



Chapter VII Antitrust Division Relationships with Other Agencies and the Public

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A. The FTC

The Antitrust Division and the FTC have concurrent statutory authority to enforce Sections 2, 3, 7, and 8 of the Clayton Act. Judicial interpretation of Section 5 of the FTC Act permits the FTC to challenge conduct that also may constitute a Sherman Act violation; thus, there is an overlap between the Division and FTC in this area as well. This overlapping antitrust enforcement authority necessitates coordination between the two agencies to ensure both efficient use of limited resources and fairness to subjects of antitrust investigations.

Traditionally, duplication of investigations has been avoided in two areas. First, pursuant to a liaison agreement, the Department has referred all civil Robinson-Patman Act matters to the FTC for action. Second, the FTC routinely refers possible criminal violations of the antitrust laws, such as price fixing, to the Division. (The procedure to be followed on criminal referrals is discussed below.) The two agencies enforce the balance of the antitrust laws—particularly merger investigations (Section 7 of the Clayton Act) and civil nonmerger investigations (Sections 1 and 2 of the Sherman Act)—concurrently.

1. Clearance

Coordination is accomplished through the clearance procedure. This procedure was established pursuant to an interagency agreement to determine, as each case arises, which agency would be the more appropriate one to handle the matter. The first interagency agreement was informally instituted in 1938 and, since 1948, has been modified and formalized by several exchanges of correspondence between the Assistant Attorney General for Antitrust and the Chairman of the FTC. On December 2, 1993, the FTC and DOJ jointly issued Clearance Procedures for Investigations. These procedures, among other things, state the criteria for resolving “contested matters” (matters on which both agencies have sought clearance). On March 23, 1995, the FTC and DOJ jointly announced Hart-Scott-Rodino Premerger Program Improvements, which includes a commitment by each agency to resolve clearance on matters where an HSR filing was made within, at most, nine business days of filing.

The agencies have agreed to seek clearance from each other (1) where either proposes to investigate a possible violation of the law; and (2) where either receives a request for a statement of agency enforcement intentions (i.e., the Division’s Business Review or the FTC’s Advisory Opinion procedures). Clearance must be obtained for all preliminary investigations, business reviews, grand jury requests that have not stemmed from an existing preliminary

investigation, and any expansion of a previously cleared matter (to include, for instance, new parties or different conduct). Neither agency may begin an investigation until clearance is granted, although publicly available information may be collected and government sources consulted prior to obtaining clearance. Outside private parties—except for complainants who approach an agency on their own initiative—cannot be contacted until clearance is obtained. Also, complainants should be advised that clearance is unresolved before they invest substantial time and effort in making a presentation, although some will wish to proceed anyway.

a. **Clearance Procedures**

i. **FTC Requests for Clearance**

In the Division, clearance of proposed investigations is principally handled by the FTC Liaison Officer and the Premerger Notification Unit. The clearance procedure operates as follows: When the FTC wishes to investigate a particular matter, it requests, through its liaison officer, the Division's clearance for the proposed investigation. This request is made through a clearance request form entered into an electronic database to which the Division's Premerger Notification Unit and the FTC have access. For a typical investigation, the clearance request specifies the firms to be investigated, the product line involved, the potential offenses, the geographic area, and the source of the allegation.

The Division's Premerger Notification Unit circulates the FTC's request for clearance by e-mail to all section chiefs. A section chief may object to clearing the investigation and contest clearance by e-mailing a preliminary investigation memo to the PI Requests mailbox. Requests for additional information about the FTC's proposed investigation should be made to the Division's FTC Liaison Officer, who will obtain additional information from the FTC. Chiefs notified about an FTC clearance request should indicate their decision no later than the return date indicated on the e-mail. If no chief objects and the Deputy Director of Operations and the FTC Liaison Officer approve, clearance is granted to the FTC. A clearance request that generates no objection or conflict should be processed promptly.

ii. **Division Requests for Clearance**

Similarly, clearance by the FTC of proposed Division investigations is also the responsibility of the Division's Premerger Notification Unit and FTC Liaison Officer. As part of their responsibility to approve and supervise investigations undertaken by the Division, the Directors of Enforcement are ultimately

responsible for clearances. Once a preliminary investigation memo, grand jury request memo, or short-form clearance request is submitted to the PI Requests mailbox (and a courtesy copy is sent to the appropriate special assistant), the Division's clearance request is submitted to the FTC so that the clearance process can begin. For HSR matters, a preliminary investigation memo should be e-mailed to the PI Requests mailbox no later than five days after the HSR filing (three days if the matter is a cash tender offer or 15-day bankruptcy matter, or two days for a 10-day bankruptcy matter). The FTC processes Division clearance requests in roughly the same manner as that used by the Division to process FTC requests.

Routine clearances generally take a few days. Non-HSR matters typically take longer than HSR matters. Matters that are subject to time pressure can receive expedited treatment. If expedited treatment is needed, that fact (and the reasons for it) should be indicated in the e-mail accompanying the preliminary investigation memo and should also be communicated by phone to the FTC Liaison Officer. Except in extraordinary circumstances, clearance requests will not be relayed to the FTC until a preliminary investigation memo has been submitted by e-mailing it to the PI Requests mailbox. Once clearance has been granted and a preliminary investigation or grand jury investigation has been authorized, the Premerger Notification Unit will notify the appropriate chief by e-mail.

iii. Preclearance Contacts in HSR Matters

Because the FTC clearance procedure applies to matters in which an HSR filing has been made, inquiries may not be made to filing parties, even if just for clarification of the filing, before clearance has been obtained. Should a question arise regarding the sufficiency of an initial HSR filing before clearance has been granted, inquiry to the filing party will be made by the FTC Premerger Office. That office has responsibility for administering the Premerger Reporting Program and historically has supervised the determination of the sufficiency of initial filings. Division attorneys should channel such inquiries through their chiefs to the FTC's Premerger Office. Other than contact with a filing party through the FTC's Premerger Office for this limited purpose, no attorney of either agency should contact any filing party or any other private person or firm in connection with a premerger filing without having first obtained clearance. Should a party initiate contact with either agency, the preclearance contacts policy requires that the other agency be given an opportunity to participate in any meetings or phone conversations. Accordingly, should a party contact the Division prior to clearance being granted, a meeting or phone call may be set up, but the FTC Liaison Officer should immediately be notified so that the FTC can be invited to participate. Similarly, chiefs may occasionally be contacted by the

FTC Liaison Officer to determine whether the Division is interested in participating in a meeting or phone call arranged by the FTC. Should a party submit documentary material prior to clearance being granted, the party should be encouraged to also make that material available to the FTC.

b. Objections to Clearance

Objections to clearance typically arise when both agencies have requested clearance to investigate the same matter. Sometimes both agencies request clearance simultaneously, but more often in a contested matter an agency requests clearance only after learning that the other agency has sought clearance. How contested matters are resolved is discussed below.

On rare occasions, an agency may refuse to grant clearance without seeking to investigate the matter itself. This may occur, for instance, if the agency denying clearance has an ongoing investigation or litigation with which the proposed investigation might interfere, or if the agency denying clearance has already examined the conduct in question and found no significant evidence of illegal activity. In such cases, the FTC Liaison Officer will typically discuss the matter with staff, the section chief, the Deputy Director of Operations, and the relevant individuals at the FTC in an attempt to resolve the matter.

c. Resolution of Contested Matters

Once a matter is contested, staff should prepare a Contested Matter Claim. The Contested Matter Claim describes the conduct or merger sought to be investigated and describes the Division's relevant expertise with the product in question. *See* Chapter VII, Part A.1.d (discussing criteria used to resolve contested clearances). Examples of Contested Matter Claims are available from the FTC Liaison Officer and on the Division's intranet (ATRnet). Staff should work closely with the FTC Liaison Officer in preparing the claim. Contested Matter Claims should be completed within a day after a matter is contested.

Contested Matter Claims are simultaneously exchanged between the Division and the FTC, and then the respective liaison officers discuss the merits of each agency's claim. In a majority of cases, the liaison officers are able to resolve the dispute and the matter is either cleared to the Division or (after approval by the Deputy Director of Operations) to the FTC. If the liaison officers are unable to resolve clearance, the matter is escalated to the Deputy Director and his or her counterpart at the FTC. If the matter remains unresolved following a discussion at this level, the matter is escalated to the relevant Deputy Assistant Attorney General and his or her FTC counterpart. In the rare instance where a matter is still unresolved after discussion at this level, the Assistant Attorney General will

enter into negotiations with the FTC Chairman to resolve the matter. After a contested matter has been resolved, the Premerger Notification Unit will notify the section by e-mail. Should an attorney at any time want to know the status of a clearance request, he or she should contact the FTC Liaison Officer.

d. Criteria for Resolving Contested Clearances

The criteria for resolving contested merger matters are set forth in some detail in the 1993 Clearance Procedures for Investigations. The principal ground for clearance is expertise in the product in question gained through a substantial investigation of the product within the last five years, or within ten years, if neither agency has a substantial investigation within five years. Substantial investigation means any civil investigation where compulsory process (i.e., CIDs or second requests) was issued and documents were received and reviewed. Expertise in the product is obtained when the product involved in the prior substantial investigation was the same product as that involved in the contested clearance matter or a substitute product, a major input or output product, or one produced using the same manufacturing process (in decreasing order of significance). Should both agencies have at least one substantial investigation of the same category (i.e., same product), the order of priority is as follows (in decreasing order of significance): litigated case, filed case, announced challenge or fix-it-first, second request merger investigation, and civil conduct investigation. Only if neither agency has a relevant substantial investigation will nonsubstantial investigations be considered as expertise, if appropriate. The process is somewhat flexible, and if either agency has an ongoing investigation or an existing decree with which the proposed investigation may conflict, the matter will often be cleared so as to avoid conflicts.

The criteria for resolving civil nonmerger contested matters are similar to those used for merger matters. While rewarding expertise, more weight is given to initiative: in the absence of overwhelming expertise in a product, the matter generally will be awarded to the agency that first identified the potential competitive problem and developed the proposed investigation.

2. Criminal Referrals

When a matter is before the FTC and the FTC determines that the facts may warrant criminal action against the parties involved, the FTC will notify the Division and make available to the Division the files of the investigation following an appropriate access request. *See infra* Chapter VII, Part A.3. The Director of Criminal Enforcement, through the Premerger Notification Unit, will refer the matter to the appropriate section or field office for review of the materials and for determination as to whether the matter should be investigated

by or presented to a grand jury. Determination should be made by the section or field office within 30 days of the referral, so that the Division can inform the FTC of its position in timely fashion.

If the Division determines that a matter should be a grand jury matter, the Division will request that the FTC transfer the matter. If, on the other hand, the Division decides not to pursue the matter with a grand jury investigation, then the FTC may proceed with its own investigation.

3. Exchange of Information and Access Requests

The liaison procedure between the Division and the FTC also provides for the exchange of information and evidence between the agencies to the extent permitted by law and internal policies. If the FTC has conducted an investigation that involved materials that could be useful in an investigation being conducted by the Division, the section or field office chief should contact the Division's FTC Liaison Officer, who will make arrangements for the Division to obtain access to the appropriate files. If, upon examination, it is determined that copies of any of the materials would be of assistance to staff, arrangements for copying should be made with the FTC staff. Requests by the FTC for access to materials in the Division's possession are processed through the FTC Liaison Officer. If an attorney or economist receives a direct request for access to, or copies of, Division files, such materials should not be made available until the matter is cleared through the Division's Liaison Officer.

