent.

15. When the Agencies issue compulsory requests for information, either in the form of a Second Request in a merger investigation or a subpoena or CID, they typically encourage the recipient to discuss the request and, indeed, recipients almost always engage the Agencies' staff in a compliance negotiation. Staff and counsel for the recipient often have extended discussions and agree to modifications and/or deferrals that ensure that the Agencies obtain the information they need for their investigations, while minimizing – to the extent possible – the cost and burden on the recipient.<sup>11</sup> Typically, staff and the recipient's counsel will examine the recipient's organizational chart and come to an agreement on a set of individuals whose files must be searched for responsive documents. The number and position of the search group individuals varies depending on the nature and complexity of the investigation. The process is generally the same whether the recipient is a potential defendant or a third party; however, the Agencies recognize that third parties are differently situated than potential defendants and therefore strive to an even greater extent to minimize their burden.

16. Regarding timing, Second Request compliance is in the hands of the merging firms – there is no deadline for parties to comply with Second Requests, but they cannot close their merger until a specific number of days following substantial compliance with the Second Request. With regard to subpoenas and CIDs, the demand includes a deadline for response, but often that date is subject to negotiation and the Agencies can extend it if circumstances warrant. Regardless of the form of the information request, it is often helpful to the Agencies if the recipient agrees to produce materials on a staggered basis and if it prioritizes early production of the most critical information. Subpoenas and CIDs are subject to judicial review, although the grounds for successfully objecting to either are limited, and court challenges are rare.

17. Although Second Requests are not subject to judicial review, the Agencies have practices and procedures that effectively provide an internal appeals process in merger investigations. Second Requests

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<sup>11</sup> For example, in some situations, the Agencies will use a "quick look" review for non-complex investigations, which can further minimize burdens on the parties. See DIVISION MANUAL III-45 ("When staff believes that the resolution of discrete issues through the examination of limited additional information could be sufficient to satisfy the Division that the transaction is not anticompetitive, staff may arrange a 'quick look' investigation. In a 'quick look' investigation, the parties refrain from complying fully with the Second Request and instead provide limited documents and information, and staff commits to tell the parties, by a particular date, whether full compliance will be necessary."); *Horizontal Merger Investigation Data, Fiscal Years 1996-2007* at 3-2 & n.6 (FTC Dec. 1, 2008); available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>.

inform respondents that they may discuss clarifications and modifications with the FTC and DOJ staff;<sup>12</sup> the Agencies instruct their staffs to discuss the Second Request and modify the request if they determine that a less burdensome request will elicit the information needed. If a respondent believes that compliance with any part of a request should not be required, and thereafter exhausts efforts to obtain modifications from staff, the respondent may, in the case of the DOJ, appeal the matter to a Deputy Assistant Attorney General, and in the case of the FTC, the Commission's General Counsel.<sup>13</sup> These officials must review and act on the matter quickly. The FTC's General Counsel must set a conference date with the petitioner and the investigating staff within two business days of receipt of the petition; the conference must take place within seven days, unless the respondent agrees to a longer period or waives the conference; the petitioner and the investigating staff may submit written briefs to the General Counsel no later than three business days before the conference; and the General Counsel must decide the matter within three business days of the conference.<sup>14</sup> DOJ procedures for appealing Second Requests are detailed in the Second Request Internal Appeal Procedure.<sup>15</sup>

18. The FTC also provides an additional avenue for parties to object to an information request -- the opportunity to file with the Commission a motion to quash or limit a subpoena or CID. If the Commission does not grant the motion to quash or limit, the party is required to comply with the subpoena within a set period of time. Should the party not comply with the subpoena, the Commission would be required to petition a federal district court for an order enforcing and requiring compliance with the subpoena or CID. The party then would have the opportunity to make any objections to the subpoena or CID to the court to convince it to deny the Commission's petition for enforcement.

#### 4. Confidentiality

19. As noted, the Agencies highly value open communication with the subjects of antitrust investigations. At every stage, parties are encouraged to meet with the lawyers and the economists charged with investigating the conduct at issue. These discussions encompass the procedural course of the investigation (including the scope of document requests) and staff's substantive theories of the case. They are, of course, subject to appropriate confidentiality constraints. Effective protection of confidential information provided to the Agencies by parties and third parties is essential to creating an environment in which the Agencies can efficiently obtain the sensitive information they need to evaluate conduct and, if necessary, prove the case in an adjudicative forum. It is, of course, also important to prevent competitively sensitive information from being shared among competitors.

