



**MEMORANDUM OF AGREEMENT BETWEEN  
THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION  
OF THE UNITED STATES DEPARTMENT OF JUSTICE  
CONCERNING CLEARANCE PROCEDURES FOR INVESTIGATIONS**

1. On a number of occasions the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, “the agencies”) have exchanged correspondence and entered into agreements addressing the clearance process.<sup>1</sup> The agencies have agreed to refine this process, as reflected in this Memorandum. This Memorandum is intended to supersede existing practices, procedures, or agreements that are expressly modified herein, or that are inconsistent with the terms of this Memorandum.
2. The agencies issue this Memorandum for the purposes of effectiveness, cooperation, and efficiency in their law enforcement responsibilities, and to avoid unnecessary duplication of efforts. Each agency nevertheless retains full responsibility and authority for the discharge of its statutory duties. Nothing in this Memorandum in any way shall limit either agency in making an independent decision regarding what investigations it will undertake or in fulfilling its statutory responsibilities.
3. This Memorandum does not confer on any person any enforceable right or benefit.

**Harmonization of Practices**

4. The agencies will review their internal procedures for handling clearance matters and, wherever possible, will adopt common forms, terminology, and procedures regarding clearance. The agencies will develop a common Clearance Manual and, to promote transparency, will make the contents of the Clearance Manual available to the public on their web sites.
5. The agencies will maintain a common database to track Hart-Scott-Rodino filings and clearance matters.

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<sup>1</sup> See, e.g., 68 ATTR (BNA) 403 (1995); 4 Trade Reg. Rep. (CCH) ¶ 9,565.05; 65 ATTR (BNA) 746 (1993).

### **Dedicated Staffing**

6. Each agency will designate one agency employee to act as Clearance Officer and one or more additional employees to act as back-up Clearance Officers for that agency. Responsibilities regarding clearance will be part of the permanent duties of the Clearance Officer.
7. The agencies will adopt common job descriptions for those personnel responsible for clearance matters. The job descriptions shall emphasize interagency cooperation and prompt dispute resolution, not success in obtaining clearances for the employees' agency.

### **Agency Communications**

8. The Clearance Officers of each agency should communicate frequently regarding the status of outstanding matters, and should meet weekly to review process and ongoing matters. The Clearance Officers jointly will produce weekly reports concerning relevant statistics, including, but not limited to, the number of clearance requests submitted, the amount of time each request took to be processed, the basis on which claims were resolved, and the number of claims outstanding.
9. The agency heads, senior officials, Clearance Officers, and other personnel responsible for clearance matters will meet on a quarterly basis, at least for the first year following the implementation of this Memorandum, to review the manner in which this Memorandum has been implemented and the results that its procedures have produced, and to discuss improvements as appropriate.

### **Procedures and Schedules**

10. The time periods contained in this Memorandum exclude days or hours falling on a Saturday, Sunday, national holiday, or any other day on which the offices of either agency are closed.

### **Procedures and Time Periods**

11. For those matters for which the clearance decision is obvious, the decision should be made by the Clearance Officers or their back-ups without further reference to line staff. Such clearances should be granted within 48 hours of receipt of the initial clearance request.
12. All matters that are referred to the line sections or shops of an agency should be transmitted to those sections or shops (utilizing common forms) no later than 24 hours after receipt of the initial clearance request. In these cases, if the other agency does not

request clearance within 48 hours of the initial clearance request, the matter will be deemed to be cleared to the agency requesting clearance.

13. For matters in which both agencies have requested clearance, the agencies must submit to each other written statements of their positions regarding clearance within 96 hours following receipt of the initial clearance request. Failure of an agency to submit a written statement within this time period shall result in clearance to the other agency.
14. Each agency shall designate one senior official (and a back-up) who may attempt to resolve the clearance dispute up to and including the 144<sup>th</sup> hour following receipt of the initial clearance request.
15. If the staff or senior officials at each agency are unable to resolve a clearance dispute within 144 hours following receipt of the initial clearance request, the matter will be referred to the Chairman of the FTC and the Assistant Attorney General in charge of the Antitrust Division (“the agency heads”).
16. Within 48 hours of submission of a dispute to them, the agency heads will determine whether to submit the dispute to the Neutral Evaluation dispute resolution mechanism described below.