B. U.S. Attorneys

Relationships between the Antitrust Division and U.S. Attorneys are controlled by policies of the Department of Justice and the Division. For example, Department of Justice policy provides that U.S. Attorneys' Offices should watch for manifestations of price-fixing, bid-rigging, or other types of collusive conduct among competitors that would constitute criminal violations of Section 1 of the Sherman Act. A U.S. Attorney's Office with evidence of a possible antitrust violation should consult with either the chief of the Antitrust Division's closest field office or the Deputy Assistant Attorney General for Criminal Enforcement (Criminal DAAG) to determine who should investigate and prosecute the matter. Most criminal antitrust investigations are conducted by the Antitrust Division's field offices and litigating sections because of their specific expertise in particular industries and markets.

The Division may refer certain antitrust investigations to U.S. Attorneys, particularly those involving localized price-fixing or bid-rigging conspiracies.

According to an [Attorney General's Policy Statement](#), U.S. Attorneys are assigned the responsibility of enforcing Section 1 of the Sherman Act against offenses which are “essentially of local character, and which involve price fixing, collusive bidding, or similar conduct. The U.S. Attorneys shall handle such investigations and proceedings as the Assistant Attorney General in charge of the Antitrust Division may specifically authorize them to conduct.” Once a U.S. Attorney’s Office accepts a referral, it will be primarily responsible for the investigation and prosecution of that matter.

All antitrust investigations conducted by a U.S. Attorney’s Office, whether initiated by that office or referred by the Division, are subject to supervision by the Assistant Attorney General for Antitrust. *See* 28 C.F.R. § 0.40. Accordingly, the Division’s approval is required at various stages of the investigation, such as empaneling a grand jury, recommending an indictment, or closing the matter. These procedures are described at [United States Attorneys’ Manual § 7-2.000, “Prior Approvals.”](#)

It is the policy of the Division to create and maintain good working relationships with all U.S. Attorneys. The chiefs of the Division’s field offices should maintain contact with all of the U.S. Attorneys within their geographic areas of responsibility. This liaison provides U.S. Attorneys with a convenient contact to whom to refer complaints or other evidence of local antitrust violations and from whom to obtain information about antitrust matters and Division procedures. Additionally, close liaison provides the Division field offices with a ready source of information and support in complying with local court rules, procedures, and practices when Division attorneys are conducting investigations and litigating cases within the U.S. Attorney’s jurisdiction. The relationship also is valuable when Division attorneys need the approval of the U.S. Attorney to apply to the local district court for immunity orders or otherwise need local assistance. In order to develop and continue good relationships with U.S. Attorneys, Division attorneys must keep U.S. Attorneys apprised of all significant Division activities occurring within their districts. It is, for example, normal practice to present and explain indictments, informations, and plea agreements to U.S. Attorneys.

Division attorneys who have particular questions or issues regarding dealings with U.S. Attorneys should consult with their field office or section chiefs, or, where appropriate, with the Director of Criminal Enforcement or the Criminal DAAG.

C. State Attorneys General

The Division is committed to cooperating with state attorneys general. Effective cooperation between the Division and the states benefits the public through the efficient use of antitrust enforcement resources. Cooperation with the states gives the Division the benefit of local counsel who know the local markets well. It also promotes consistent enforcement and minimizes the burden of duplicative investigations.

The purpose of this section is to provide information and guidance regarding cooperation and interaction with state enforcers. Although it is the Division's policy to cooperate whenever possible with state attorneys general, there is no formula or checklist for cooperation. The nature and level of cooperation are decided on a case-by-case basis, keeping in mind that conducting an effective and efficient investigation is the Division's first priority. For example, investigations affecting primarily local markets within a state are more suitable for joint enforcement efforts or possibly for referring the matter entirely to the state. Other factors include the experience, interests, and resources of a particular state attorney general's office.

1. Antitrust Enforcement by State Attorneys General

The functions and organization of offices of state attorneys general are similar to those of the Department of Justice. A state attorney general is the chief legal officer of the state. State attorneys general bring civil suits on behalf of the state; represent the state and state agencies in civil suits; handle criminal appeals; and enforce antitrust, consumer protection, and environmental statutes. The majority of resources in a state attorney general's office are devoted to defending the state in civil litigation and criminal appeals.

State attorneys general are authorized to bring civil federal actions seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, and damages under Section 4, 15 U.S.C. § 15, as direct purchasers of goods or services. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-64 (1972) (recognizing that a state is a "person" under Sections 4 and 16 and holding that Section 4 does not authorize a state to sue as *parens patriae* for damages for injuries to the state's general economy). Further, Section 4C of the Clayton Act, 15 U.S.C. § 15c, authorizes state attorneys general to bring damage actions, as *parens patriae*, on behalf of natural persons residing within their states. State attorneys general may also bring federal injunction actions as *parens patriae* based on injury to their general economies under Section 16 of the Clayton Act

and common law. *See, e.g., Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447-48 (1945).

Most states have enacted a civil antitrust statute of general application prohibiting combinations and conspiracies in restraint of trade. *See* State Laws, 6 Trade Reg. Rep. (CCH) ¶ 30,000. These statutes typically authorize the state attorney general to seek treble damages on behalf of natural persons residing within the state, state agencies and institutions, and political subdivisions; civil penalties; injunctive relief; and attorneys' fees and costs. They also typically authorize the state attorney general to issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations in connection with antitrust investigations. State antitrust statutes also usually expressly require that they be interpreted in conformity with comparable federal antitrust statutes. *See generally* ABA Section of Antitrust Law, *Antitrust Law Developments* 809-11 (5th ed. 2002).

It is the practice of most state attorneys general to file cases in federal court with pendent state antitrust claims. Most states are reluctant to bring actions in state court because most state court judges generally have little or no experience with antitrust cases.

Few state attorneys general's offices have significant experience prosecuting criminal antitrust violations. However, many states have some form of criminal penalty for anticompetitive conduct. *See* ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook* 16 (2003).

The level of antitrust enforcement—both civil and criminal—varies from state to state. State antitrust attorneys are often responsible for consumer protection as well as antitrust enforcement.

Most state antitrust units are financed through direct appropriations from their state legislatures. Several states, however, finance their antitrust units, at least in part, through revolving funds that are funded by attorneys' fees and costs paid to the state in connection with settlements and judgments.

State attorneys general, under the auspices of the National Association of Attorneys General (NAAG), often form working groups and ad hoc committees to coordinate investigations and litigation involving several states. The states participating in multistate investigations usually execute cost-sharing agreements apportioning their costs based on population. Multistate investigations and litigation are also supported by a fund established by NAAG for expert witness fees and expenses.

a. **National Association of Attorneys General**

Comprised of the attorneys general of the fifty states and the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands, NAAG facilitates cooperation among state attorneys general on legal and law enforcement issues and conducts policy research and issue analysis. The U.S. Attorney General is an honorary member.

The attorney general is popularly elected in 43 states and appointed by the governor in five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming). In Maine, the legislature elects the attorney general, and in Tennessee, the state Supreme Court appoints the attorney general. In the District of Columbia, the Mayor appoints the attorney general, whose duties are similar to those of a state attorney general.

NAAG has a full-time staff, headed by an Executive Director. Reporting to these officials are counsels who are responsible for specific projects and subject areas, including antitrust.

The Antitrust Committee, a standing committee of the organization, is responsible for all matters relating to antitrust policy (e.g., adoption of guidelines and resolutions). The President of NAAG appoints the Chairperson, who serves up to a two-year term.

b. **NAAG Antitrust Task Force**

The NAAG Antitrust Task Force is comprised of state staff attorneys responsible for antitrust enforcement in their states. The Task Force recommends policy and other matters for consideration by the Antitrust Committee, organizes training seminars and conferences, and coordinates multistate investigations and litigation. The Chairperson of the Task Force, who is appointed by the Chairperson of the Antitrust Committee, is the principal spokesperson for the states on antitrust enforcement.

2. Seeking Assistance from State Attorneys General

State attorneys general's offices can assist the Division in certain investigations and cases. The Division often seeks information in the possession of state officials and agencies. Division attorneys should consult with the Division's state liaison in the Legal Policy Section about contacting the state attorney general's office whenever the need arises to contact a state agency employee.

State attorneys general, as the chief legal officers of their states, can be of tremendous assistance in obtaining information from state officials and agencies.

3. Providing Assistance and Information to State Attorneys General

a. Procedures Under Section 4F of the Clayton Act

Pursuant to Section 4F of the Clayton Act, 15 U.S.C. § 15f, the Division has the statutory responsibility to provide state attorneys general with information, to the extent permitted by law, that may assist them in determining whether to bring an action under the Clayton Act based upon a violation of the federal antitrust laws.

The Division has adopted the following procedures to implement Section 4F consistently.

i. Informing State Attorneys General of Division Suits

Under Section 4F(a), 15 U.S.C. § 15f(a), the Division notifies state attorneys general when it believes the state may be entitled to bring an action under the Clayton Act based substantially on the same violation of the antitrust laws alleged in a civil or criminal antitrust prosecution filed by the United States. This notification, which supplements the routine notification of state attorneys general when any Division action is filed, is made when, in the Division's judgment, more specific notification should be made because a state may have a particular interest in bringing an action based substantially on the same violation alleged by the Division. In making its judgment in such instances, the Division considers, among other relevant factors, the factual circumstances of the alleged violation, the posture of the state as a potential claimant under existing law, and the likely effect of the alleged violation on cognizable state interests.

For example, a more specific notification might be appropriate where the alleged federal antitrust violation has already occurred and had likely resulted in harm limited primarily to the citizens, governmental entities, or general economy of that particular state.

A notification of the state attorneys general should be recommended by the investigative staff and assessed by the appropriate Director of Enforcement. The section chief will make all notifications to the affected states under Section 4F(a). This notification is accomplished by sending the Complaint, Indictment, or other action-commencing pleading to the state attorney general for the applicable state or states, as well as a cover letter stating, "Pursuant to 15 U.S.C. § 15f(a), we respectfully notify you that the Attorney General of the United States has brought an action under the antitrust laws against [Defendant] of

[principle place of business or headquarters]. Enclosed please find a copy of the [complaint or indictment]. We look forward to discussing the issues with you."

Even without specific notification pursuant to Section 4F(a), state attorneys general have authority to bring a Clayton Act damages action arising from any federal civil or criminal antitrust prosecution and to request, under Section 4F(b), investigative files and other materials of the Division relevant to that actual or potential cause of action. This data will be made available to state attorneys general under the standards for Section 4F(b) disclosure, as described in the next section.

ii. Providing State Attorneys General with Investigative Files and Other Materials

(a) Division Policy

Section 4F(b), 15 U.S.C. § 15f(b), requires disclosure to the state attorneys general "to the extent permitted by law" of any investigative files or other materials that may be relevant or material to an actual or potential state cause of action for damages under the Clayton Act. The Division will disclose materials from its files to assist state attorneys general to the maximum extent appropriate in fulfilling their state antitrust enforcement responsibilities. There are, however, certain instances where, because of statute, case law, or other constraints, nondisclosure or at least protective limitations upon the disclosure may be necessary. The Division retains discretion to determine the proper scope of Section 4F(b) disclosures.

