Clearance: The Back Story and Looking Forward

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In antitrust circles, "clearance" is a loaded word. It has become synonymous with disagreement, not just between the Federal Trade Commission and the Antitrust Division over which agency conducts an investigation but also within the antitrust bar over whether the clearance process needs to be reformed. Opinions in recent years have ranged from those strongly favoring reform[1] to those that are skeptical and dismissive of the need or benefit.[2] The debate has even become the butt of jokes.[3]

William J. Baer, whom President Obama nominated on February 6, 2012, to the position of Assistant Attorney General for the Antitrust Division, historically falls squarely into the category of advocates for reforming and refining the clearance process.[4] And while the reform momentum has steadily diminished since then-Senator Ernest "Fritz" Hollings (D-SC) forced the agencies to abandon their 2002 agreement (the terms of which Mr. Baer helped formulate as one of four prac-

[1] *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, ANTITRUST SOURCE, Aug. 2008, at 12 ("[T]he clearance process by which the agencies avoid duplication of effort with respect to the specific matters is quite worthy of a rethink."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug08_KovacicIntrvw8_6f.pdf; *Interview with Antitrust Modernization Commission Chair Deborah A. Garza*, ANTITRUST SOURCE, Apr. 2007, at 2 ("The [Antitrust Modernization Commission] Commissioners would like to see action on our recommendation regarding a global clearance agreement between the Justice Department and FTC"), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr07_GarzaIntrvw4_30f.pdf.

[2] *Interview with Richard A. Feinstein, Director, FTC Bureau of Competition*, ANTITRUST SOURCE, Apr. 2010, at 7 ("[T]he notion that [clearance is] a problem of major proportions or that consideration of deals is frequently delayed by clearance disputes doesn't comport with my experience."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_FeinsteinIntrvw4_14f.pdf; *Interview with William Blumenthal, General Counsel, