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ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE PROCEEDINGS

-- United States --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

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1. Substance and process in government antitrust investigations go hand in hand. Regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome.

2. This submission provides an overview of the practices of the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies") with regard to transparency and procedural fairness. Part I discusses transparency with respect to substantive standards and agency policies and procedures. Part II discusses open and frequent dialogue with the parties, and Part III addresses the closely related issue of informing parties of the allegations against them in a timely manner. Parts IV and V describe the opportunities that parties are given to respond to agency concerns and to be heard prior to an adverse decision. Part VI addresses the length of antitrust investigations, and Part VII summarizes the Agencies' practice with regard to the publication of decisions.

3. Although the Agencies' investigatory processes are similar, their enforcement processes differ procedurally. DOJ is a cabinet department of the U.S. government, and must initiate an enforcement action in an appropriate U.S. district court. The court determines whether the law has been violated and orders any relief or remedy required. The FTC is an independent agency that enforces competition and consumer protection laws and may use its own administrative processes, codified in Part III of its rules, to enforce the law. Under this process, the Commission, 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. The FTC thus exercises both prosecutorial and judicial, functions.[1] The FTC 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.[2] The Commission's process affords respondents procedural rights that are quite similar to those in a court proceeding. Thus, even though the Agencies' processes differ, both agencies provide procedural fairness to subjects of enforcement proceedings.

1. Transparency of substantive standards and agency policies and procedures

4. There are three primary antitrust statutes in the United States: the Sherman Act,[3] which became law in 1890; the Clayton Act,[4] which was enacted in 1914; and the Federal Trade Commission Act,[5] which also became law in 1914. Under the United States common-law system, independent courts issue

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1 Representative Covington, who authored the original bill that led to the FTC Act, emphasized that the agency would have specialized expertise and experience, and thus should have both prosecutorial and judicial functions: "[T]he function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order discontinuance of its use. In doing so, it will exercise power of a judicial nature…. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature." Congressional Record, Sept. 10, 1914, at 14931-33.

2 15 U.S.C. § 53(b). Under the same provision of the FTC Act, the Commission may also seek permanent injunctive relief.

3 15 U.S.C. § 1 *et seq.* The Sherman Act is enforced by DOJ.

4 15 U.S.C. § 12 *et seq.* The Clayton Act is enforced by both DOJ and the FTC.

5 15 U.S.C. § 45 *et seq.* The FTC Act, Section 5 of which encompasses violations of the Sherman Act, is enforced by the FTC.

decisions that apply the general statutory provisions to specific facts as presented through adversarial litigation. As the United States Supreme Court has explained:

> *Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.*[6]

5. The extensive body of court decisions under the common-law system is an important way that substantive legal standards become known and transparent to the business community, lawyers, economists, and consumers.[7] In addition, the FTC, through its administrative enforcement process, contributes to the body of decisional law interpreting the Clayton and FTC Acts.

6. The Agencies also publicize substantive guidance, including information about how they decide whether to open an investigation or challenge conduct on antitrust grounds. Both agencies have published guidelines, available on their websites, that describe the standards they use to analyze various kinds of conduct that could raise an antitrust concern.[8] The best known of these guidelines are the Horizontal Merger Guidelines[9] which reflect the best practices and thinking regarding substantive merger review. They periodically have been revised since first adopted over forty years ago, and currently are under review. To increase transparency, the Agencies supplemented the Merger Guidelines in 2006 with a Commentary on how they apply the Guidelines in particular investigations.[10] The Agencies also have published similar guidance regarding collaboration among competitors,[11] issues concerning intellectual property,[12] and particular industries.[13]

7. These formal guidance documents are supplemented in various ways. Officials from the Agencies frequently speak about the substantive direction in which they intend to move,[14] and file *amicus*

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6 *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

7 *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877, 899 (2007) ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.").

8 *See generally* http://www.justice.gov/atr/public/guidelines/guidelin.htm; http://www.ftc.gov/bc/guidance.shtm.

9 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

10 COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm.

11 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

12 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

13 *See, e.g.*, U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), *available at* http://www.justice.gov/atr/public/guidelines/1791.pdf.