This discretion will be exercised to further the overall policies embodied in the federal antitrust laws. These policies favor vigorous federal and state enforcement of the antitrust laws, but occasionally a balance must be struck between immediate disclosure of investigative files and federal enforcement priorities and necessities. While it is the Division's policy to cooperate fully with state attorneys general, in some instances disclosures may be delayed or limited to preserve the integrity of Division prosecutions or investigations, its work product, and deliberations. Normally, the Division will not release work product or deliberative process materials in response to a 4F(b) request, as doing so may compromise the ability to preserve the privileges applicable to these materials or otherwise may compromise pending Division litigation.

(b) Procedures Employed in Responding to 4F(b) Requests

Requests for access to investigative files or other materials of the Division, pursuant to Section 4F(b), should be made to the chief of the FOIA Unit, who is

responsible for responding to such requests. A request from a state attorney general may be made by the attorney general or his or her designee, who shall be an official of the state government (e.g., an assistant attorney general in charge of antitrust enforcement in the state attorney general's office). Requests on behalf of a state should not be made, and will not be honored, if they come from private counsel, even though the state may retain such counsel for the purpose of considering and filing an antitrust damage action on the state's behalf. *See* 15 U.S.C. § 15g(1). The FOIA Unit will seek assurance that materials disclosed by the United States can be shielded from involuntary disclosure under state law and will not be voluntarily disclosed except in connection with antitrust litigation.

The response from the chief of the FOIA Unit to a request made under Section 4F(b) will indicate the general nature of the proposed disclosure and any conditions that may be imposed on further disclosure, such as protective arrangements or limitations. Generally, the chief of the FOIA Unit sends the state attorney general relevant material such as the indictment or complaint in the case. The letter also informs the state attorney general of the Division's intention to disclose other relevant non-grand jury material that the state may request, the Division's position regarding disclosure of grand jury materials, and the name, address, and telephone number of the section or field office chief supervising the case whom the state antitrust attorneys may contact for further information regarding the case. The FOIA Unit will handle the arrangements for the disclosure of investigative files or other material.

iii. Limitations on Disclosure of Investigative Files and Materials

In response to a Section 4F(b) request, the Antitrust Division will make all relevant files and materials available to state attorneys general with certain exceptions and limitations. These exceptions and limitations are not exhaustive, and peculiar circumstances may require modification or extension of these standards. Any such modification that affects the interests of the state attorneys general under Section 4F(b) will be made known to them promptly.

(a) Grand Jury Matters

Where the Division has an open criminal investigation or case, disclosure of investigative files pursuant to Section 4F(b) generally will be denied. The effectiveness of the investigation or case is potentially compromised by making investigative files available during its pendency. As a matter of practice, the Division will deny investigative file disclosure until the end of any grand jury investigation or subsequent case. If a state moves for disclosure of grand jury

materials during an ongoing investigation or case, the Division will oppose such a motion.

(b) Civil Investigative Demand Materials

Materials obtained by Civil Investigative Demand will not be disclosed under Section 4F(b). There is no provision in the law for disclosure of such materials, except where the party from whom the materials are obtained consents to the disclosure. *See* 15 U.S.C. § 1313(c)(3).

(c) Confidential Sources

The identity of confidential sources will not be disclosed pursuant to Section 4F(b). This is necessary to ensure the future cooperation of these and other sources, especially since they often rely on a promise that their identities will not be revealed.

(d) Confidential Business Information

Confidential business information is protected from disclosure by the Freedom of Information Act, 5 U.S.C. § 552(b)(4). Accordingly, where such information is part of investigative files, that data will not be disclosed to state attorneys general under Section 4F(b).

(e) Premerger Notification Materials

All files or materials obtained by the Division under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, are protected by law from disclosure. Accordingly, such data will not be disclosed to state attorneys general under Section 4F(b) except when the party from whom the materials were obtained consents to the disclosure. This includes the fact that a filing has been made and its date.

(f) Materials Obtained from Other Agencies

Files or materials obtained from the Internal Revenue Service or other federal investigative agencies frequently are protected by law from disclosure outside the Department of Justice. Federal investigative agencies, as a matter of practice, frequently require the Division to limit disclosure of files or materials generated by those agencies. Therefore, access by state attorneys general to investigative files and material generated outside of the Antitrust Division will be denied unless the agency in question permits release and disclosure is not otherwise prohibited by law.

Certain FBI files and materials may not be disclosed. Frequently, the FBI conducts or assists in conducting federal criminal antitrust investigations. Information derived from its efforts may be incorporated in Division files and, as such, revealed under Section 4F(b). However, raw FBI investigative reports will not be disclosed under Section 4F(b) as a matter of course, unless the FBI allows disclosure. State attorneys general may request such materials directly from the FBI or under the Freedom of Information Act.

(g) Division Work Product

The Division ordinarily will not disclose its work product analyses and other deliberative memoranda to state attorneys general under Section 4F(b). This is necessary to protect the candor and effectiveness of communications within the Division and to preserve and foster the integrity of its enforcement programs and the recommendations and analyses of its staff.

These limitations may not result in complete denial of access to investigative files or materials. In appropriate cases, particular memoranda or portions of such memoranda may be produced. Often this limits the timing and extent of such disclosure rather than preventing disclosure altogether. Finally, Division staff may be able orally to discuss issues relating to the investigation in a way that substantially assists the state attorneys without jeopardizing or unduly exposing internal Division deliberations.

iv. Restrictions on Use of Materials

Except as described above, the Division usually will not seek to impose additional restrictions on the use by state attorneys general of investigative materials disclosed pursuant to Section 4F(b). Under special circumstances, the Division may set other restrictions on investigative data if there is a need for continued secrecy.

v. Disclosure of Rule 6(e) Material for State Criminal Enforcement

Rule 6(e)(3)(E)(iv) of the Federal Rules of Criminal Procedure was amended by P.L. 108-458 (effective December 17, 2004). It reads as follows:

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter:

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long

as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law.

It is both the intent of the rule and the policy of the Department of Justice (as stated in a memorandum dated December 9, 1985, from the Assistant Attorney General in charge of the Criminal Division to the other Divisions' Assistant Attorneys General) to share such grand jury information whenever it is appropriate to do so. Thus, the phrase "appropriate state [or] state-subdivision ... official" shall be interpreted to mean any official whose official duties include enforcement of the state criminal law whose violation is indicated in the matters for which permission to disclose is to be sought. This policy is, however, subject to the caution in the Advisory Committee's notes that "[t]here is no intention ... to have federal grand juries act as an arm of the state."

It is thus clear that the decision to release or withhold such information may have significant effects upon relations between federal prosecutors and their state and local counterparts, and that disclosure may raise issues that go to the heart of the federal grand jury process. In this respect, the Assistant Attorney General in charge of the Criminal Division (who is a member of the Advisory Committee) promised the Advisory Committee that prior to any request to a court for permission to disclose such grand jury information, authorization would be required from the Assistant Attorney General in charge of the Division having jurisdiction over the matters that were presented to the grand jury. It is the policy of the Department that such prior authorization be requested in writing in all cases. A copy of such requests shall be sent to all federal investigating agencies involved in the grand jury investigation. In the case of a multiple-jurisdiction investigation (e.g., tax), requests should be made to the Assistant Attorney General of the Division having supervisory responsibility for the principal offenses being investigated.

To ensure that grand jury secrecy requirements are not violated in the submission of such requests, the following legend should be placed at the top and bottom of each page of the request:

GRAND JURY INFORMATION:
Disclosure restricted by Rule 6(e), Federal
Rules of Criminal Procedure

In addition, the entire packet should be covered with a plain white sheet having the word "SENSITIVE" stamped or typed at the top left and bottom right corners.

Division attorneys seeking permission to apply for a disclosure order for materials obtained in a criminal antitrust investigation must submit a memorandum to the Criminal DAAG so that the approval of the Assistant Attorney General may be sought. The memorandum should provide the following information:

- Title of grand jury investigation and involved targets.
- Origin of grand jury investigation.
- General nature of investigation.
- Status of grand jury investigation.
- States for which authorization to disclose grand jury matters is sought.
- Nature and summary of information to be disclosed.
- General nature of potential state offenses.
- Impact of disclosure to states on ongoing federal grand jury investigative efforts or prosecutions.
- Extent of prior state involvement, if any, in federal grand jury proceedings under Rule 6(e)(3)(E)(iv).
- Extent, if any, of state knowledge or awareness of federal grand jury investigation.
- Existence, if any, of ongoing state investigations or efforts regarding grand jury matters sought to be disclosed.
- Any additional material necessary to enable the Assistant Attorney General to evaluate fully the factors set forth in the following paragraph.

In determining whether to authorize obtaining permission to disclose, the Assistant Attorney General must consider all relevant factors including whether:

- The state has a substantial need for the information.
- The grand jury was convened for a legitimate federal investigative purpose.
- Disclosure would impair an ongoing federal trial or investigation.
- Disclosure would violate a federal statute (*e.g.*, 26 U.S.C. § 6103) or regulation.
- Disclosure would violate a specific Departmental policy.

- Disclosure would reveal classified information to persons without an appropriate security clearance.
- Disclosure would compromise the government's ability to protect an informant.
- Disclosure would improperly reveal trade secrets.
- Reasonable alternatives exist for obtaining the information contained in the grand jury materials to be disclosed.

There is no requirement that a particularized need be established for the disclosure under Rule 6(e)(3)(E)(iv), but there should be substantial need. *See* U.S. Dep't of Justice, [Antitrust Division Grand Jury Practice Manual II.H.5](#) (1st ed. 1991). The need to prosecute or investigate ongoing or completed state or local felony offenses will generally be deemed substantial.

If the request is authorized, the staff attorney who seeks permission to disclose shall include in the proposed order a provision that further disclosures by the state officials involved shall be limited to those required in the enforcement of state criminal laws.

A copy of any order *denying* a request for permission to disclose should be sent to the Office of Criminal Enforcement.

b. Informal Requests for Information and Assistance

The overwhelming majority of state attorney general requests for assistance and information are informal. State attorneys general's offices often have limited antitrust resources and occasionally will request assistance from the Division. State attorneys may find consulting informally with Division attorneys and economists to be very helpful. It is the policy of the Division to comply with informal requests for information and assistance by state attorneys general whenever possible. Sharing information with state enforcers is critical to enhancing state antitrust enforcement. The chief of the FOIA Unit should, however, be consulted before sharing any nonpublic documents with the state.

4. Referrals to and from State Attorneys General

The Division actively encourages state attorneys general to refer to the Division significant criminal and civil matters. Whenever a state refers a matter to the Division, the state should be advised generally of the status of any subsequent investigation. Providing the state with information will encourage future

referrals. If a referral results in an enforcement action, the state attorney general's referral of the matter to the Division should be publicly acknowledged.

The Division often refers matters whose possible effects are predominantly local to state attorneys general for possible investigation. When referring a matter to a state attorney general, as much information as practical regarding the matter should be communicated to the state official responsible for antitrust enforcement.

5. Cooperating with State Attorneys General in Merger Investigations

State attorneys general have become increasingly active in merger enforcement. They are more likely to have an interest in transactions involving goods or services purchased directly by consumers or state and local governments and that primarily affect local markets. It is the policy of the Division to cooperate when practical with state attorneys general on mergers that affect local markets.