#### **General Principles For Resolving Clearance Disputes**

17. The principal criterion for resolving clearance disputes is the allocation of industries provided in Appendix A. Prior experience does not affect the application of Appendix A, which shall always govern if applicable. Matters not resolved in this manner shall be resolved as provided in paragraph 18.
  - a. In Appendix A, a specific industry description or enumeration trumps a more general description.
  - b. In Appendix A, the enumerated industry, product, or service categories following “Includes” are intended to be clarifying and illustrative, but are not intended to be exhaustive.
  - c. The agencies anticipate continued convergence between certain telecommunications and information technologies. In order to address clearance issues that arise as a result of such convergence, each agency will appoint two representatives to form an inter-agency “Convergence Committee” that will be tasked with recommending in six months further refinements to Appendix A. Wireless devices that have telecommunications capability, such as personal computers, PDAs, and handheld gaming devices, are considered hardware within the responsibility of the FTC, but telephones, whether or not they contain some computing capability, are considered telecommunications within the responsibility

of the DOJ. This allocation of responsibility shall remain in force for a period of 2 years, subject to any refinement by the agencies upon the recommendation of the Convergence Committee. Upon expiration of the 2-year period, this allocation will be reconsidered, at which point the basis for assignment will be whether such devices predominantly function as computing or communications devices, and not the experience an agency has gained during the initial period.

- d. An agency may request clearance of a non-merger matter, even if the matter falls within an industry that has been allocated to the other agency in Appendix A; provided, however, that the agency to which the relevant industry has been allocated has the right of first refusal to investigate the matter.
18. The principal ground for clearance in a matter not resolved with reference to Appendix A is expertise in the product involved in the proposed investigation gained through a substantial antitrust investigation of the product within the last seven years.
- a. “Product” means (in order of most significant to least significant) the same product, a product that is or may be a substitute for the subject product, and a product that is a major input to, or output from, the subject product.
  - b. “Substantial antitrust investigation” means any of the following: a merger investigation in which second requests and/or compulsory process were issued, and in which documents were submitted and reviewed; a civil conduct investigation involving the same product in which compulsory process was issued, and in which documents were submitted and reviewed; and outstanding civil decrees or consent orders, regardless of the year the decree or order was entered, in which there is a continuing or ongoing familiarity with the product acquired through investigation, or where the proposed investigation could interfere with enforcement under the decree.
  - c. In resolving claims for which both agencies have substantial expertise, litigated civil cases take precedence over filed civil cases (including settled cases), followed by announced challenges (including situations where a fix-it-first occurs in response to an agency determination that the merger would otherwise be challenged), followed by other merger investigations, followed by civil conduct investigations, followed by criminal trial or investigation. When a civil decree or consent order is implicated, the matter will be considered on a case-by-case basis.
  - d. If neither agency has substantial expertise, an agency’s expertise concerning a party shall be considered in the following limited circumstances: (1) ongoing contacts with the involved party due to an investigation of, or litigation with, that party; or (2) an investigation within the last 3 years in which there were failing firm issues that are also relevant to the proposed investigation.

