

February 25, 2002

The Honorable Timothy Muris
Chairman
Federal Trade Commission
6th & Pennsylvania Avenue, NW
Room 440
Washington, DC 20580

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OFFICE OF THE CHAIRMAN

Dear Chairman Muris:

On behalf of The Business Roundtable ("BRT"), the National Association of Manufacturers ("NAM"), and the U.S. Chamber of Commerce (the "Chamber") (collectively the "Business Community"), we are writing to urge that the Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") (collectively the "agencies") work together to resolve problems with "clearance" that too often impair the most efficient use of scarce antitrust enforcement resources.

The Business Roundtable is an association of chief executive officers of leading U.S. corporations with a combined workforce of more than 10 million employees in the United States. The BRT has a single objective: to promote policies that will lead to sustainable, non-inflationary, long-term growth in the U.S. economy. It is only through such growth that American companies will be able to remain competitive around the world and thus provide the technology and jobs that will continue to improve our standard of living and extend the benefits of that standard to all Americans. To promote growth, competitiveness, and exports, the United States must create the right environment for American companies at home and abroad.

The National Association of Manufacturers is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses, associations, and chambers of every size, sector and region. The U.S. Chamber continuously works to

promote the fundamental principles of free enterprise and recognizes our free market system is essential to achieving and maintaining a vibrant and productive economy.

The Business Community has frequently worked with Congress and the antitrust agencies to promote growth and competition with respect to regulatory and antitrust issues. Antitrust enforcement has a broad impact on American businesses and must be undertaken in ways that insure that businesses are not unduly burdened while assuring effective and efficient enforcement of the antitrust laws.

The U.S. has two antitrust agencies, which have largely overlapping jurisdiction, with certain exceptions.¹ When a matter arguably falls within the jurisdiction of both agencies, they need to determine which agency will review the matter. This process is called "clearance." When a new antitrust issue arises—whether in a proposed merger or other transaction, or an investigation of conduct that might violate the antitrust laws—the agencies resolve which agency will handle the investigation through consultation between them. There are traditional areas of expertise within each agency, and matters within those areas of expertise are typically "cleared" to that agency with little, if any, dispute.² However, where both agencies have an interest or expertise in the matter, there are often extended disputes over which agency will undertake the review. Most of these disputes are resolved by consultation among agency staff. In some instances, however, the dispute is resolved by negotiations directly between the FTC Chairman and DOJ Assistant Attorney General.³

¹ For example, only DOJ can prosecute criminal antitrust matters. The FTC lacks jurisdiction over some financial institutions. On the other hand, the FTC Act has in certain rare situations, been interpreted in a way that provides some additional flexibility.

² For example, the FTC typically handles oil industry and chemical mergers while DOJ handles airline and telephone mergers. For lists of industry expertise for both agencies, see ABA Antitrust Section, *THE MERGER REVIEW PROCESS* 447-84 (2d ed. 2001).

³ The Washington Post described this dispute resolution process as follows:

"There are a handful of industries in which both the FTC and Justice Department have expertise. So when a hot merger comes up, and the staff of each agency wants a piece of it, the assistant attorney general for antitrust and the FTC chairman have to sort it out. This had been done in an ancient ritual that included a series of athletic events such as arm wrestling, mud wrestling, greased-pig wrestling and a bull-riding competition, and an essay contest. Okay, we're making that up. Well, most of it. The agencies really *do* write essays explaining why they are best to review the mergers.

In many cases the clearance process works smoothly. But far too often there is an extended dispute that delays the resolution of clearance. This problem has occurred in merger and non-merger investigations. This problem was identified by the ABA Antitrust Section in its report to the incoming Clinton Administration in 1993,⁴ and again in its 2001 Report to the Bush Administration:

The Agency Clearance Process Needs to be Regularly Monitored By the Agencies.

The "clearance process," by which the enforcement agencies allocate responsibility for investigating a merger among themselves, in the past has consumed a significant part of the 30-day [HSR] waiting period in a number of transactions, leading to second requests occasioned solely by a lack of time to preliminarily review a proposed transaction and unnecessary re-filings to avoid such second requests. The 1993 Task Force Report recommended that regulations be promulgated under the HSR Act to require clearance no later than the 10th day of the waiting period and that unexceptional transactions be cleared in a week.

* * *

The Task Force believes that it is much more important that the clearance decision be made quickly than which agency eventually handles the matter, and suggests serious consideration be given to setting an absolute limit of ten days for all

And there really has been a lot of wrangling over who would get to review a merger. The 'discussions' would last more than two weeks sometimes, and that's almost half the 30 days in which investigators must decide whether to launch a more detailed review, called a "second request" for documents. Delays of more than 15 days occurred 32 times in 2000." *Washington Post* (Jan. 28, 2002).