14 *See, e.g.*, Christine A. Varney, Assistant Attorney General, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General (Oct. 7, 2009) at 7-14 (describing a possible direction for the law of resale price maintenance), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf, and among others, addressing issues related to

curiae briefs in private litigation that describe their policies.[15] The Agencies provide guidance to businesses about the legality of proposed conduct under the antitrust laws. In particular, through FTC staff advisory opinion letters and DOJ business review letters, persons concerned about the legality of proposed business conduct may request the Agencies to state their respective antitrust enforcement intentions.[16] Both agencies also actively participate in competition-related academic, professional, business, and governmental forums, including, for example, the Organisation for Economic Co-operation and Development, the International Competition Network, and the American Bar Association's Antitrust Section. In addition, both agencies engage in advocacy in public policy or regulatory proceedings conducted elsewhere in the government. The Agencies' officials also regularly publish articles in print and electronic journals. This all allows for an active dialogue among the business community, antitrust lawyers, economists, academics, and the agencies regarding the substantive standards involved in initiating, litigating, and closing antitrust investigations.

8. Transparency on substance is matched with equal emphasis on procedural transparency. As Assistant Attorney General Christine Varney has emphasized, this aspect of transparency – allowing parties and the public to understand *how* the agency makes decisions – is vitally important.[17] For that reason, DOJ's internal practices and procedures are exhaustively described in the Antitrust Division Manual, which is published on its website.[18] DOJ also created its Merger Review Process Initiative[19] to facilitate dialogue with the parties on the procedural aspects of merger review, especially the timing of the process. DOJ's criminal cartel enforcement website similarly provides a wealth of information regarding its leniency program and other elements of its cartel investigations.[20] Finally, DOJ civil staffs are quite

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Section 5 of the FTC Act and the review of the Horizontal Merger Guidelines, *Chairman Jon Leibowitz*: *Priorities and challenges for the US Federal Trade Commission*, Concurrences No. 1-2010 at 1-6, *available at* http://www.concurrences.com/article_revue_web.php3?id_article=30209&lang=en.

15 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, American Needle, Inc. v. Nat'l Football League, No. 08-661 (2009), *available* at http://www.justice.gov/atr/cases/f250300/250316.pdf. DOJ makes all of its appellate briefs readily available on its website http://www.justice.gov/atr/public/appellate/appellate.htm. The FTC's *amicus* briefs are available at its website http://www.ftc.gov/ogc/briefs.shtm.

16 An overview of DOJ's business review process, as well as past business review letters, is *available at* http://www.justice.gov/atr/public/busreview/201659a.htm. An overview of FTC's advisory opinion process, including previous opinions, is *available at* http://www.ftc.gov/bc/advisory.shtm.

17 *See* 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) at 2, *available at* http://www.justice.gov/atr/public/speeches/249974.pdf.

18 *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL (2008) *available* at http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf.

19 *See* http://www.justice.gov/atr/public/220237.htm.

20 *See* http://www.justice.gov/atr/public/criminal.htm. With respect to criminal cartel matters, DOJ has worked for over a decade to provide appropriate transparency. We have: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements; (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Leniency Program. For a more detailed discussion on transparency in the Antitrust Division's criminal enforcement program, *see*, Gary R. Spratling, Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders, presented before Fordham Corporate Law Institute (October 15, 1999), *available at* http://www.justice.gov/atr/public/speeches/3952.htm; Scott D. Hammond, Cornerstones of an Effective Leniency Policy, Speech Before the ICN Workshop on Leniency Programs at Section V (Nov. 22-23, 2004), *available at* http://www.justice.gov/atr/public/speeches/206611.htm; and Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD

open with the parties regarding how an investigation is proceeding and when major landmarks are approaching. Together, these sources give parties a good idea of how DOJ will evaluate matters before it, especially the identities of the key decision makers and the timetable of important events.

9. The FTC's practices and procedures for investigating and enforcing the competition laws for which it is responsible are also transparent. The Commission's procedures are codified in its publicly-available Rules of Practice; Part II relates to investigational procedures, while Part III, as indicated above, sets forth adjudicative procedures.[21] The FTC recently engaged in a comprehensive review of its Part III rules, including seeking and responding to public comment. The agency's pre-merger notification requirements are fully set forth in subchapter H of the Commission's rules.[22] FTC staff communicates with parties about how an investigation is proceeding and its schedule. While the timetable of a given investigation necessarily depends on the complexity of the factual and legal issues involved, the schedule for resolving an administrative adjudicative proceeding is defined expressly, as explained below.