20. Consistent with the practice in other jurisdictions, the same U.S. federal statutes that provide authority for the Agencies to obtain information from parties and third parties in civil investigations also provide for confidential treatment of submitted information.<sup>16</sup> Thus, the Agencies have developed rules and policies for the treatment of information to ensure that, while they obtain comprehensive information regarding the topic of the investigation or action, they also balance the need to protect confidential information obtained in enforcement matters against the need to provide targets of competition

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<sup>12</sup> See generally 16 C.F.R. § 2.20; MRPI, pt. III.

<sup>13</sup> See 16 C.F.R. § 2.20(b)(4); *Second Request Internal Appeal Procedure* (2001), available at <http://www.justice.gov/atr/public/8430.pdf>.

<sup>14</sup> For more information on Second Requests, see COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 2 (2006), available at <http://www.justice.gov/atr/public/guidelines/215247.pdf>.

<sup>15</sup> See *supra* note 13.

<sup>16</sup> See, e.g., 15 U.S.C. § 18a(h).

enforcement proceedings with the evidence forming the basis of the case against them to allow them fairly to defend themselves. During the course of an investigation, information provided by parties under investigation or by third parties is generally treated as confidential by the Agencies, both as a matter of policy and pursuant to statutory restrictions.<sup>17</sup> The Agencies are especially careful to protect the identities of any complainants. Thus, although the Agencies will often share the nature of their concerns with potential defendants, as well as their general understanding of the facts and evidence, throughout the course of their investigations they will not – and, indeed, cannot – share specific confidential information submitted by third parties.

21. First, during the course of an investigation, the Agencies may obtain information through compulsory process (*e.g.*, CIDs or subpoenas) or through voluntary cooperation. In the case of the FTC, for materials obtained through compulsory process,<sup>18</sup> the FTC takes physical possession through a designated custodian, who generally must not allow members of the public to have access to the materials without the permission of the submitter, and must return the materials upon request at the conclusion of an investigation or after a reasonable period of time has elapsed and the material has not been received into the record of a proceeding. The custodian may copy materials submitted as necessary for official use, and may permit them to be used in connection with obtaining oral testimony. DOJ confidentiality requirements for CID materials are governed by statute, and summarized in section III.E.6 of the Division Manual.<sup>19</sup>

22. The FTC must also treat information obtained outside of compulsory process (*i.e.*, voluntarily)<sup>20</sup> as confidential when so marked by the submitter. The FTC may release such information if it determines that it is not a trade secret or confidential or privileged commercial or financial information, but it must provide the submitter 10-day advance notice to bring an action in federal court to restrain and stay disclosure of information based on the submitter’s contention that the information constitutes a trade secret or confidential or privileged commercial or financial information. Similarly, DOJ has developed policies for the treatment of voluntarily-provided information.

23. The Agencies may also obtain confidential information from third parties, such as competitors or customers of a respondent. The Commission, in order to address the confidentiality concerns of such parties, includes a model protective order in its Part 3 Rules that governs the use of these materials by the Commission and the respondent if a matter proceeds to an administrative adjudication. In addition to requirements generally to protect the information from the public, such as placing confidential materials under seal and requiring *in camera* review of any sensitive information, the model order also balances the need of respondent and the need to keep a third-party’s sensitive materials from being shared with a

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<sup>17</sup> For investigations of notified mergers, section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of any information provided to DOJ pursuant to the Hart-Scott-Rodino (“HSR”) Act, *except* “as may be relevant to any administrative or judicial action or proceeding” to which the FTC or DOJ is a party, or to Congress. Information obtained from CIDs is governed by the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), (d), which provides that no material B documents, interrogatory responses, or deposition transcripts B received in response to a CID may be made public unless the submitter has waived confidentiality. CID material also may be used in courts, administrative bodies, or grand juries. HSR and CID materials are expressly exempted from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Information provided voluntarily to the DOJ (*i.e.*, not under HSR or pursuant to a CID) does not receive statutory protection; however, as a matter of policy the DOJ typically does not disclose such information without good cause. For more information on FOIA, see *infra* note 30.

<sup>18</sup> See generally 15 U.S.C. § 57b-2(a), (b). “Material” means “documentary material, written reports or answers to questions, and transcripts of oral testimony.” *Id.* § 57b-2(a)(1).

<sup>19</sup> See discussion *supra* note 17.