⁴ 1993 Report of the ABA Antitrust Section Special Task Force on Competition Policy.

clearance decisions, if necessary made by a coin flip or some similar random method.⁵

There are far too many instances in which clearance disputes delay antitrust investigations in both merger and civil non-merger matters. For example:

- the clearance dispute over the investigation into Internet licensing practices in the music industry lasted more than 14 months;
- the dispute over ATT/Media One lasted two months;
- the dispute over the AOL/Time Warner merger lasted more than 45 days;
- disputes over mergers involving electric utilities and gas pipelines regularly extend for many weeks—Pacific Enterprises/Enova required 5 months to clear, while another electric utility/gas pipeline merger was cleared at 11 am on the 30th day of the HSR waiting period.⁶

During these extended delays, the 30-day HSR waiting period is running without any substantive work on the merger by either the agencies or the parties—or worse, the parties are meeting with staff of both agencies, which is a total waste of time for at least one agency. Too often, HSR second requests are issued because all or a substantial part of the initial 30-day waiting period was consumed by the clearance dispute, or, alternatively, the parties are encouraged to withdraw their filings and re-file to re-start the HSR waiting period and hopefully avoid a second request.

It is universally recognized that this process is not an example of good government. It wastes the time and resources on the part of both the agencies and the merging parties.

In an effort to eliminate these problems, FTC and DOJ proposed to execute an agreement on January 18, 2002, allocating specific industries between the agencies. Execution of the agreement was delayed, however, because of

⁵ ABA Section of Antitrust Law, *The State Of Federal Antitrust Enforcement – 2001: Report of the Task Force on the Federal Antitrust Agencies* at 28-29, reprinted at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

⁶ There are many other examples, including at least the following: Motorola/General Instruments; Allied Signal/Honeywell; MCN/DTE; Banc One/First Data; Friede Goldman/Halter Marine; Sierra Pacific/Nevada Power; Applied Materials/Obsidian; Primex/K Systems.

objections from Congress over the process used to negotiate the agreement and because of concerns about the allocation of media matters to DOJ.

There is no dispute over the need to improve the clearance process. In addition to Chairman Muris, who negotiated the agreement, three of the other four FTC Commissioners issued statements acknowledging the clearance problem and discussing the need for a solution.⁷

An agreed process for resolving clearance disputes and an agreed allocation of particular industries between the agencies would represent an exercise in "good government," be far more efficient than the current system, and also provide certainty to the business community, bar, and the agencies:

- It would allow the most efficient utilization of the time of the agencies and the merging parties, especially during the short HSR waiting period.
- The agency decision to issue a second request would be as fully informed as possible, and the time to determine whether a merger poses competition issues would be maximized to avoid unnecessary second requests, which are costly and time consuming for both the parties and the agency.
- It would be most efficient to allocate specific industries between the agencies to allow each agency to develop expertise in particular industries so they can rely on that expertise in reviewing antitrust issues in those industries based on that background rather than re-inventing the wheel.

⁷ For example, FTC Commissioner Sheila Anthony wrote: "The efficient division of work between the two federal antitrust enforcement agencies is a perennial challenge. The occasional delays endemic to the clearance process are frustrating for everyone involved. I strongly believe that it is incumbent upon the Commission and the Justice Department's Antitrust Division to cooperate on an ongoing basis to minimize clearance disruptions and delays. To the extent the plan announced today represents such an effort, I applaud it." Commissioners Thomas Leary and Orson Swindle wrote: "We can hardly find the words to express our disappointment at this forgone opportunity to install an improved clearance process that promised substantial benefits for merging parties, the antitrust bar, the business community at large, and the consuming public (not to mention the agencies themselves)." Even Commissioner Thompson, who opposed the agreement, acknowledged the clearance problem. *See Statements Concerning the Abandoned Memorandum of Agreement Between The Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations* (Jan 18, 2002), reprinted at <http://www.ftc.gov/opa/2002/01/index.htm>.


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- It will make government processes more transparent and provide assurance to the business community and the bar that transactions will be reviewed expeditiously and efficiently.
- The business community and bar will know in advance which agency is likely to review particular transactions, in situations that are not clear today. This will facilitate pre-announcement discussions with the agency in appropriate cases.

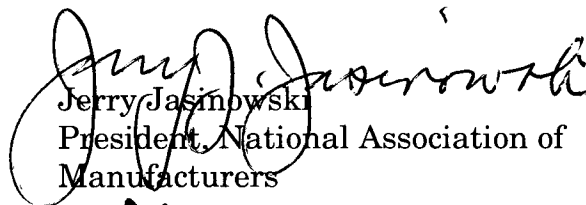
It is much more important that FTC and DOJ decide quickly which agency will handle an investigation than which agency will actually conduct the review. The Business Community does not believe that it should matter which agency reviews a particular matter since both agencies will apply the same legal standards and precedents. The Business Community supports the need for an agreement between the agencies to bring efficiency and certainty to the clearance process.

If you have any questions, we would be happy to respond.

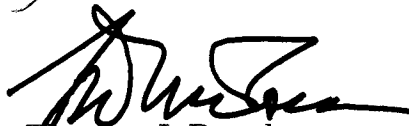
Very truly yours,



John J. Castellani
President, The Business Roundtable



Jerry Jasnowski
President, National Association of
Manufacturers



Thomas J. Donohue
President, U.S. Chamber of Commerce

cc: The Honorable Sheila Anthony
The Honorable Thomas Leary
The Honorable Orson Swindle
The Honorable Mozelle Thompson