Early coordination with state attorneys general on mergers of common interest benefits the Division, the states, and the parties. It is not uncommon for the parties to want the Division and the state attorneys general to coordinate their respective investigations. Close coordination allows the parties to avoid the additional costs of responding to duplicative investigations. Moreover, close cooperation between the Division and the states facilitates the consistent application of the antitrust laws, making it less likely that a state attorney general and the Division will arrive at different conclusions concerning a merger. State attorneys general have authority to challenge and seek divestiture in transactions that a federal agency declines to challenge. *See California v. Am. Stores Co.*, 495 U.S. 271 (1990); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995). The likelihood of such a challenge is reduced when there is significant coordination and cooperation.

a. Information Sharing Issues

The HSR Act and the Antitrust Civil Process Act (ACPA) significantly restrict the Division's ability to share with state enforcement officials information or material the Division receives through precomplaint compulsory process.

Two Court of Appeals decisions prohibit disclosure of HSR materials to state attorneys general. *Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985). The Division also treats the filing of HSR forms, the date the resulting waiting periods end, the issuance of second requests, and the receipt of second request filings as confidential information under the HSR Act.

While the ACPA, like the HSR Act, prohibits the disclosure of information or materials produced in response to CIDs, the ACPA does allow the Division to provide the states with CID schedules and the identity of the CID recipients. Any confidential information appearing in the schedules should be excised, including the home address of an individual CID recipient.

In response to the 1985 Court of Appeals decisions prohibiting disclosure of HSR materials to state attorneys general, NAAG in 1988 adopted [the Voluntary Pre-Merger Disclosure Compact](#) (NAAG Compact) (amended in 1994). The NAAG Compact allows parties to an HSR merger to file with a designated state liaison copies of the initial HSR filing, any second request, and any second request responses. The states agree to keep all information they receive pursuant to the NAAG Compact confidential, except in connection with a state challenge of the transaction. In exchange for providing the information to the state, the state agrees not to issue compulsory process during the waiting period. Under the NAAG Compact, the states reserve the right to issue compulsory process for any information the parties decline to produce voluntarily.

In addition, in 1997, the Division, the FTC, and NAAG reached agreement on a protocol to facilitate coordination of parallel state and federal merger investigations. *See* [Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and States Attorneys General](#). Prior to the Division disclosing certain confidential documents or information to state attorneys general, the protocol requires the parties to (1) agree to provide the states with all information submitted to the Division and (2) submit a letter to the Division waiving the HSR and CID confidentiality provisions to the extent necessary to allow communications between the Division and state attorneys general. The Protocol includes an example of such a letter at Exhibit 1B.

It is the responsibility of the state attorneys general, and not of the Division's staff, to ensure that the parties submit satisfactory waiver letters to the Division. The Division generally looks with disfavor upon any waiver letter that does not permit the Division to share and discuss otherwise confidential HSR or CID materials or information fully with each state attorney general participating in the investigation. It is also the responsibility of the state attorneys general, and not of the Division's staff, to obtain from the parties all of the information the parties have submitted to the Division.

Once the waiver letters from the parties are received, the Division will provide the designated state liaison with (1) the second request schedules the Division served upon the parties to the transaction, and (2) the HSR waiting period expiration date.

The Division, however, will not provide the state attorneys general with information or materials the Division received from third parties in response to compulsory process unless the third parties consent to disclosure. It is the responsibility of the state attorneys general, and not the Division's staff, to receive any such consent from a third party.

In addition to complying with these statutorily imposed confidentiality requirements, the Division, when cooperating in merger investigations with state attorneys general, must also take appropriate steps to protect any legally recognized privilege the Division may have. As a general rule, work product is protected “[s]o long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.” *United States v. Amer. Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Work product protection is even stronger “[w]hen the transfer to a party with such common interests is conducted under a guarantee of confidentiality.” *Id.* at 300. The wording of a state's public records or open government act may be such, however, that it is unclear whether there would be a “guarantee of confidentiality” if the Division provides documents to that state's attorney general. Before sharing confidential information with state attorneys general, the Division must be confident that no privilege available to the Division is lost and that the information will not otherwise be disclosed.

As the above shows, information sharing with a state can be restricted, particularly in absence of a waiver from at least the parties to the merger. Division staff on a merger investigation can and should, however, feel free to direct state attorneys general to any public source of pertinent information. In addition, the Division will be able frequently to share with the state attorneys general much of the information the Division obtains voluntarily from third parties.

b. Joint or Closely Coordinated Merger Investigations

At the outset of any cooperative effort with state enforcers, Division attorneys should discuss with state attorneys general the level and nature of possible cooperation. Early discussions will help to avoid misunderstandings between the state and the Division that could prove harmful not only to the investigation but also to the Division's relationships with state attorneys general. In initial discussions with state staff, Division attorneys should determine the level of state interest in the transaction. If the state wishes to take an active role in the investigation, issues that should be discussed include mechanisms for communication, coordination of witnesses interviews and CID depositions, meetings with the parties, and review of documents.

i. Interviews

There may be several advantages to conducting interviews jointly with state attorneys general. Conducting joint interviews with state staff conserves state and Division resources by avoiding duplicative interviews. Many witnesses desire to be interviewed jointly by state attorneys general and the Division to avoid the time and expense of separate interviews. Joint interviews also help avoid inconsistent statements by potential witnesses. Joint interviews can be done only with the advance consent of the interviewee. In some cases, however, joint interviews may not be practical or feasible. The needs of the investigation and the enforcement interests should dictate the best approach.

Division staff and state attorneys general should establish ground rules for interviews. A state, for instance, may wish to participate only in interviews of certain witnesses. On the other hand, a state may wish to be given notice, when possible, of all interviews and the opportunity to participate. Similarly, Division staff may wish to obtain a commitment from state attorneys general to give Division staff notice of and the opportunity to participate in witness interviews. Agreement should be reached in advance as to who will be the primary questioner in the interview and whether an opportunity will be provided to other participants to ask their own questions either during the course of the interview or after the primary questioner has completed his or her questions.

ii. CID Depositions

With the oral or written consent of the witness, state attorneys general may be permitted to attend CID depositions. A state's attendance at CID depositions avoids possible duplicative depositions under state CID statutes. On the other hand, having additional attorneys present may tend to make the witness more circumspect. Before inviting state attorneys general to participate in CID depositions, staff should consult with the appropriate Director of Enforcement and consider alternatives such as reviewing questions with the state(s) in advance and providing a copy of the transcript to the state(s), which may be done with the written consent of the witness.

Participation by Division staff in state CID depositions may be an alternative when a witness declines to consent to the participation of the state attorneys general in CIDs under the ACPA. Most state attorneys general interpret their state CID statutes to allow the participation of Division attorneys without the consent of the witness. Division attorneys may participate in state CID depositions as long as it is clear that the depositions can be used in any subsequent Division challenge of the transaction regardless of whether the state is a party to the litigation.

iii. Joint Settlements

The parties may wish to pursue a settlement with the Division and the states simultaneously. In those instances, Division staff and state attorneys general should reach an understanding in advance concerning a state's participation in settlement discussions with the parties and the appropriate scope of relief.

6. Cooperating with State Attorneys General in Civil Nonmerger Investigations

As with merger investigations, the appropriate level of cooperation with state attorneys general in a civil nonmerger investigation is determined on a case-by-case basis, depending upon a state's need for support, the benefit to the parties of governmental coordination, the cost of any delay the coordination would entail, and the complexities of coordination. Many of the coordination issues in merger investigations—including the sharing of confidential information—are also present in civil nonmerger investigations. Thus, discussions with state attorneys general in the early stages of the investigation are crucial. And, just as with merger investigations, Division attorneys should discuss with their state counterparts such issues as mechanisms for communication, coordination of joint interviews and CID depositions, meetings with the parties, and document review, as well as the timing of phases of the investigation.

An additional issue that should be discussed early in the investigation is whether a state intends to seek damages, a civil penalty, or attorneys' fees. A state's pursuit of these remedies may make joint settlement negotiations difficult. Because the Division usually seeks injunctive relief, the states must negotiate damages, penalties, or attorneys' fees separately for inclusion in their own decree.

7. Cooperating with State Attorneys General in Criminal Investigations

As stated above, most state attorneys general are concerned primarily with civil antitrust enforcement, including recovering civil damages on behalf of natural persons residing within their states, state agencies, institutions, and political subdivisions harmed by unlawful conduct. An increasing number of state attorneys general, however, have established criminal antitrust enforcement programs.

a. **Cross-Designation Program**

In 1984, as part of the Division's efforts to strengthen cooperation with state attorneys general in the prosecution of criminal antitrust matters, the Division instituted the cross-designation program, which allows the Division to stretch enforcement resources through the appointment of state prosecutors to assist the Division on grand jury investigations. As with civil investigations, state attorneys general often have special knowledge of local markets that may prove helpful in a grand jury investigation. The program also provides state attorneys general opportunities to gain experience in criminal antitrust enforcement, which hopefully will result in increased state prosecution of criminal antitrust offenses.

Every attorney selected for the program will be appointed as a special assistant to the United States Attorney General, pursuant to 28 U.S.C. § 515(b), and will be detailed to the Antitrust Division. Section 515(a) authorizes special assistants, when specifically directed by the Attorney General, to conduct any legal proceedings, including grand jury proceedings, that United States Attorneys are authorized by law to conduct.

Special assistants initially will be appointed for six months, on the basis of a name and fingerprint check, pending completion of a full-field background investigation by the FBI. The appointment may be extended upon satisfactory completion of the background investigation.

Special assistants will serve without compensation other than that which they receive through their existing employment with the state. A special assistant will report to and act under the direction of the chief of the field office or section conducting the investigation or prosecution or such other attorney or Division attorneys as the chief may designate. A special assistant may be terminated at any time and without cause or notice. Each special assistant must take an oath of office and must agree to abide by all restrictions applicable to attorneys employed by the Department against the disclosure to unauthorized persons of information obtained in the course of service as a special assistant, including Rule 6(e) restrictions regarding the disclosure of grand jury materials.

Requests to participate as a cross-designee for a particular investigation should be made to the Criminal DAAG, who will arrange with the Personnel Unit for the appropriate forms to be sent to the state attorney general. Upon the return of the completed forms to the Division, including three fingerprint cards, the Personnel Unit will arrange for a name and fingerprint check by the FBI. Once this has been completed, the applicant will be notified of his or her six-month appointment pending completion of the FBI's full-field background investigation. The special assistant must sign the appointment letter and oath of

office and return them to the Division. A copy of the appointment letter and oath should be filed with the clerk of court in the district where the investigation is being conducted. The section or field office chief should request a grand jury letter of authority for the special assistant, which should also be filed with the clerk. Upon completion of the full-field investigation, the special assistant's term of appointment may be extended to one year from the original appointment date.

b. NAAG/Antitrust Division Protocol

In 1996, NAAG and the Division agreed upon a protocol concerning the cross-designation of state attorneys. See [Protocol for Increased State Prosecution of Criminal Antitrust Offenses](#). The purpose of this protocol is to address several of the issues that may arise in connection with the cross-designation of state attorneys general, particularly when the state has potential civil treble damage claims involving the same subject matter as the grand jury investigation.

The simultaneous participation by a special assistant in the grand jury investigation and a civil action brought by the state attorney general involving the same subject matter presents potentially significant Rule 6(e) problems. The state commits under the protocol to delay the filing of any damage action involving the subject matter of the grand jury investigation until the completion of all prosecutions at the district court level. There is an exception when the state faces the possible expiration of the statute of limitations of its civil claims.