19. In matters involving multiple product markets, horizontal effects shall prevail over vertical or conglomerate effects, and the product markets in which competitive effects are to be evaluated that involve the largest dollar volume of commerce shall prevail over smaller product markets; provided that product markets that obviously present no competitive concern to an antitrust observer with only rudimentary knowledge of the industry are excluded. For matters involving a product in Appendix A and a product not in Appendix A, Appendix A shall control. This provision applies to disputes resolved by the allocation of industries in Appendix A and disputes resolved by gauging expertise.
20. When there is reason to believe that a criminal violation of the antitrust laws has occurred, or during the course of an FTC investigation evidence is uncovered that indicates the likelihood that criminal conduct has occurred, the matter will be cleared to DOJ. If DOJ does not uncover evidence of a criminal violation of the Sherman Act or of any other criminal violation, the matter will be returned to the FTC if it was originally cleared to that agency or would have been cleared to the FTC under the appropriate provisions of this Memorandum.
21. Whether all or part of the commerce at issue in a particular matter takes place on or through the Internet is irrelevant in determining clearance issues. The underlying nature of the industry will continue to control the clearance decision in terms of the allocation of industries in Appendix A or in gauging expertise when relevant. Similarly, clearance of matters involving computer-based or computer-related services, whether the services are delivered via hardware or software, will be determined according to the underlying nature of the services provided, whether resolved pursuant to the allocation of industries in Appendix A or by gauging expertise when relevant.
22. In non-HSR matters, there may be circumstances in which one agency has an ongoing investigation that would be affected by an investigation that the other agency wishes to conduct. In such circumstances the agencies will take steps (up to and including clearing the proposed investigation to the agency conducting the ongoing investigation) to ensure that the ongoing investigation is not jeopardized.
23. The procedures set forth in this Memorandum shall also apply to FTC advisory and staff opinions and DOJ business review letters.
24. Matters previously cleared to either of the agencies by the date of execution of this Memorandum are not affected by this Memorandum.

#### **Dispute Resolution by Neutral Evaluation**

25. Once a clearance dispute is referred to the agency heads, either one agency head will clear the matter to the other agency or the matter will be submitted for Neutral Evaluation.

26. If the agency heads agree to submit a clearance dispute to Neutral Evaluation, they will refer the dispute within the applicable deadline to a neutral third party (“the Neutral”) who shall be selected, by lot, from a pre-established, mutually-agreeable panel of experts (such as academics, retired government employees or other knowledgeable individuals). The individuals on this panel will be subject to the applicable confidentiality and ethics guidelines, rules, statutes, or regulations. At the time of, or contemporaneously with, the appointment of the Neutral, the agencies will provide the Neutral with the written statements of position submitted with respect to the clearance dispute pursuant to paragraph 13.
27. The Neutral will tender a recommendation within 48 hours of the Neutral’s appointment. If either agency requests an opportunity to make a presentation to the Neutral before the Neutral makes a recommendation, the Neutral may arrange for no more than one hour for such discussion (including presentations from each agency), with each agency designating a single person to participate in that discussion on behalf of the agency.
28. The sole basis for the Neutral’s recommendation shall be the Neutral’s judgment as to which agency is likely to be able to carry out more efficiently, in this particular instance, the public interest in effective antitrust investigations. Thus, the Neutral should take into account the factors outlined in this Memorandum, including the prior experience and expertise of each agency with respect to the particular industry and the issues and parties involved.
29. All Neutrals assigned to the panel must acknowledge and agree that all information acquired in the Neutral Evaluation process, including the fact that Neutral Evaluation has been invoked, the identities of the parties, the industries involved, and any other information acquired from the agencies, is subject to confidentiality restrictions including statutory restrictions and may not be disclosed in any fashion to anyone other than the agency representatives involved in a particular clearance dispute.

#### **Avoidance of Manifestly Inefficient Results**

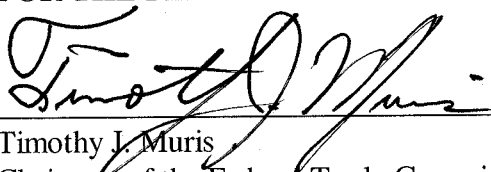
30. In the rare instance that the head of either agency determines that resolution of a clearance dispute under the foregoing provisions will produce a manifestly inefficient result, that agency head shall immediately inform the head of the other agency, and the agency heads shall consult with one another on the appropriate resolution of the dispute. If the agency heads are unable to agree on the appropriate resolution, then the provisions in this Memorandum shall govern.

