

## MERGER REVIEW PROCESS INITIATIVE

### I. STATEMENT OF PURPOSE

The objective of the merger review process initiative is to empower and encourage Division staff to actively tailor investigative plans and strategies according to each proposed transaction, in lieu of reliance on standardized procedures or models. This effort builds upon the process improvements implemented by the Division over the last few years. The staff, working together with the chiefs and deputies, and with support from the Office of Operations, will have considerable discretion to exercise judgment in devising an investigative plan. Key factors in tailoring an investigation will include the complexity of the transaction under review; the nature and magnitude of the competitive concerns at issue; the Division's expertise in the markets and issues under investigation; the volume, types and availability of information required to make an appropriate law enforcement decision; and the likelihood of litigation in the event of a decision to proceed with an enforcement action.

The goals are to more quickly identify critical legal, factual and economic issues regarding the proposed transaction, to facilitate more efficient and more focused investigative discovery and to provide for an effective process for the evaluation of evidence, in an effort to deploy the Division's investigative resources more efficiently. The initiative may also have the effect of reducing the investigative burden upon all concerned.

This document sets forth a basic framework for conducting merger investigations, assuming a high level of cooperation by both sides. It is the Division's hope that this framework will encourage such cooperation, toward the end of more quickly and more thoroughly investigating important issues. This document sets forth no mandatory procedures. Nor does it create any entitlements for parties proposing mergers. The Division's willingness to adopt any particular investigative approach will depend upon the specific circumstances of the proposed transaction, including the parties' willingness to engage on a cooperative basis.

### II. INITIAL 15- OR 30-DAY PERIOD

The staff is encouraged to be as aggressive as possible during the initial 15- or 30-day waiting period in attempting to dispense with transactions that are not candidates for further investigation, and to narrow and refine issues for transactions likely to progress to formal HSR Second Request inquiries. The success of this effort will require the active participation and cooperation of the parties, who may or may not wish to engage with the staff in an active process of identifying and resolving critical issues. Counsel representing parties are encouraged to be equally aggressive in framing issues for inquiry, substantiating claimed defenses and responding in a timely manner to staff requests.

A. Request to Provide Information Voluntarily

1. As soon as feasible during the initial waiting period, staff will contact the parties and request that they voluntarily provide preliminary information and documents tailored to the specifics of the proposed transaction. Depending on the specific issues raised by a transaction and the Division's expertise in the relevant area, a request might include, for example:
  - a. A list and description of all overlap and otherwise potentially relevant products;
  - b. Product/marketing brochures;
  - c. Business plans, market studies, strategic plans and information on market shares and competitor positioning;
  - d. A list of competitors, suppliers and customers;
  - e. Readily available data regarding sales and output; and
  - f. Analyses or studies regarding the transaction.
2. In order to ensure good faith compliance with voluntary requests, the staff may request that the parties describe the scope and nature of their search for the requested documents and information and certify that description of their search.
3. The earlier the information is provided, the sooner and more effectively the staff can determine whether a significant competitive concern exists or, if issuance of a Second Request is necessary, can tailor it to address the relevant issues.

B. Early Consultations Encouraged

1. Early substantive consultations are strongly encouraged. The goal of early consultations is to establish an effective process that will enable the Division to determine whether the investigation can be concluded prior to issuance of a Second Request and, if it cannot, to enable the Division to devise an appropriate investigative plan that includes a tailored Second Request. Consultations will provide an opportunity for both the Division and the parties to present their preliminary views on the transaction and to

identify issues requiring further inquiry. The success of such consultations will depend in large part on the cooperation between the staff and the parties.

2. As soon as possible, the Division staff will request a consultation with the parties to discuss the parties' views of the transaction, the structure of the organization and the industr(ies), recent changes in the industr(ies), etc. In most instances, the staff will request that appropriate business persons participate and that, where possible, parties provide relevant documents to support their contentions. These consultations will be most productive when the parties have provided the staff with any requested information and materials in advance of the meeting.
3. As part of the Division's efforts to engage the parties early in the process, the staff will, as early as feasible, discuss its current substantive evaluation of the transaction with the parties and attempt to identify critical or potentially dispositive issues. While the Division will endeavor in good faith to identify all such issues as soon as possible, certain issues may not be identified until later in the process. Accordingly, the Division will not consider arguments by the parties that the Division is essentially estopped from later raising issues that were not discussed with the parties early in the process.
4. If it appears that major issues are unlikely to be resolved prior to issuance of Second Requests, it may be more productive to focus on other issues that potentially could be resolved prior to issuance of the requests and assist in narrowing their scope.