Simultaneous civil and criminal proceedings may be unavoidable in many circumstances because the Clayton Act and most state antitrust statutes impose a four-year statute of limitations on civil treble damage antitrust actions. See 15 U.S.C. § 15b; *but see* 15 U.S.C. § 16(i) (tolling the statute of limitations during pendency of an antitrust suit by the United States). By contrast, criminal antitrust actions have a five-year statute of limitations. See 18 U.S.C. § 3282. Whenever the state attorney general files a civil action during the pendency of a grand jury investigation to preserve a civil claim, the protocol requires the state attorney general to assign separate staff to handle the civil action and to ensure that the civil staff and any person supervising the civil staff be screened from any information obtained in connection with the grand jury investigation.

Simultaneous criminal and civil proceedings provide opportunities for defense counsel to use civil discovery to depose government witnesses. The commitment under the protocol to delay the filing of civil damage actions significantly benefits the Division because it prevents this potential misuse of civil discovery.

It is crucial to the success of any joint effort that Division and state attorneys general discuss at the outset the issues covered by the protocol. Division staff

should obtain a commitment that the state will adhere to the protocol from the official in the state attorney general's office for antitrust enforcement.

c. Dual and Successive Prosecution Policy (Petite Policy)

In making decisions about whether the Division will investigate a matter, refer a matter to a state for prosecution, or investigate a matter while a state is conducting a parallel criminal investigation, staffs should be aware of the Department's Dual and Successive Prosecution Policy (Petite Policy). This policy addresses the question of under what circumstances a federal prosecution will be instituted or continued following a state criminal prosecution based on substantially the same act or acts. There is no constitutional bar to federal prosecution for the same offense as to which there has been a state prosecution. The Double Jeopardy Clause simply does not apply to this situation. See *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). Further, while Congress has expressly provided that as to certain specific offenses a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts, it has not included violations of the antitrust laws in this category. See, e.g., 18 U.S.C. §§ 659, 660, and 2117; and 15 U.S.C. § 80a-36.

Nonetheless, since 1959, the Department has followed the policy of not initiating or continuing a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution. This policy is known as the "Petite policy" based on *Petite v. United States*, 361 U.S. 529 (1960) (granting the Solicitor General's petition to vacate the second of two federal subornation of perjury convictions after the government indicated its intention to avoid successive federal prosecutions arising from a single transaction, just as it had earlier announced that it would generally avoid duplicating state criminal prosecutions). The Petite policy provides that only the appropriate Assistant Attorney General may make the finding of a compelling federal interest, and failure to secure the prior authorization of the Assistant Attorney General for a dual prosecution will result in a loss of any conviction through a dismissal of the charges, unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason for the failure to obtain prior authorization. This policy is discussed in full in Chapter III, Part G.1.c of this Manual and the [United States Attorneys' Manual § 9-2.031](#).

d. Parallel State Civil Investigations

It is not uncommon for a state attorney general to conduct a civil investigation at the same time the Division is conducting a grand jury investigation of the same

conduct. It is in the interests of the Division and the state attorney general to coordinate their respective investigations to the extent practical. For the reasons stated in the previous section, the Division may request that the state attorney general defer filing a civil action involving the subject matter of a grand jury investigation during the pendency of the investigation if it appears that a state civil action may interfere with an ongoing Division prosecution. The Division will not make such a request if the state is faced with the possible expiration of the statute of limitations. The state has significant incentives to ensure that a state civil action does not interfere with possible criminal prosecutions by the Division. Guilty pleas and convictions constitute prima facie evidence of liability in Sherman Act civil actions. 15 U.S.C. § 16(a).

Division staff should also determine whether the state is contemplating taking CID depositions of possible targets and government witnesses. Since most state CID statutes authorize the state attorney general to grant immunity to and compel the testimony of witnesses, state CID depositions of possible targets of a grand jury investigation could present significant problems for the Division in any subsequent prosecution of a state CID witness. *See Kastigar v. United States*, 406 U.S. 441 (1972).

Testimony compelled under a state grant of immunity cannot be used against the witness in a federal criminal prosecution. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law). Accordingly, when a defendant in a federal criminal trial has previously testified pursuant to a state grant of immunity, the Division has the burden of establishing that the immunized testimony has not tainted its evidence. *See id.* at 79.

Division attorneys should ensure that they are not exposed to the immunized CID testimony of a potential target. The state should be requested not to disclose to the Division the CID deposition testimony of any witness. Since most state CID statutes contain strict confidentiality provisions, there should be little likelihood of public disclosure of the testimony, except for use in a state proceeding. In most instances, the federal criminal proceeding will be concluded prior to any state proceeding in which the CID deposition testimony might be disclosed.

Insulating Division staff from exposure to immunized testimony does not end the inquiry concerning the use of the testimony against a defendant. *See United States v. North*, 920 F.2d 940 (D.C. Cir. 1990). The court in *North* found that *Kastigar* is “violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony.” *Id.* at 942.

The state's use of a defendant's immunized testimony in interviews or depositions of individuals who subsequently testify in a criminal trial raises *Kastigar* issues similar to those in *North*. In the course of questioning witnesses, a state prosecutor might disclose portions of the defendant's immunized testimony, which the witnesses arguably could then use to shape their testimony in the subsequent federal criminal trial. Demonstrating that witnesses questioned by state prosecutors under these circumstances did not shape their testimony could be difficult and time consuming. Accordingly, the Division may request that the state, in the spirit of cooperation, refrain from immunizing possible targets of Division grand jury investigations.

State CID depositions of cooperating witnesses also may present problems. Because state CID deposition transcripts may be discoverable, transcripts of testimony of cooperating witnesses are sources of possible impeachment. As an alternative, the state could interview the cooperating witnesses without recording or transcribing the interview. The state prosecutor's notes should be protected from discovery under the work product doctrine. If government witnesses are willing to cooperate with the state, Division staff should consider requesting that the state refrain from taking the witness's CID depositions until the completion of the criminal trial. This type of request has been made of state attorneys general in the past with good results for all involved.

e. **Global Settlements of Criminal Charges and State Attorneys General Civil Claims**

One area of concern for state attorneys general is the situation in which the Division accepts a plea from a defendant requiring the payment of a substantial fine that renders the defendant unable to pay civil damages to the state. Where the state has potential civil claims arising out of conduct that is the subject of a Division criminal enforcement action and the defendant may be experiencing financial difficulties, Division staff should explore two options with state attorneys general. Division staff could attempt to negotiate a plea agreement that requires the defendant to pay restitution to the state. The state should be consulted concerning the amount of restitution. The other option is a global settlement that includes a plea agreement with the Division and a civil settlement with the state. The Division and the state would determine the maximum amount of criminal fines and civil damages the defendant could pay and remain viable and then decide on the amounts to be paid as criminal fines and civil damages. The Division has successfully negotiated plea agreement restitution provisions and global settlements with state attorneys general in the past.

D. Foreign Governments, International Organizations, and Executive Branch Agencies with International Responsibilities

1. Background and Procedures

The Division's work frequently requires contact with foreign governments, companies, and individuals. Contact with foreign individuals and entities is subject to the requirements of various international agreements to which the United States is a party. In addition, direct contact by Division attorneys with foreign nationals and entities may raise sovereignty concerns in foreign countries and, in some instances, constitute a violation of the foreign country's laws. Matters with international aspects, therefore, often raise issues of special concern and should be brought to the attention of the Foreign Commerce Section.

In addition to imposing obligations on the Department, many of the international agreements to which the United States is a party (as well as many of the international relationships that the Department maintains) present opportunities both for obtaining assistance in specific investigations and for enhancing overall cooperation efforts in international antitrust enforcement. It is the responsibility of the Foreign Commerce Section to maintain good working relationships with foreign governments and international organizations, as well as to work with the Department of State and other Executive Branch agencies with international responsibilities in order to ensure that the Department fulfills its responsibilities under its international agreements.

Various countries, including some of the United States's important trading partners, have domestic laws or policies that may impact efforts by the Division to obtain information from foreign nationals or corporations. Because of the varying requirements that foreign governments impose, it is important that the Foreign Commerce Section be apprised of any proposed actions by Division attorneys that may raise international issues.

The United States is also party to a number of bilateral and multilateral international agreements that require the notification of foreign governments about proposed Division actions that may affect the foreign governments' interests. Many foreign governments consider their interests to be affected by Division actions in a wide range of circumstances, such as when the Division seeks information or documents located in their countries; when the Division investigates or otherwise has dealings with their firms or citizens even on a voluntary basis; or when conduct that the Division is investigating occurred in whole or in part in their jurisdictions.

Notification of contemplated Division investigative or enforcement action that may affect another country's interests is intended to avoid misunderstandings that may affect the Division's future ability to enforce the antitrust laws. The Foreign Commerce Section is responsible for implementing the Department's notification obligations under these agreements.

In accordance with Division Directive ATR 3300.2, "Notification of Antitrust Activities Involving Foreign Companies, Individuals or Governments," any section or field office chief responsible for a matter that may involve substantial interests of a foreign government or foreign national should keep the Foreign Commerce Section fully apprised so that the Foreign Commerce Section can perform its various responsibilities. Proposed actions as to which the Foreign Commerce Section must receive advance notification are set forth more fully in Directive 3300.2, but, in essence, staff must inform the Foreign Commerce Section:

- When authorization is requested for an investigation (including business reviews), case, or competition advocacy that may involve substantial interests of a foreign government, foreign national, or foreign corporation. Most commonly, this will involve situations in which (i) a foreign national, foreign corporation, or a U.S. corporation in which a foreign company owns a substantial interest is a subject or target of a criminal or civil nonmerger investigation or a merging party in a merger investigation; (ii) the investigation involves conduct that occurred in whole or part outside the United States; or (iii) the activities that are the subject of the investigation may have been wholly or in part required, encouraged, or approved by a foreign government.
- As soon as Division staff learns or has reason to believe that any of the circumstances listed above are present in the investigation.
- Before seeking information, documents, or evidence (whether through subpoena, second request, CID, or voluntary request) that may be located outside the United States.
- Before seeking information from a foreign national (even if the foreign national is located in the United States when the request is made).
- Before seeking to conduct interviews or depositions in another country.
- Before requesting information or cooperation from foreign antitrust authorities or other agencies of a foreign government.
- Before sending out target letters in a criminal investigation to foreign individuals, foreign corporations, or U.S. corporations in which a foreign entity owns a significant interest.

- Before entering into settlement discussions or plea negotiations with a foreign individual, foreign entity, or a U.S. company in which a foreign entity has a substantial ownership interest.
- When staff is contacted by or on behalf of a foreign individual, entity, or government.
- Before any significant change in the status of a matter in which there previously has been notification to a foreign government.

2. Liaison with the Department of State

The notifications described above are generally transmitted to the relevant foreign governments through the Department of State. Notifications are sent by the Division to the State Department's Office of Multilateral Trade Affairs for transmission through diplomatic channels. That office also routes notifications to State Department desk officers responsible for the countries to which the notifications are addressed. This procedure allows the State Department to consider whether the actions or proposed actions described in the notifications have any foreign policy implications and to consult with the Division on any issues raised by the notification. The Foreign Commerce Section is charged with the responsibility to act as liaison with the Department of State with regard to these notifications.

3. Liaison with the Department of Homeland Security

As the number of Division investigations involving potential foreign subjects and witnesses increases, the Division has, with increasing frequency, requested the U.S. Department of Homeland Security to establish border watches to check for the entry of relevant foreign nationals into the United States. Such requests are coordinated through the Office of Criminal Enforcement (OCE). If a border watch is implemented, OCE should be notified as soon as the need for the watch passes to ensure that the border watch be lifted.