**Review of Agreement**

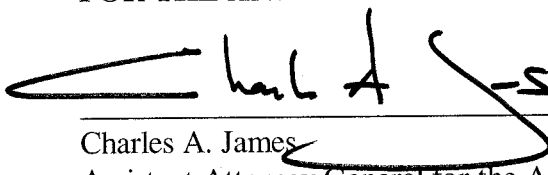
31. This Memorandum, and specifically the allocation of industries provided in Appendix A, shall be reviewed by the agency heads 4 years from the date of execution of this Memorandum to determine whether it continues to promote the purposes of effectiveness, cooperation, and efficiency in their law enforcement responsibilities and the avoidance of unnecessary duplication of efforts, and whether improvements should be made.

**DATE:** March 5, 2002

**FOR THE FEDERAL TRADE COMMISSION:**

  
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Timothy J. Muris  
Chairman of the Federal Trade Commission

**FOR THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE:**

  
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Charles A. James  
Assistant Attorney General for the Antitrust Division

## APPENDIX A

### Federal Trade Commission

1. Airframes
  - Includes civilian and military airframes, helicopters, and airframe components
2. Autos and Trucks
  - Includes related parts and dealers
3. Building Materials
4. Chemicals
  - Includes paints and plastics
5. Computer Hardware
  - Matters involving computer hardware do not become matters involving computer software, for purposes of this allocation, merely because software is being shipped with the hardware. In matters involving both hardware and software, clearance will be determined on the basis of the market in which the competitive effects being investigated are predominantly likely to occur.
6. Energy
  - Includes gas, electric, coal, pipelines, petroleum, and gas stations
7. Healthcare
  - Includes hospitals, professional services, medical equipment, and medical devices
8. Industrial Gases
9. Munitions
10. Operation of Grocery Stores and Grocery Manufacturing, including distilled spirits and tobacco products



11. Operation of Retail Stores
12. Pharmaceuticals and Biotechnology (other than that associated with agriculture)
  - Includes human and animal pharmaceuticals
13. Professional Services
14. Satellite Manufacturing and Launch, and Launch Vehicles
15. Textiles

## **Antitrust Division**

1. Agriculture and Associated Biotechnology
  - Includes all seeds, crops and livestock; produce, meat, poultry, fish, seafood, and dairy products; herbicides, fungicides, insecticides, and fertilizers; and all associated biotechnology
2. Avionics, Aeronautics, and Defense Electronics
3. Beer
4. Computer Software
  - Matters involving computer software do not become matters involving computer hardware, for purposes of this allocation, merely because the software is being shipped with hardware. In matters involving both hardware and software, clearance will be determined on the basis of the market in which the competitive effects being investigated are predominantly likely to occur.
5. Cosmetics and Hair Care
6. Financial Services/Insurance/Stock and Option, Bond, and Commodity Markets
7. Flat Glass
8. Health Insurance, and Healthcare Products and Services Over Which the FTC Determines It May Lack Jurisdiction
9. Industrial Equipment
  - Includes stationary or mobile equipment or machinery (excluding primarily on-road transportation vehicles) employed in agricultural, manufacturing, construction, refining, fabricating, processing, extraction and power generation operations
10. Media and Entertainment
  - Includes cable services, satellite services, television and radio broadcasting, publishing, newspapers, magazines, movies, movie theaters and upstream video distribution, advertising, music, toys and games, gaming, and sports

11. Metals, Mining and Minerals
  - Includes steel and steel products
12. Missiles, Tanks, and Armored Vehicles
13. Naval Defense Products
14. Photography and Film
15. Pulp, Paper, Lumber, and Timber
16. Telecommunications Services and Equipment
  - Includes set-top boxes, cable plant and related infrastructure, satellite data and programming, communications infrastructure, and telecommunications equipment (*e.g.*, telephones, pagers, switches, Internet backbone, telephone cable)
17. Travel and Transportation
  - Includes airlines, railroads, trucking, ocean shipping, cruise ships, oil tankers, travel agents, and computerized reservation systems
18. Waste