10. FTC decision-making staff are easily identified. The agency's permanent, professional antitrust enforcement staff is housed primarily within its Bureau of Competition, with additional contributing staff provided by the Bureau of Economics and several Regional Offices, among others. Last year, the Bureau of Competition published a user's guide, which identifies its organizational structure, all competition-related staff, and how their work fits into the agency's maintaining competition mission.[23]

2. Open and frequent dialogue between antitrust agencies and the parties

11. The Agencies highly value open communication with the subjects of antitrust investigations, subject, of course, to appropriate confidentiality constraints.[24] 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)[25] and staff's substantive theories of the case.[26]

12. During an FTC investigation, staff is available to meet with the subject of an investigation at its request. Parties are free to request meetings with agency personnel, including investigating staff, the Director of the Bureau of Competition, and Commissioners, at the appropriate stage of the investigation.[27]

Competition Committee, Working Party No. 3 (October 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm.

21 *See* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3ad5b48a02eb1707974872e00175bbb5&c=ecfr&tpl=/ecfrbrowse/Title16/16cfrv1_02.tpl**.**

22 For information about premerger notification, *see* http://www.ftc.gov/bc/hsr/index.shtm.

23 *See* http://www.ftc.gov/bc/BCUsersGuide.pdf.

24 Of course, antitrust agencies must abide by a variety of confidentiality constraints (which Working Party 3 will discuss at its June 2010 session).

25 Indeed, this is a key object of DOJ's Merger Review Process Initiative. *See* http://www.justice.gov/atr/public/220237.htm. With respect to staff requests for additional documents following a pre-merger filing, the FTC's rules grant parties a right to discuss the requests with an authorized representative of the FTC, and outline a procedure for resolving any conflicts.[25] Similarly, DOJ provides an internal appeals process in merger investigations as early as the request for documents stage. *See* Second Request Internal Appeal Procedure (2001), *available at* http://www.justice.gov/atr/public/8430.pdf.

26 Criminal investigations are necessarily more secret: proceedings before the grand jury must be kept confidential under United States law, and investigations can include covert techniques.

27 Once the Commission has issued an administrative complaint, however, neither the respondent nor the Commission's litigating staff is permitted to have *ex parte* communications on the merits of the dispute

Parties are especially urged to open a continuing dialogue with agency economists early in any investigation, r to address issues related to the collection and analysis of relevant data and the applicability of different potential economic theories.[28] Parties are also free to submit "white papers" containing argument, facts, and theories they believe relevant during the investigation. Notably, Part II of the Commission's rules, which govern investigations, state: "Any person under investigation compelled or required to furnish information shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation."[29]

13. Similarly, in a typical DOJ investigation, these ongoing discussions with parties will engage more and more senior staff and policy officials, including the Deputy Assistant Attorneys General, as the investigation proceeds, allowing DOJ and the parties to refine and narrow the open issues.[30] Moreover, before any civil investigation matures into a lawsuit, parties ordinarily will have a chance to meet directly with the Assistant Attorney General, as well as present written materials outlining their positions in detail. Finally, parties are always free, at any stage of an investigation, to present relevant information or other facts directly to the investigating staff.

14. The agencies have found that this openness enhances their ability to investigate and prosecute successfully by focusing energies on the real areas of dispute. More important, this type of transparency ultimately helps the agencies make the right enforcement decision.

3. Informing parties of the allegations against them

15. As discussed above, the subjects of civil investigations have ample opportunity to interact with the Agencies' staff and senior officials and to discuss the theories that the agencies are pursuing during the investigational stage. If DOJ decides to bring an enforcement action, the allegations against the parties will be set forth in a complaint, which is filed in federal court and available to the public. If the FTC decides enforcement is warranted, the charges are identified in an administrative complaint, and, if the FTC is also seeking preliminary relief, in a federal court complaint.