The increase in the Division's international enforcement effort has also resulted in an increase in the number of foreign individuals charged in the Division's criminal cases. For many of these defendants, an important inducement to submit to U.S. jurisdiction is the ability to resume travel for business activities in the United States. Because, however, the U.S. Immigration and Customs Enforcement of the Department of Homeland Security (ICE, formerly Immigration and Naturalization Service (INS)) considers criminal violations of the Sherman Act to constitute "crimes involving moral turpitude," see 8 U.S.C. § 1182 (a)(2)(A)(i)(I), foreign nationals convicted of such crimes may be subject

to exclusion or deportation from the United States. The Division therefore entered into a Memorandum of Understanding (MOU) with the INS, now implemented by ICE as successor to INS, pursuant to which each component agrees to cooperate with the other in their respective enforcement obligations. The MOU, signed in 1996 by the Assistant Attorney General and the Commissioner of the INS, established a protocol whereby the Division may petition ICE to preadjudicate the immigration status of a cooperating alien before the alien enters into a plea agreement or pleads guilty to a crime. Division attorneys who wish to consider whether the MOU might be applicable in their matters should consult with a senior counsel to the Criminal DAAG, the Director of Criminal Enforcement, or the Criminal DAAG before entering into discussions with counsel.

4. Bilateral Mutual Legal Assistance Treaties

Among the international agreements likely to be of interest to Division attorneys are the bilateral mutual legal assistance treaties, pursuant to which the United States and foreign countries agree to assist each other in criminal law enforcement matters. Bilateral Mutual Legal Assistance Treaties (MLATs) create a routine channel for obtaining a broad range of legal assistance in foreign countries, including taking testimony or statements from witnesses, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. The United States currently has MLATs in force with approximately 50 countries; many others have been signed but are not yet in force.

The Criminal Division's Office of International Affairs (OIA) acts as liaison for the Department with regard to incoming and outgoing assistance requests under MLATs. OIA also maintains relationships with many other foreign governments for the purpose of obtaining legal assistance in criminal law enforcement matters. Assistance requests to governments with which the United States does not have a MLAT usually take the form of letters rogatory (i.e., requests from a U.S. court to a foreign court), although some such countries may accept a less formal MLAT-like request. The Foreign Commerce Section works closely with OIA on matters relating to efforts to obtain foreign-located evidence and is responsible for assisting Division attorneys who desire to obtain foreign-located information. The Foreign Commerce Section should be consulted prior to the transmission of any assistance request to OIA.

5. Bilateral Antitrust Cooperation and Consultation with Foreign Governments

In order to further the Division's goal of promoting the cooperation of foreign governments in its antitrust enforcement efforts, the Foreign Commerce Section is responsible for seeking and maintaining bilateral understandings with antitrust enforcement agencies in other jurisdictions. The Division has developed close bilateral relationships with antitrust officials of many jurisdictions. In certain instances, informal understandings have been reached on the obligations of governments as to notification, consultation, and cooperation in antitrust matters.

Formal [bilateral antitrust cooperation agreements](#) exist with many countries, including Australia, Brazil, Canada, the Commission of the European Communities, Germany, Israel, Japan, and Mexico. In addition to setting out notification and consultation obligations, these agreements provide for the exchange of information between the parties on matters relating to each other's enforcement interests. These agreements, however, do not override domestic laws of either country, including confidentiality laws. Regular consultations are held with antitrust officials of Canada, the European Commission, Japan, and South Korea; similar consultations are held on an ad hoc basis with other countries. Close informal ties are maintained with antitrust authorities in other countries. Relationships with foreign antitrust authorities, whether or not they have resulted in formal agreements, are often helpful in facilitating the execution of law enforcement assistance requests.

The International Antitrust Enforcement Assistance Act of 1994 (IAEAA), 15 U.S.C. §§ 6201-6212, gives the Department and the FTC the authority to enter into bilateral agreements with foreign antitrust authorities that would, among other things, allow the exchange of otherwise confidential information. In a [memorandum and order approved May 22, 2008](#), the attorney general delegated the authority under the IAEAA to make and respond to requests for legal assistance in international antitrust investigations to the Assistant Attorney General for the Antitrust Division. In 1999, the United States entered into an [agreement on mutual antitrust enforcement assistance under the IAEAA with Australia](#).

6. Cooperation with International Organizations

a. The International Competition Network

In October 2001, the Antitrust Division and the FTC joined with antitrust agencies from around the world to create the [International Competition Network](#)

(ICN). The ICN is the only international body devoted exclusively to antitrust law enforcement. It was established as a virtual network of antitrust authorities focused on improving international antitrust cooperation and promoting greater procedural and substantive convergence based on sound competition principles. Membership is voluntary and open to any national or multinational authority entrusted with the enforcement of antitrust laws. The ICN has over 90 member antitrust agencies from all over the world. The ICN has no permanent secretariat nor does it exercise any rule-making function. The ICN holds annual conferences, and members participate in project-oriented, informal working groups that communicate via conference calls and e-mail. ICN members cooperate with and seek input from nongovernmental advisers that include representatives of international organizations, associations and private practitioners of antitrust law, and members of the economic and academic communities. The [ICN website](#) contains a vast array of useful information about international convergence and cooperation and how the ICN promotes efficient and effective antitrust enforcement worldwide.

b. The Organization for Economic Cooperation and Development

The Division, along with the FTC and the Department of State, represents the United States in the [Competition Committee of the Organization for Economic Co-operation and Development](#) (OECD). This Committee and its working groups normally meet three times a year at OECD headquarters in Paris to consider issues of common concern to the 30 member countries of OECD, including cooperation in antitrust enforcement, the role of competition policy in regulatory reform, and the sharing of experience in particular substantive areas. The Division also participates, along with the Office of the United States Trade Representative, the FTC, and the State and Commerce Departments, in OECD's Joint Committee on Trade and Competition.

c. The United Nations

The Division participates in antitrust-related conferences of the United Nations. These include meetings of Experts on Competition Law and Policy, held under the auspices of the United Nations Conference on Trade and Development (UNCTAD), to monitor a voluntary international antitrust code of conduct adopted in 1980 by the U.N. General Assembly and to discuss competition law and policy generally. This work is carried out in the Division by the Foreign Commerce Section, with the cooperation of other sections when needed, and is coordinated with the Department of State and other U.S. government agencies.

d. Regional Trade Agreements

The Antitrust Division participates in a number of antitrust-related negotiations and working groups related to regional and bilateral trade agreements. The Division has chaired or co-chaired delegations negotiating competition chapters in current and proposed free trade agreements with Chile, Singapore, Australia, Thailand, and the Andean countries (Colombia, Peru, and Ecuador). The Division participates with other U.S. government agencies in competition policy working groups associated with, inter alia, the Asia-Pacific Economic Cooperation forum. The Division also played an important role in the World Trade Organization working group established in 1997 to study issues relating to the interaction between trade and competition policy and will continue to monitor any competition policy initiatives at the World Trade Organization.

7. Competition Advocacy in U.S. International Trade Policy and Regulation

The Division, through the Foreign Commerce Section, represents the Attorney General at the staff level in several interagency committees involved in the formulation and implementation of U.S. international trade and investment policies. In addition to regular participation in interagency deliberations, the Division from time to time participates in U.S. Government delegations negotiating agreements with other governments. These activities usually are coordinated by the Office of the United States Trade Representative (USTR) and other parts of the Executive Office of the President. USTR conducts interagency work through the Trade Policy Review Group, a body on which the Division usually represents the Department of Justice.

The Division is a principal advocate of competition as the cornerstone of U.S. international economic policy. In addition, the Division actively seeks to provide advice in trade negotiations on the competition implications of proposed trade agreements. Finally, the Division occasionally advises USTR or other agencies on the antitrust implications of various trade policy options, in order to ensure consistency with the antitrust laws.

E. Federal Agencies That May Be the Victim of Anticompetitive Conduct

In some instances, federal agencies may be the victims of conduct that violates the antitrust laws. Agencies involved in procurement may be victimized by bid-rigging or other criminal conspiracies. Similarly, federal agencies can be adversely affected by civil antitrust violations; in particular, mergers in

industries such as defense can have their greatest impact on federal government procurement.

1. General

Before contacting an agency with which the Division has a regular relationship, staff should contact the relevant section within the Division to coordinate contacts with that agency. For example, contact with the Department of Defense should be coordinated through the Litigation II Section. For additional information on dealing with the Department of Defense, see Chapter VII, Part E.2. Generally, when information is required from other federal agencies, it is obtained relatively informally on a consensual basis. In the event that a federal agency is reluctant to provide information voluntarily, staff should consult with the appropriate Director of Enforcement or Deputy Assistant Attorney General.

In addition, if an investigation involves procurement by a federal agency, staff should consider seeking the assistance of that agency's Inspector General's Office. IG agents have in the past proven to be helpful in collecting and analyzing bid or pricing data, interviewing potential witnesses, and explaining a particular agency's procurement system and regulations. No special Division procedures are required for obtaining the assistance of IG agents, and staff should make whatever arrangements are appropriate directly with the Inspector General's office for the agency involved.

2. Defense Industry Merger Investigations

The Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation, which included representatives of the Division and the FTC, issued a report in 1994 that creates the framework for investigations of mergers in the defense industry. See [Office of the Under Secretary of Defense for Acquisition & Technology, U.S. Department of Defense, Report of the Defense Science Board Task Force on Antitrust Aspects of the Defense Industry Consolidation \(1994\)](#). The report recognized that the Department of Defense's (DoD) knowledge of the defense industry can contribute to an informed review of defense mergers by the enforcement agencies. *Id.* at 39. Although the Division makes the ultimate decision on whether to challenge any defense merger that it investigates, it has committed to "give DoD's assessment substantial weight in areas where DoD has special expertise and information, such as national security issues." *Id.*

On a practical level, the report established the Office of the Deputy Under Secretary of Defense for Industrial Affairs and Installations (DUSD) as the

central point of contact on antitrust issues. The DUSD uses both its own permanent staff and attorneys detailed from the DoD General Counsel's office. Throughout any defense merger investigation, the Office of the DUSD will arrange all interviews with knowledgeable DoD staff and will coordinate information provided to the Division while conducting a parallel investigation. Division staff should contact the Director of Operations before initiating contact with DUSD on a matter. Division staff are expected to develop strong working relationships with DoD staff working on the investigation and should seek appropriate waivers to share confidential information received through discovery with DoD staff. In most cases, at the completion of its review and discussion with Division staff, DoD will formally communicate its views on the competitive impact of a proposed transaction and any proposed relief to the Division.

When reviewing HSR filings in the defense industry, staff should not early terminate the waiting periods without clearance from the appropriate Deputy Assistant Attorney General so that DoD can convey any competitive concerns to the Division.

F. Congressional and Interagency Relations

The Legal Policy Section is responsible for ensuring consistency in the Division's congressional relations and in its dealings with other federal agencies on matters affecting the Division's legislative program.

1. Legislative Program

The Legal Policy Section advises the Assistant Attorney General and other senior policy officials on matters affecting the Division's legislative program. The section draws on the resources of the entire Division in identifying legislative matters of importance to the Division and in developing and articulating the Division's position on pending legislation.