<sup>20</sup> See generally *id.* § 57b-2(c), (d).

competitor.<sup>21</sup> The model order accomplishes this goal by limiting the disclosure of such materials to the administrative law judge and staff, Commission employees, outside counsel of record for any respondent (provided they are not employees of a respondent) and anyone retained by outside counsel to assist in hearing preparation (provided they are not affiliated with a respondent, and any witness or deponent who may have authored or received the information in question). Thus, for the respondent, the model protective order requires disclosure to be limited to outside counsel, and does not allow confidential third-party materials to be disclosed to in-house counsel or business employees of the respondent.<sup>22</sup>

24. Upon receiving an appropriate request from a congressional committee, the FTC may share confidential information. When it receives such a request, the FTC typically seeks to minimize the exposure of any confidential materials by making presentations to congressional members or their staff in confidential briefings, before which the FTC notifies the members and their staff in writing about the confidential nature of the information to be provided and requests that the information remain confidential. The FTC also notifies the submitter of the information that it has received a congressional request.<sup>23</sup> The FTC may also share confidential information with other federal or state law enforcement agencies, if the requesting agency certifies that the information will be maintained in confidence and used only for law enforcement purposes.<sup>24</sup>

25. Should the Agencies decide to file a case in federal court, absent a settlement, the parties would have an opportunity to see the specific evidence against them in accordance with constitutional provisions and federal rules of civil procedure as administered by independent federal judges.<sup>25</sup> Federal judges have a broad range of tools available, including protective orders, to protect confidential business information and the rights of parties, and the Agencies typically will support the entry of an appropriate protective order to govern the use of confidential information throughout the litigation.<sup>26</sup> The terms of such protective orders

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<sup>21</sup> See 16 C.F.R. § 3.31 App. A.

<sup>22</sup> *Id.* ¶ 7.

<sup>23</sup> For DOJ procedures relating to disclosure to Congress, see DIVISION MANUAL III.E.6.b.ii.

<sup>24</sup> In addition to publicly-available information, the Agencies and foreign competition agencies possess, and develop during the investigation, relevant information that they are empowered, but not mandated (as in the case of confidential business information), to keep confidential. Such “confidential agency information” can include the fact that an investigation is taking place, the subject matter, and the agencies’ analysis of the matter, including market definitions, assessments of competitive effects, and potential remedies. Agencies typically share such information while maintaining its confidentiality outside the agency-to-agency relationship. See INT’L COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS 3-4 n.11 (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

<sup>25</sup> The statutes governing both HSR and CID material permit the use of such material in federal court proceedings.

<sup>26</sup> DIVISION MANUAL III-70-73 (citing H.R. Rep. No. 94-1343, at 2610 (1976)) (“Once a case is filed, the use of CID material [by the DOJ] in that case will typically be governed by a protective order issued by the court in which the suit is pending. Whenever a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information gathered in the investigation that is relevant to their defense. ... [D]efendants will thus be able fully to protect their rights at trial by interrogating, cross-examining, and impeaching CID witnesses.... [T]he scope of civil discovery is not unlimited and ... the court has broad discretion under the Federal Rules to set limits and conditions on discovery, typically by issuing a protective order.”); 15 U.S.C. § 57b-2(d)(1)(C) (providing that confidentiality restrictions shall not prohibit “the disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party”).



may vary, but it is not uncommon during pretrial proceedings for such orders to require especially sensitive information to be filed under seal with access limited to the parties' attorneys.<sup>27</sup>

26. Regarding the FTC's administrative process, the confidentiality protections continue to apply if the FTC files an administrative complaint pursuant to Part 3 of its rules or an action in federal court. The FTC's rules provide that material obtained through compulsory process, information that is marked confidential, and confidential commercial or financial information may be disclosed in administrative or court proceedings, but state that the submitter will first be given an opportunity to seek an appropriate protective or *in camera* order from the adjudicator.<sup>28</sup>

27. Several laws, regulations, and procedures provide for sanctions for breaches of the confidentiality laws.<sup>29</sup> Perhaps most importantly, the Agencies' employees (from the day they begin work) are instructed in the importance of protecting confidentiality. Agency staff is made well aware that improper disclosures of confidential information will not be tolerated.<sup>30</sup>

## 5. Agreed resolutions of enforcement proceedings

28. As reported in our February 16 submission, the Agencies are open to settlement negotiations at virtually every stage of an antitrust investigation<sup>31</sup> or trial proceeding.<sup>32</sup> There are no restrictions on the

<sup>27</sup> DIVISION MANUAL III-70-73 ("The [DOJ Antitrust] Division's position on the reasonableness of protective orders is guided by balancing the public interest in conducting litigation in the open to the greatest extent possible, *see* 28 C.F.R. § 50.9, against the harm to competition from having competitively sensitive information disclosed to competitors. Staffs should also keep in mind that the disclosure of third-party confidential business information obtained through CIDs may cause third-party CID recipients to be less cooperative with the Division in the future. . . ."); 16 C.F.R. § 3.31 App. A (FTC's Part 3 model protect order).