16. If the FTC issues an administrative complaint, resolution of the matter is governed by the agency's Part III rules. Like the federal procedural rules that govern the Agencies' actions in court, the FTC's Part III rules require counsel for the agency and respondent to identify individuals likely to have information relevant to the proceeding, and to produce documents (or certain information about documents) relevant to the proceeding, subject to limited exceptions, such as privilege; they also authorize the parties to obtain other discovery from one another through a variety of means.[31] The parties must also identify their experts and produce reports prepared by, and permit pre-trial discovery of, these experts.[32]

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with those involved in the decision-making, such as an administrative law judge or the Commissioners. *See generally* 16 C.F.R. § 4.7. The purpose of these rules is to ensure procedural fairness, *i.e.*, to ensure that one party does not have the opportunity to influence resolution of relevant factual and legal issues without the other party's having an opportunity to respond.

28 *See* "Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations," *available at* http://www.ftc.gov/be/bestpractices.shtm.

29 16 C.F.R. § 2.6.

30 *See* Varney, Procedural Fairness, at 3 ("Frank exchange during all phases of an investigation allows us to conduct investigations more efficiently by focusing all parties on the real issues in dispute. Simply put, transparency and cooperation enhance enforcement efforts and are fully consistent with litigation tactics.").

31 *See generally* 16 C.F.R. § 3.31. As under the Federal Rules of Civil Procedure, parties to an administrative proceeding may, under the FTC's procedural rules, discover information from each other through

17. When an Agency's case proceeds to court, defendants are entitled under constitutional law and federal procedural rules to extensive review of the evidence that the Agencies have gathered for its case. The standard rules for discovery in civil litigation govern the Agencies' cases,[33] and those rules, for example, require the government (indeed all parties to a litigated matter) to provide documents, as well as the names of individuals, that it may use to support its claims, and entitle defendants to request documents from the government, to depose the government's witnesses, and to obtain substantial information about the government's expert testimony, if any.[34]

4. Opportunities to respond to agency's concerns

18. Entities under investigation have multiple opportunities to discuss their defenses or positions with staff lawyers and economists, and with senior management. They also have the opportunity to present written materials describing why the conduct under investigation should not be challenged or why proposed remedies would be sufficient to prevent competitive harm.

19. When an Agency's case proceeds to court, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor. These procedural rights include the right to legal representation, to present witnesses and documentary evidence, to cross-examine the government's witnesses and experts, to present legal arguments to the judge or jury as to why the case should not proceed, to test the legitimacy of documentary evidence, and to appeal any adverse determination. Although there are some statutory constraints on the timing of trials, the nature and timing of trial proceedings vary widely according to the needs of the parties and the judges' schedules.

20. The procedural rights granted to respondents in FTC adjudications are similar to those in a court proceeding. For example, at the administrative trial, the respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."[35] Under the FTC's rules, the trial is typically expected to occur within five months of the filing of the complaint in cases in which the agency is also seeking preliminary injunctive relief in federal court, and within eight months in all other cases.[36] Accounting for the administrative law judge's initial decision, as well as any review by the Commission of that decision, the administrative proceeding will typically conclude within fourteen months in cases in which the Commission has sought preliminary injunctive relief, and no longer than twenty months in all other cases. As a result, counsel for the Commission and the respondent have opportunities to present arguments to the adjudicator in a fair, organized, and timely manner.

21. The Agencies are open to settlement negotiations at virtually every stage of the antitrust investigation or trial proceeding.[37] The Agencies view the opportunity for settlement as an essential part of

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depositions, written interrogatories, production of documents, and requests for admission. *Id*. *See* also 16 C.F.R. §§ 3.32 (admissions), 3.33 (depositions), 3.35 (interrogatories), 3.37 (production of documents). Of course, parties may also obtain discovery from third parties. *See, e.g.,* 16 C.F.R. § 3.34.

32 16 C.F.R. § 3.31A.

33 *See* Fed. R. Civ. P. 26-37, *available at* http://www.uscourts.gov/rules/CV2008.pdf.

34 In criminal cases, U.S. constitutional guarantees require other sorts of affirmative disclosures. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

35 16 C.F.R. § 3.41(c).

36 16 C.F.R. § 3.11(b)(4).