Division staff should contact the Legal Policy Section if they become aware of legislation that may affect the policy interests of the Antitrust Division or the enforcement of the antitrust laws. Division staff are also encouraged to bring possible legislative initiatives to the attention of the chief of the Legal Policy Section, who is responsible for evaluating, developing, and presenting such initiatives to the Division's senior policy officials. Legislative proposals must be approved by the Assistant Attorney General before being discussed outside of the Division. Staff acting in an official capacity should not offer views on pending legislation or discuss legislative initiatives outside of the Division without first consulting the chief of the Legal Policy Section.

2. Testimony and Written Legislative Reports

The Division is often asked to testify before Congress or to prepare a written report stating the Administration's views on pending or proposed legislation. The Legal Policy Section is responsible for coordinating the Division's response to such requests. The preparation of testimony and written reports is supervised by the chief of the Legal Policy Section, working closely with senior Division policy officials. When appropriate, the Legal Policy Section will consult others in the Division. Both testimony and written comments require the approval of the Assistant Attorney General and clearance by the Department; in addition, both are subject to interagency review and final clearance by the Office of Management and Budget (OMB). The Legal Policy Section is responsible for obtaining all necessary clearances.

In reviewing proposed legislation, attorneys and economists should consider carefully the potential impact of such legislation on the antitrust laws and the enforcement of those laws. A proposal's impact on the operations of the Division should also be considered. Written comments and reports should be tailored according to the significance and complexity of the legislation and its importance to the Division. As written testimony and legislative reports frequently become part of the public record, careful attention is necessary at all stages of the drafting process.

3. Interagency Clearance and Approval Procedures

Before transmittal to Congress, legislative proposals or comments from Executive Branch agencies, including testimony and written reports, must be reviewed and cleared by OMB. The Division participates in OMB's interagency clearance process in both an originating and reviewing capacity.

In the case of legislative materials originating within the Division, once such materials have been approved by the Assistant Attorney General, the Legal Policy Section transmits them to the Department's Office of Legislative Affairs (OLA), which in turn submits them to OMB for interagency clearance and approval.

OMB referrals of other agencies' proposals that are sent to the Department for comment are transmitted to OLA where they are logged in and, if designated for review by the Division, delivered to the Legal Policy Section. In many instances, the Legal Policy Section will forward these proposals to the section or field office with substantive responsibility for the subject matter for review and comment. Such referrals may be subject to only cursory review by the Legal

Policy Section prior to delivery to the appropriate component. After receipt by the appropriate component, OMB referrals require priority handling and strict attention to internal deadlines established by OLA and the Legal Policy Section.

Staff comments, including written comments intended for submission to OMB, should be e-mailed to the appropriate person in the Legal Policy Section. Whenever possible, comments should be cleared by a section supervisor; however, this requirement may be waived for referrals requiring a same-day response. “No comment” replies also should be e-mailed to the Legal Policy Section for record purposes.

Draft comments need not be prepared as formal memoranda; however, written comments must be in a form that is suitable for direct transmission to OMB clearance officials. Given the strict deadlines that accompany OMB referrals, the Legal Policy Section generally does not provide drafting assistance.

4. Congressional Correspondence

Incoming congressional mail addressed to Main Justice or bearing the Department’s central zip code, 20530, is sorted by the Department’s Mail Referral Unit and entered into a Department-wide correspondence management database. It is then transmitted to the Department’s Executive Secretariat, where each item is assigned a file number and specific instructions for reply. Correspondence designated for handling by the Division is then transmitted to the Legal Policy Section, where it is downloaded, logged on the Division’s Correspondence and Complaint Tracking System, and assigned to the appropriate section or field office within the Division for the preparation of a draft reply.

Drafts must conform to standards developed by the Office of the Attorney General for controlled correspondence, *see DOJ Correspondence Policy, Procedures, and Style Manual*, as well as all relevant Department and Division policy guidelines on communications with Members of Congress and the disclosure of confidential information, *see* Division Directive ATR 3000.1, “Communications with Outside Parties on Investigations and Cases.” Attorneys are expected to meet the internal reply deadline assigned by the Legal Policy Section and any item-specific drafting instructions contained in the transmittal materials.

Prior to transmitting a draft to the Legal Policy Section, staff should clear proposed replies with their section or field office supervisor, who should review

drafts not only for their content but also for conformance to Department standards.

Staffs are expected to notify the Legal Policy Section whenever it appears that additional time will be needed for the preparation of a draft reply. In addition, all congressional correspondence delivered directly to an individual or office within the Division should be referred to the Legal Policy Section for handling. Specific procedures for the management of congressional correspondence and other high priority mail are addressed in Division Directive ATR 2710.1, "Procedures for Handling Division Documents."

5. Informal Congressional Inquiries

The Division often receives informal inquiries from congressional staff and other congressional sources. In order for the Division to be aware of the nature and extent of its congressional contacts, all telephone, fax, and e-mail inquiries from congressional sources should be directed to the Legal Policy Section. The Legal Policy Section will screen the inquiries and, when necessary, refer them to a section or field office for appropriate handling. If a Division attorney or economist has an impromptu discussion regarding a matter of interest to the Division with congressional staff without prior clearance, the Legal Policy Section should be informed as soon as possible of the nature and content of the communication. *See* Division Directive ATR 3000.1, "Communications with Outside Parties on Investigations and Cases." These occasions should be rare and unanticipated, as congressional inquiries ordinarily should be referred to the Legal Policy Section.

6. Resources

The Legal Policy Section maintains extensive legislative files on congressional activities. Its files include archival materials from previous sessions of Congress and records of the Division's contacts with Congress, such as written testimony, legislative reports prepared at the request of a congressional committee, and correspondence with individual members of Congress. These materials and other legislative resources are available to Division staff upon request. These permanent files are a useful record of the Division's participation in past legislative initiatives, and their use is encouraged.

The Legal Policy Section also has access to a variety of resources that can be made available upon request to Division personnel. Legislative resources include the *CQ Today*, the *Congressional Record*, the *Congressional Quarterly*, the *Weekly Compilation of Presidential Documents*, and various online databases. In

addition, the Legal Policy Section can search the Department's correspondence database for information on the Division's correspondence history with particular members of Congress and for correspondence statistics generally.

All Division professionals are encouraged to use these legislative resources and to contact the Legal Policy Section whenever they need information or have questions about legislative matters.

G. Freedom of Information Act Requests and Procedures

1. Organization

Since the passage in 1966 of the Freedom of Information Act (FOIA), [5 U.S.C. § 552](#), individuals, public interest groups, corporations, and other entities have been provided access to various categories of governmental records unless access is specifically limited by one of the exemptions to FOIA. The 1996 amendments to FOIA make clear that information maintained electronically is covered by FOIA. Requesters have a right, within reasonable limits, to request that information be provided in the format of their choice. In response to FOIA, the Department of Justice established FOIA offices in its various organizational entities, including the Division. Final determinations of FOIA matters within the Division are made by the Director of Operations. The final Departmental responsibility for making a determination relating to the FOIA generally rests with the Office of Information and Privacy. The Division's FOIA Unit, which is part of the Office of Operations, is staffed by a FOIA officer, paralegals, and support personnel.

2. Procedures

FOIA requests that relate to the work of the Division should be directed to the Division's FOIA Unit for processing. It should be noted that the requester of the information is responsible for the cost of reproducing the materials requested, as well as search and review charges where applicable.

Division attorneys who directly receive requests for nonpublic Division documents either by telephone or in person should advise the requestor to contact the FOIA Unit. The request should be in writing and should describe as specifically as possible the documents requested.

Attorneys in the Division who have worked on a matter about which information has been requested are consulted regularly by the Unit. The 1996 amendments to FOIA impose strict time limits for responding to FOIA requests. Accordingly,

attorneys who are consulted by the FOIA Unit should respond expeditiously and provide all possible assistance.

3. Exemptions

All agency records are available to the public under FOIA, except nine categories of information that are exempt from disclosure under the Act. 5 U.S.C. § 522(b). Drafts and handwritten notes that are not distributed to staff or placed in the official file are generally not considered agency records and hence are not required to be produced. The application of some of these exemptions is discretionary and information falling within their scope may be released to the public. The exemptions to the FOIA are:

a. Classified Documents

Portions of documents containing national security information properly classified under the standards and procedures of the appropriate executive order are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1). Classified documents can be processed only by employees in the FOIA Unit with the appropriate security clearance.

b. Internal Personnel Rules and Practices

Documents consisting of “internal personnel rules and practices” of an agency may be withheld under the FOIA. 5 U.S.C. § 552(b)(2). This exemption has been interpreted by most courts to apply to (1) internal agency matters where there is no substantial and legitimate public interest in disclosure, such as procedures for obtaining parking spaces or determining cafeteria hours, and staff manuals containing internal investigation and litigation instructions and tips; and (2) more substantial internal matters the disclosure of which would allow circumvention of a statute or agency regulation.

c. Materials Exempted by Other Statutes

Information that is specifically exempt from disclosure by another statute can be withheld pursuant to Exemption 3 of the Act. 5 U.S.C. § 552(b)(3). The statutes that pertain to Division matters are: (1) Fed R. Crim. P. 6(e) (grand jury information); (2) 15 U.S.C. § 18a(h) (HSR premerger notification information); (3) 15 U.S.C. § 1314(g) (CID material); (4) 15 U.S.C. § 4305(d) (National Cooperative Research and Production Act filings); and (5) 15 U.S.C. § 4019 (commercial or financial information protected by the Export Trading Company Act). Information obtained from other agencies also may be protected by statutes

applicable to their areas of responsibility (e.g., the FTC Improvements Act and the income tax statutes).

The coverage of the different statutes varies. For example, copies of CID schedules generally are not protected while HSR second request letters and grand jury subpoenas generally are protected. Excerpts from and descriptions of information received pursuant to the statutes noted above as they appear in transmittal letters and internal memoranda are exempt to the same extent as the source documents.

The circuit courts are divided about the scope of protection under Rule 6(e), which prohibits the disclosure of any information that would reveal a “matter occurring before the grand jury.” The majority of circuits, including the D.C. Circuit, agree that “[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers.” *Senate of Puerto Rico v. Dep’t of Justice*, 823 F.2d 547, 582 (D.C. Cir. 1987) (Justice, then Judge, Ruth Bader Ginsburg); *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412-1414 (9th Cir. 1993) (explaining the various approaches established by the circuits). Rule 6(e) only protects information that would reveal the inner workings of the grand jury, such as “the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.” *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (*en banc*). Thus, courts have generally held that documents created “for independent corporate purposes” are not protected by 6(e) just because they have been presented to the grand jury, but documents which might “elucidate the inner working of the grand jury” may be withheld. *Senate of Puerto Rico*, 823 F.2d at 582-83 (internal citation omitted). In the Sixth Circuit, however, there is a rebuttable presumption that confidential nonpublic documents obtained by grand jury subpoena are protected by Rule 6(e). *See In re Grand Jury Proceedings*, 851 F.2d 860, 866-67 (6th Cir. 1988). (Note that documents to which 6(e) does not apply may be exempt pursuant to other exemptions.)

Copies of statutorily exempt information are released under FOIA only when they have become part of a public record.

d. Confidential Business Information

FOIA exempts (1) trade secrets, and (2) commercial or financial information obtained from a person that is confidential or privileged. 5 U.S.C. § 552(b)(4). This exemption covers information obtained from outside the federal government but very little commercial or financial information is generated by the government. This exemption protects the interests of those who submit

proprietary business information, as well as the interests of the government in obtaining access to such information.