<sup>28</sup> 16 C.F.R. § 4.11(g).

<sup>29</sup> The Trade Secrets Act, 18 U.S.C. § 1905, provides criminal penalties (fine of up to \$1,000 and/or up to one year imprisonment, and removal from employment) for unauthorized disclosure of confidential business information by government employees. The Theft of Government Property statute, 18 U.S.C. § 641, provides criminal penalties (fine and/or imprisonment up to 10 years) for theft of any record or "thing of value" (including information) possessed by the U.S. government. Finally, the Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.703, prohibits the improper use of non-public information by an Executive Branch employee to further his or her own private interest or that of another person; any violation may be cause for appropriate corrective or disciplinary action.

<sup>30</sup> Another aspect of the issue of the confidentiality of information submitted to the federal government in the United States is FOIA. 5 U.S.C. § 551 *et seq.* FOIA generally permits any person to obtain access to "records" of federal agencies, unless they are protected from disclosure by statute or by one or more FOIA exceptions. Particularly sensitive materials that the FTC receives, such as information in pre-merger filings and materials received pursuant to compulsory process, are generally exempt from public disclosure. 15 U.S.C. §§ 18a(h), 57b-2(f). In addition, one of the exemptions to FOIA permits agencies to withhold "records or information compiled for law enforcement" if certain conditions are satisfied. 5 U.S.C. § 552(b)(7).

<sup>31</sup> Even when a party is willing to settle at any stage of an investigation, the Agencies must have sufficient information to be satisfied that there is a sound basis for believing that a violation will otherwise occur before negotiating any settlement. *See, e.g.,* ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), available at <http://www.justice.gov/atr/public/guidelines/205108.htm>.

<sup>32</sup> Under the Federal Rules of Civil Procedure, the Agencies can accept a settlement at any point prior to entry of a final judgment, or during the pendency of an appeal.

kinds of cases that the Agencies can settle. The Agencies view the opportunity for settlement as an essential part of their role as antitrust enforcers. First, an appropriate settlement is often sufficient to achieve the goals of antitrust enforcement while conserving resources. Second, providing the parties with the opportunity to present settlement options and to discuss consensual resolution is a key aspect of a fair and transparent investigation process. Both merger and civil non-merger cases often are resolved in a settlement in which the company agrees to certain conditions but does not admit to the alleged law violation.<sup>33</sup>

29. For DOJ settlements, prior to entry of judgment the court determines whether the settlement is in the public interest after reviewing the proposed settlement and public comments received in accordance with the Tunney Act, 15 U.S.C. § 16.

30. As part of consummating a settlement, the FTC files both a complaint and a settlement document; in order to issue a complaint, the FTC Act requires the agency first to “have reason to believe” that the respondent “has been or is using any unfair method of competition,” and to find that “a proceeding by it in respect thereof would be in the interest of the public.”<sup>34</sup>

## **6. Judicial review and interim relief**

### **6.1. *FTC practice***

31. As indicated, the FTC’s antitrust enforcement process usually involves an administrative trial, which is conducted pursuant to Part 3 of the agency’s rules and overseen by an administrative law judge, who will resolve the matter by issuing an initial decision. The respondent has a right to appeal the initial decision to the full Commission, which will conduct a *de novo* review of the administrative law judge’s decision. The respondent can then appeal the final decision of the full Commission to a U.S. court of appeals and to petition the U.S. Supreme Court to review the court of appeals decision. These courts will review the Commission’s legal conclusions *de novo*, while accepting its findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>35</sup> The Administrative Procedure Act generally governs court review of agency decision-making. Although divestiture orders are stayed until all appeals are exhausted, any other order of the Commission becomes final unless the respondent seeks a stay from the Commission. If the Commission denies the stay, the respondent may seek a stay from the court of appeals.

32. As also indicated, the FTC may seek interim relief in aid of its administrative proceeding by seeking a preliminary injunction in U.S. district court, such as to block a merger. In deciding whether to grant a preliminary injunction, the court’s task is to determine, “weighing the equities and considering the Commission’s likelihood of success, [whether] such action would be in the public interest.”<sup>36</sup> The district court’s action is subject to review by a federal appeals court and ultimately the U.S. Supreme Court. There are no defined timetables for the court to rule on the preliminary injunction, but given the importance and urgency of the issues involved in such a proceeding, the court typically acts as quickly as it can, given its caseload.