37 Of course, even though a party may be willing to settle early in 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

their role as antitrust enforcers -- an appropriate settlement is often sufficient to achieve the goals of the antitrust enforcement while both conserving resources and enabling the parties to achieve their legitimate business objectives. Accordingly, the Agencies view the opportunity for parties to present settlement options and to discuss consensual resolution as a key aspect of a fair and transparent investigation process.[38]

5. Opportunities to be heard before adverse decisions are taken

22. As indicated, DOJ cannot unilaterally order parties to take or not take certain actions (*e.g.*, block a merger). Instead, DOJ must file a lawsuit in court to obtain relief, and defendants to such lawsuits are entitled to a formal hearing or trial before a court takes final action against them. As noted above, once a case proceeds to trial, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor.

23. The FTC, by contrast, has the power to order respondents to "cease and desist" from anticompetitive practices if the Commission finds, after a full administrative proceeding, that a law violation has occurred. Parties may seek reconsideration of that decision as well as a stay by a federal appellate court. As explained above, parties have the opportunity to be heard through these processes before a decision is made against them. If the FTC wishes to block a merger pending an administrative proceeding to determine the lawfulness of the transaction, however, it must, like DOJ, seek relief in U.S. district court.

24. There is no opportunity for a formal hearing before either of the Agencies before the Agencies decide to file a complaint. However, as discussed more fully above, both agencies afford parties in civil investigations significant ongoing informal opportunities to be heard on the merits before deciding whether to bring a lawsuit. As mentioned, parties in civil matters are able to submit written materials detailing their positions, and they typically are able to meet directly with the Assistant Attorney General in the case of DOJ, Commissioners in the case of the FTC, and other senior officials at either agency, to explain their case. It is not unusual for the agencies to alter or refine their thinking in response to those meetings and submissions. While this procedure does not involve formal witness testimony, business executives and industry or economics experts, as well as the parties' lawyers, often attend to explain their views.

6. Length of agency investigations

25. For both Agencies, the time limits of merger review are structured by the Hart-Scott-Rodino ("HSR") Act.[39] Under the HSR system, merging parties notify both agencies before consummating

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REMEDIES (2004), available at http://www.justice.gov/atr/public/guidelines/205108.htm. 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." 45 U.S.C. § 45(b).

38 In criminal cartel matters, DOJ has strived to maximize transparency in the plea negotiation context to help companies predict in advance how they will be treated if they offer to cooperate pursuant to a plea agreement. For a further discussion of transparency in the criminal cartel plea negotiation context, *see* Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee, Working Party No. 3, at Section II (October 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm; and Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Address Before the 54th Annual Spring Meeting of the ABA Section of Antitrust Law (March 29, 2006), *available at* http://www.justice.gov/atr/public/speeches/215514.htm.

39 15 U.S.C. § 18.

transactions exceeding certain monetary thresholds, and they may be required to wait additional time if the agencies need to review documents, obtain oral testimony, or consider other evidence before deciding whether a proposed transaction is anticompetitive.[40] Recognizing that even the full initial waiting period is not always necessary, the agencies allow, and frequently grant, requests for early termination of merger investigations.[41]

26. Conversely, some transactions warrant a more extended investigation. Because the HSR framework allows the agency to request documents and other information, and the transaction cannot be consummated until the parties have fully provided that information, the agency and the parties have an interest in limiting the volume of information provided and the length of the investigation. In 2006, the FTC announced reforms to its merger review process that allows for the parties to agree to a limitation on the scope of information requested by the agency in exchange for certain obligations regarding the prompt production of information and agreeing to delay consummation of the transaction.[42] The parties may, but are not required to, enter into a timing agreement with the FTC in accordance with this process. Similarly, DOJ, through its Merger Review Process Initiative,[43] endeavors to negotiate process and timing agreements with the parties that ensure a timely but complete investigation. These discussions involve an agreement that the parties will delay closing the transaction in exchange for limits on document production and a reasonable schedule for engaging substantively with DOJ, further document production, depositions, and other major investigatory milestones.[44] The timing in merger matters, however, is ultimately determined by the HSR statutory time limits for review. The parties, absent an agreed-upon schedule that alters this timing, are free to proceed according to those time limits.

27. In civil non-merger cases, there are no formal time limits on the length of investigations. To conserve scarce resources and ensure that anticompetitive behavior is timely challenged, however, both agencies endeavor to move investigations forward as quickly as possible, and to close investigations if they fail to progress.[45] As indicated above, if an investigation by the FTC results in an administrative complaint, the FTC's Part III rules establish a schedule to bring the adjudication to appropriate milestones and final resolution within defined periods of time.