The term “trade secret” has been defined narrowly by the courts to mean “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *See, e.g., Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Under this definition of trade secret, there must be a direct relationship between the information and the production process.

Applicable standards under the commercial or financial information exemption generally depend upon whether the person who provided the information was obliged to provide the information or submitted it voluntarily. Information that the person was required to provide generally must be released unless disclosure either would impair the government’s ability to obtain similar information in the future or cause substantial competitive harm to the person. *Nat’l Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770-71 (D.C. Cir. 1974).

Commercial or financial information submitted voluntarily is categorically protected provided it is not customarily disclosed to the public by the person who submitted the information. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993); *accord Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001). If coverage is unclear, the FOIA Unit will consult with staff attorneys and economists to determine the nature of the commercial or financial information and whether it is exempt under FOIA. In addition, under the Department’s regulations, 28 C.F.R. § 16.8, the FOIA Unit will consult with the person who submitted the information as appropriate.

Promises of confidentiality by the Division are pertinent in applying this exemption, but they are not always dispositive. The FOIA Unit *always* should be consulted before any promises of confidentiality are given to parties from whom the Division has requested information. *See* Chapter III, Parts C.3, E.7. A model confidentiality letter, providing assurances for voluntarily produced commercial or financial information, may be found on ATRnet.

e. Civil Privileges

“Inter-agency or intra-agency memoranda or letters” that would normally be privileged in civil discovery are exempt from disclosure pursuant to Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This exemption encompasses the attorney work product

doctrine and the deliberative process, attorney-client, and other discovery privileges.

i. Attorney Work Product Doctrine

The attorney work product doctrine protects documents prepared by attorneys in contemplation of litigation. The doctrine also applies to documents prepared by other Division employees and outside expert consultants who are working with an attorney on a particular investigation or case. Unlike the deliberative process privilege, discussed below, factual information generally is included within the attorney work product doctrine. *See Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987). The termination of an investigation or case does not alter the applicability of the attorney work product doctrine. *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983).

ii. Deliberative Process Privilege

The deliberative process privilege (often referred to as the executive privilege) is much more limited as it covers only internal government communications that are deliberative and made prior to a final decision. The purpose of the privilege is to prevent injury to the quality of agency decisions. The privilege does not cover documents announcing a final decision or those explaining decisions that already have been made. Further, it usually does not apply to essentially factual information unless such information is so intertwined with the analysis or so clearly reflects the internal deliberative process employed by the Division as to make segregation of factual portions impossible.

iii. Attorney-Client Privilege

The attorney-client privilege covers confidential communications between an attorney and the attorney's client relating to a legal matter for which the client has sought advice. This privilege seldom arises with regard to Division documents. It may apply in certain circumstances to communications between the Division and another government agency.

f. Materials That Involve Invasion of Personal Privacy

Personnel, medical, and similar files that would cause an unwarranted invasion of personal privacy if disclosed are exempt under the FOIA. 5 U.S.C. § 552(b)(6). In applying this exemption, the Division must balance the public interest in disclosure against the invasion of privacy the disclosure would cause. The public interest seldom outweighs an individual's privacy interest.

g. Investigatory Records

Under 5 U.S.C. § 552(b)(7), six categories of investigatory records are exempt.

Exemption 7(A), which protects records or information that “could reasonably be expected to interfere with enforcement proceedings,” applies to nonpublic documents relevant to an open investigation or case, as well as to closed files that are relevant to another open or contemplated investigation or case. To support a claimed 7(A) exemption, the agency must be able to describe with particularity the harm disclosure would cause.

Exemption 7(B) protects materials that would deprive a person of a right to a fair trial or an impartial adjudication.

Exemption 7(C) protects records that could reveal personal privacy information similar to, but broader than, the exemption for personnel and medical files (e.g., the identity of interviewees).

Exemption 7(D) protects the identity of a confidential source and, in criminal and lawful national security intelligence investigations only, confidential information furnished by that source. In other investigations, this exemption protects the identity of confidential sources but not necessarily the information furnished except to the extent that the information could be used to identify the confidential source. Sources are considered confidential if they request an express promise of anonymity or if they have provided information in circumstances where the assurance of confidentiality may reasonably be inferred. This exemption applies not only to real persons but also to corporations, trade associations, domestic and foreign governments, and law enforcement sources.

Exemptions 7(E) and (F) respectively protect confidential investigative techniques and procedures the disclosure of which would risk circumvention of the law and information that, if released, could endanger the life or safety of law enforcement personnel.

h. Financial Records

FOIA exempts from disclosure matters that are contained in or related to examination, operating, or condition reports by or for agencies that supervise or regulate financial institutions. 5 U.S.C. § 552(b)(8).

i. Geological and Geophysical Information

FOIA exempts records containing geological and geophysical information about wells. 5 U.S.C. § 552(b)(9). This exemption generally does not arise in the Division's matters.

4. Other Records

a. Personal Papers

Personal papers of individual employees are not subject to disclosure under FOIA. Such personal papers include handwritten documents as well as other papers and information that are maintained for private use, are not distributed to staff, and are not part of the official record of any investigation or case. *See* Division Directive ATR 2710.1, "Procedures for Handling Division Documents"; *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

b. Records Subject to Court-Ordered Protective Orders

Where records are under seal pursuant to court-ordered protective orders, they may be released only upon application to the court. Unless the protective order clearly prohibits the Division from disclosing records as long as the order remains in effect, the FOIA Unit must contact the court that issued the protective order to clarify the scope of the protective order. *See Morgan v. United States*, 923 F.2d 195 (D.C. Cir. 1991).

5. Division Records Maintenance and Procedures

Division attorneys, economists, and paralegals should carefully review materials that are placed in official files of the Division to determine that they are official records and are properly within those files. E-mails that reflect official government activity should be printed out and placed in the official file. If it is clear to the attorney at the time the record is made or placed in the file that it would involve confidential information or material that would be exempt from FOIA, it is appropriate to make a notation on the document at the time it is placed within the Division files stating that the document is "FOIA sensitive." This will assist the FOIA Unit in determining whether the document comports with a proper exemption or is not otherwise subject to FOIA. When confidentiality agreements are made under the terms and conditions outlined above, such agreements should be placed in the file in writing to make those

reviewing the files for FOIA purposes aware of the circumstances and the reasons for such confidentiality.

Consistent with the Division's commitment to release information under FOIA that is responsive to the request and that does not fall within a specific exemption or is not subject to FOIA, attorneys, economists, and paralegals should be familiar with the Division's directives relating to sensitive information and document retention and destruction. Division Directive ATR 2710.4, "Safeguarding Sensitive Information"; Division Directive ATR 2710.1, "Procedures for Handling Division Documents."

If any other questions arise as to a proper application of FOIA, or regarding confidentiality commitments, Division personnel should confer with the Division's FOIA Unit.

H. News Media

The Division generally communicates with the media through the Department's Office of Public Affairs (OPA). A Public Affairs Press Officer from OPA is assigned to handle all antitrust press matters and a close liaison is maintained with that Press Officer and OPA, through the Assistant Attorney General, the Deputy Assistant Attorneys General, and the Directors of Enforcement. Where appropriate, OPA may contact a section or field office chief or an attorney to obtain specific information about a matter. The chief or attorney contacted should provide clarifying information to OPA and should point out whatever information is sensitive or cannot be released publicly and the reasons for that practice.

1. Press Releases

The Division communicates with the media through the issuance of press releases describing significant matters such as case filings and (in appropriate circumstances) closings, business review letters, consent decrees, judgment terminations, regulatory filings, and important administrative and policy decisions of the Division. News conferences are held to announce significant enforcement actions. When submitting a recommendation or pleadings for approval, staff should also submit a proposed press release when appropriate. The appropriate Director of Enforcement will review and modify the proposed press release and then send it to the appropriate Deputy Assistant Attorney General and to the Public Affairs Press Officer who handles Division matters. That Press Officer will discuss the matter with the appropriate individuals within the Division and obtain approval on the final text of the press release from the

relevant Deputy Assistant Attorney General and the Assistant Attorney General. For additional information, see Division Directive ATR 3000.1, “Communications with Outside Parties on Investigations and Cases.”

When an indictment, civil case, or consent decree is publicly filed, the attorney immediately should inform the office of the appropriate Director of the filing. That office will then inform OPA that the press release should be issued. The attorney handling the matter should not call OPA to authorize release of a press statement.

The Division uses relatively standardized press statements relating to the return of indictments, filing of civil cases, termination of cases by consent decree, consent to termination of judgments, and issuance of business review letters. Press releases are available on the Division’s Internet site. Staff should contact the appropriate special assistant if assistance is needed in finding examples of press releases issued in cases similar to their own.

2. Press Inquiries and Comments to the Press

The policy of the Department of Justice and the Antitrust Division is that public out-of-court statements regarding investigations, indictments, ongoing litigation, and other activities should be minimal, consistent with the Department’s responsibility to keep the public informed. Such comments as are made are handled through OPA.

Because charges that result in an indictment or a civil action should be argued and proved in court, not in a newspaper or broadcast, public comment on such charges should be limited out of fairness to the rights of individuals and corporations and to minimize the possibility of prejudicial pretrial publicity.

Division attorneys should be familiar with the provisions of Division Directive ATR 3000.1, “Communications with Outside Parties on Investigations and Cases”; 28 C.F.R. § 50.2, “Release of information by personnel of the Department of Justice relating to criminal and civil proceedings”; and the [Department’s guidelines on media relations](#).

The following summarizes the applicable policy considerations:

- Information about investigations, indictments, and civil cases should be provided equally to all members of the news media subject to specific limitations imposed by law or court rule or order. Written releases relating to the essentials of the indictment, complaint, or other pleadings are

usually prepared and distributed as outlined above. *See* Chapter VII, Part G.1.

- Any comments that need to be made on a particular investigation or series of investigations should be handled by OPA, which will coordinate with the appropriate Director of Enforcement or Deputy Assistant Attorney General. Attorneys should not take it upon themselves to make such comments to the press or even to release the identity of staff members or others involved in the course of the investigation. In virtually every instance where a Division attorney or other representative receives a press inquiry, he or she should refer the inquiry to OPA.
- In antitrust investigations, reference to the name of an individual or particular company should be subject to the Department's general "no acknowledgment" rule except in merger investigations.
- The Division will not disclose the fact that companies have filed under the HSR Act. However, the Division and OPA will confirm an investigation of a proposed transaction based on the fact that the Department and the FTC are required under the law to look at transactions that meet certain threshold requirements. A Division attorney should never comment further.
- Where the Division has undertaken an investigation or inquiry as a result of a referral from another agency or individual, and that agency or individual has publicly said that such referral has been made, or if the matter has received a significant amount of publicity, the Department, upon inquiry, may acknowledge the existence of an investigation into a particular industry. Investigation of overall industry or market practices may be acknowledged by OPA, the appropriate Director of Enforcement, or Deputy Assistant Attorney General (e.g., "The Antitrust Division is conducting an investigation into the marketing practices of the widget industry.").
- Generally, even the existence of particular criminal investigations should not be acknowledged or commented upon.

In general, the Division and the Department have a policy of openness, fairness, decency, and civility to all. The Division does not wish to prejudice the rights or affect the interests of anyone accused of a crime or a civil violation of the law. Accordingly, press relations should be based on a common sense view of the guidelines set forth herein.