C. Record Testimony and Interviews

1. Division staff may request interviews of personnel of the merging parties to develop issues or allow the narrowing of the Second Requests. Voluntary interviews will be the preferred methodology. Record testimony, however, may be requested in the limited instances in which it could make significant progress towards resolving important issues (*e.g.*, market definition, competitive overlaps, entry, efficiencies and failing firm defenses) or in other limited circumstances.
2. Division staff will also continue to actively interview customers, competitors and complainants and to seek limited submissions from them in order to evaluate the outstanding issues.

### III. ISSUANCE OF SECOND REQUESTS

If it is determined that issuance of Second Requests is necessary, the Division staff will use the knowledge gained within the initial 15- or 30-day period to tailor the Second Requests as narrowly as possible to the transaction and the goals of the investigation. The prospect of post-issuance, agreed modifications will not serve as a substitute for issuing tailored Second Requests in the first instance. The Second Request Model will serve simply as an example, and while it may in some instances serve as a useful starting point, particularly for some definitions and instructions, consideration must be given to whether a particular definition, instruction or specification is appropriate or should be narrowed or otherwise altered.

### IV. POST-SECOND REQUEST PERIOD

#### A. Regular Consultations

1. The element of surprise in modern merger enforcement practice is highly overrated. Both the Division and the parties to a transaction benefit from the frank exchange of ideas and evidence that allows both sides to identify and test the competitive theories for and against the transaction.
2. In appropriate circumstances, the Division may agree to meetings or teleconferences with the parties on a regular basis (*e.g.*, every two (2) weeks) throughout the investigation to promote a continuing dialogue and provide a regular opportunity to discuss progress made on both sides.
3. While the Division will endeavor in good faith to identify critical or potentially dispositive issues as soon as possible, certain issues may not be identified until later in the process. Accordingly, the Division will not consider arguments by the parties that the Division is essentially estopped from later raising issues that were not discussed with the parties early in the process.
4. In multi-issue investigations, once the Division determines that an issue that had been raised and discussed has ceased to be a concern, the Division will expeditiously communicate that to the parties.

#### B. Negotiated Frameworks Tailored to Goals of Investigation

1. The Division's chiefs, in consultation with the relevant Deputy Assistant Attorney General, will be authorized in appropriate cases to commit the Division to specific procedural agreements in exchange for specific

undertakings by the parties regarding their submission of information and compliance with particular investigative requests.

2. There will not be a single model for procedural agreements. Instead, the chiefs and deputies will have considerable discretion as to how, if at all, a procedural agreement should be structured based on the specific facts and issues involved in the case. Factors in fashioning an agreement will include the complexity of the transaction; the Division's expertise in the markets and issues under consideration; the nature and magnitude of the competitive concerns at issue; the volume, types and availability of information required to make appropriate law enforcement decisions; and the likelihood of litigation in the event of a decision to proceed with an enforcement action.
3. As soon as possible after Second Requests are issued, but generally no later than three (3) business days after issuance, the Division staff will contact the parties to discuss whether negotiation of a plan and schedule for the investigation would be appropriate under the particular facts of the case. If an agreement would be appropriate, some of the potential commitments *may* include, for example:
  - a. Commitments for modification of and compliance with Second Requests and other discovery, including ordered or rolling production, compliance dates, etc.
  - b. Dates for depositions of the parties' executives (which may be conditioned on receipt of certain documents in advance).
  - c. Date for the mutual exchange of economic data and information.
  - d. Date(s) for discussions between the Division's and the parties' economists.
  - e. Date by which the parties will submit white paper(s) and underlying datasets, and date or time period by or within which the Division will discuss the white paper(s) with the parties.
  - f. Date by which the relevant section will describe to the parties its recommendation to the front office.
  - g. Date(s) when the parties will meet with front office personnel.
  - h. A Division commitment that it will advise the parties as soon as the

Deputy Assistant Attorney General makes a recommendation.

- i. Time period within which the Division will respond to settlement offers made by the parties, if any.
  - j. Date before which the parties commit they will not close the transaction.
4. The staff might also consider in the appropriate circumstances negotiating a schedule to advance an alternative investigative path.
- a. For example, the staff might identify certain potentially dispositive issues (*e.g.*, failing firm, entry) or documents (*e.g.*, bid documents) and agree to a schedule for a “quick look” at those issues or documents and, if staff determined that the “quick look” was insufficient, agree to a schedule for the additional necessary phases of the investigation.
  - b. Or, the staff could agree to a schedule for a “quick look” at certain potentially dispositive issues or documents and excuse additional production in exchange for significant stipulations from the parties and adequate assurances of significant discovery, should the Division ultimately challenge the transaction.

Date: October 12, 2001