7. Publication of agency decisions, including closing statements

7.1 FTC practice

28. The FTC may conclude a matter in one of three ways: (1) by issuing a final order at the conclusion of an adjudication conducted under Part III of its rules; (2) by entering into a settlement with the parties, during either the investigatory or enforcement stage; or (3) by concluding that no enforcement is necessary. Each of these actions results in a public announcement, except when the agency closes a pre-merger review.

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40 The time periods under the HSR Act govern when the parties may consummate their transaction; the agencies may bring a case even after the applicable statutory time periods have expired.

41 *See* http://www.ftc.gov/bc/earlyterm/index.shtml.

42 *See* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.

43 *See* http://www.justice.gov/atr/public/220237.htm.

44 *See* Model Process and Timing Agreement, *available at* http://www.justice.gov/atr/public/220240.pdf.

45 With respect to criminal violations of the Sherman Act, the statute of limitations is "five years . . . after such [an] offense shall have been committed."15 U.S.C. § 3282(a).

29. If the agency initiates an enforcement proceeding by issuing an administrative complaint, an administrative law judge will issue an initial decision after a trial. The complaint, hearing record, and initial decision are public documents, except to the extent they contain confidential information submitted by private parties.[46] Similar to a complaint filed in federal district court, the administrative complaint must contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law," as well as a "[r]ecital of the legal authority and jurisdiction for institution of the proceeding."[47] The initial decision is subject to review by the full Commission, and the Commission's decision, in turn, is subject to review by a U.S. court of appeals. Both of these decisions are also public documents.[48]

30. The Commission's acceptance of a proposed consent agreement also initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later.[49] If the FTC accepts a proposed consent agreement, the proposed agreement and complaint are available for public comment. To facilitate input by the public, the Commission simultaneously publishes an analysis to aid public comment, which explains in lay terms the violations alleged and proposed remedies. It is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm. After the comment period closes, the Commission evaluates the record and determines whether to accept, change, or reject the settlement.[50]

31. Of course, the Commission may also conclude an investigation without taking any enforcement action. If it does so, it sends a closing letter to the respondent. Generally speaking, closing letters are public, other than those associated with a transaction that triggered HSR pre-merger filings.

32. As part of its efforts to provide further transparency to its decision-making process, the FTC sometimes publishes public statements explaining the reasons for closing second-stage merger investigations.[51] As a general matter, publicizing the agency's rationale for declining to take enforcement

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46 Confidential information redacted from the public version is available to the respondent in a sealed version of the document.

47 16 C.F.R. § 3.11(b). The administrative complaint must also include a "form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint," and "[n]otice of the specific date, time, and place for the evidentiary hearing." *Id*.

48 Again, confidential information may be redacted.

49 16 C.F.R. § 2.32.

50 16 C.F.R. § 2.34.

51 *See, e.g., Statement of Bureau of Competition Director Richard Feinstein on the FTC's Closure of Its Investigation of Consummated Hospital Merger in Temple, Texas* (December 23, 2009), *available at* http://www.ftc.gov/os/closings/091223scottwhitestmt.pdf; *Statement of Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071-0170 (December 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf; *Statement of the Federal Trade Commission Concerning Federated Department Stores, Inc./The May Department Stores Company,* FTC File No. 051-0111 (August 30, 2005), available at http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf; and Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc**,** FTC File No. 021 0041 (October 2, 2002) available at http://www.ftc.gov/os/2002/10/cruisestatement.htm. For a detailed explanation of the Commission's analysis in the Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc matter, *see also* Joseph J. Simons, Merger Enforcement at the FTC,

actions in significant matters is a key element in informing the public about FTC practice and increases predictability for firms contemplating transactions likely to undergo federal merger investigation.[52] As former Chairman Majoras commented in 2007 in the context of issuing enforcement guidelines, "Because we are a law enforcement agency, we also strive to make certain that the business community and the public at large are well-informed about our competition policies. Ultimately, the FTC's work will not garner the needed public support unless we explain clearly the principles that apply and how we apply them."[53]

7.2 DOJ practice

33. The only adverse enforcement decision that DOJ can take in either a civil or criminal matter is to bring a civil lawsuit or criminal charge, which are by nature public events.[54] The minimum contents of civil complaints and criminal charging documents are a matter of federal procedural rules and Supreme Court case law. Those rules require a civil complaint to contain a "short and plain statement of the grounds for the court's jurisdiction," as well as a "short and plain statement of the claim showing that the pleader is entitled to relief."[55] At the pre-litigation stage, DOJ has numerous informal methods for considering the evidence offered by parties, including meetings between parties and staff or senior officials. Once a case proceeds to court, however, the submission and consideration of evidence is governed by federal rules of evidence and procedure, and any final judicial decision will be public.