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<sup>33</sup> Indeed, more than three quarters of all merger cases filed by the DOJ are settlements incorporating a consent decree negotiated with the parties.

<sup>34</sup> 45 U.S.C. § 45(b).

<sup>35</sup> *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

<sup>36</sup> 15 U.S.C. § 53(b).

33. The Part 3 Rules also include strict deadlines to expedite its process. For example, the administrative law judge must file the initial decision within 70 days of the filing of the last-filed proposed findings, conclusions and order, or 85 days from the closing of the record if the parties waive filing of proposed findings.<sup>37</sup> Subsequently, in cases in which the Commission seeks interim relief in a U.S. district court, the Commission automatically reviews the initial decision and must issue a final appeal decision within 45 days of the oral argument or, if no oral argument is scheduled, within 45 days after the deadline for the filing of objections.<sup>38</sup> In all other cases, the objecting party may file an appeal, and the Commission must issue its final decision within 100 days after oral argument or, if no oral argument is scheduled, within 100 days after the deadline for the filing of any reply briefs.<sup>39</sup>

## 6.2. DOJ practice

34. As previously noted, absent a settlement, DOJ enforcement action is initiated in a federal district court, and thus the initial binding determination of whether a violation of the antitrust law has occurred is made by an independent federal district judge.<sup>40</sup> The judge in an antitrust case gives no deference to DOJ's decision to file a lawsuit -- the burden of proof is always on the plaintiff, *i.e.*, DOJ, and DOJ must prove its case by a preponderance of the evidence in the same way as other plaintiffs in federal litigation.

35. Because DOJ is a law enforcement agency that does not have an adjudicative function, it cannot order the parties to take (or not to take) action, and therefore its decisions to seek relief do not result independently in a sanction or remedy. DOJ can seek interim relief from a court, for instance a temporary restraining order (TRO) or a preliminary injunction (PI), prohibiting a merger until a court has had a chance to hold a more comprehensive hearing in the case of a TRO or a full evidentiary trial in the case of a PI. The decision whether to grant such interim relief rests with the court. Courts have fairly wide discretion as to what kind of interim relief to grant (or not grant). Following a trial, the judgment of the district court is ordinarily effective when entered by the court. In the event of an appeal, parties may request relief from the judgment pending appeal from both the trial court and the court of appeals.

36. The timing as to federal district court hearings and decisions is generally within the discretion of the federal district court and will depend on the particulars of the case, the judge's calendar, the complexity of the matter, and many other factors. To the extent matters are time-sensitive, that can be brought to the court's attention. The time from the filing of a case to a hearing on the merits varies widely, and can be quite short (for instance, in a particularly time-sensitive merger case) or can take one or more years (for instance, for a very complex monopolization case). In general, though, merger cases usually go to hearing or a preliminary injunction within several months after the case is filed. There are no special rules for expedited appellate procedures for antitrust cases, but the parties can inform courts of special timing considerations that may affect scheduling arguments and deciding appeals.

## 7. Conclusion

37. Both Agencies have found that transparent and fair processes with parties during civil investigations facilitate our enforcement. Before making any prosecutorial decision, both Agencies conduct thorough investigations, and must follow internal procedures that ensure that they consider all relevant (including countervailing) evidence and legal issues. These procedures include, for example, seeking a substantive dialogue with the parties to encourage them to provide any relevant counter-

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<sup>37</sup> 16 C.F.R. § 3.51(a).

<sup>38</sup> 16 C.F.R. § 3.52(a).

<sup>39</sup> *Id.* § 3.52(b)(2).

<sup>40</sup> There are no juries in federal civil litigation.

arguments or facts that may support the parties' positions, providing the parties with the Agencies' view on an investigation's progress and the legal theories supporting the investigation, and allowing for internal assistance and independent review of the investigation's development by high-level management, economists, and other experts. Throughout the process, the Agencies are required to keep sensitive commercial information confidential, protecting the submissions of both parties and third parties by not disclosing such sensitive materials to the public. Finally, if the DOJ or the FTC formally requests information from targets through, for example, a subpoena, or bring enforcement actions against the targets, the opposing parties have the opportunity for independent review in federal district court. The agencies regularly review their procedures and practices and update them when necessary to further the public interest and provide a fair and open dialogue with parties.