34. Although there are no formal rules requiring DOJ to make a public announcement upon closing an antitrust investigation, it has a policy of doing so in significant civil matters.[56] It does so in part because "[p]ublic dissemination of enforcement and non-enforcement rationales benefits businesses attempting to comply with complex antitrust standards and consumers through a better understanding of the antitrust laws," and because "[t]ransparency of antitrust analysis helps international enforcers understand U.S. standards for antitrust enforcement, encourages international convergence on enforcement standards, and serves to prevent noncompetition issues from inappropriately influencing antitrust enforcement."[57] As Assistant Attorney General Varney has explained, the use of closing statements in civil matters was imported from the European Commission, and it represents an area in which DOJ is still learning and working to improve.[58] DOJ views those statements as an important element of transparency because they are the principal method through which non-enforcement decisions are explained. Closing statements enable parties to better understand enforcement decisions and feel that they are being treated fairly and

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Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (October 24, 2002), *available at* http://www.ftc.gov/speeches/other/021024mergerenforcement.htm.

52 *See* Joseph J. Simons, Report from the Bureau of Competition, Remarks Before the 51st Annual ABA Antitrust Section Spring Meeting (April 4, 2003), *available at* http://www.ftc.gov/speeches/other/030404simonsaba.htm.

53 Chairman Deborah Platt Majoras, Opening Remarks at the AEI/Brookings Joint Center Workshop on The Role of Competition Analysis in Regulatory Decisions (May 15, 2007), at 14, *available at*.http://www.ftc.gov/speeches/majoras/070515aei.pdf.

54 In rare cases, with leave of the Court, DOJ will file criminal antitrust charges under seal.

55 *See, e.g.*, Fed. R. Civ. P. 2, 3, 7-8; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A criminal indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. *See* Fed. R. Crim. P. 7 (c)(1).

56 *See* Issuance of Public Statements Upon Closing of Investigations (2003), *available at* http://www.justice.gov/atr/public/guidelines/201888.pdf.

57 *Id.*

58 Varney, Procedural Fairness, at 11.

impartially.[59] They also provide important guidance to the business community and antitrust lawyers on how similar transactions or conduct might be evaluated, allowing them to plan future business arrangements accordingly.

When DOJ concludes a civil antitrust investigation by settlement or consent decree, the Tunney Act requires a complaint, proposed settlement, and a competitive impact statement to be filed in federal district court.[60] The Act provides for wide publication of the details of any proposed settlement, and for a period of public comment on the proposal. The statute requires DOJ to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect.[61]
Finally, in the civil area, there are occasions in which potentially anticompetitive conduct is terminated before the filing of a complaint, such as the abandonment of a joint venture or a "fix-it first" divestiture of a portion of merging businesses. Although the Tunney Act does not apply to such situations, DOJ recognizes that such circumstances nonetheless merit an explanation as to why these steps satisfied its competitive concerns. Thus, it often issues press releases in such situations describing its analysis of the competitive effects of the actions that were being proposed and the steps being taken to address them.[62]

8. Conclusion

35. Both Agencies have found that transparent processes with parties during a civil investigation facilitate our enforcement efforts and further the public interest. Exposing our enforcement actions and the reasons behind them to scrutiny allows us to better understand and appreciate all of the facts, the underlying economics, and the law. In short, we believe that transparency of this nature is not only fair to parties but also leads to better enforcement.

59 *Id.*

60 15 U.S.C. § 16.

61 In criminal cartel matters, plea agreements are usually public documents, and the district court typically holds a public hearing before agreeing to accept the guilty plea. Fed. R. Crim. P. 11(C)(2) requires that the parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement *in camera*.

62 *See, e.g.*, Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/239167.pdf.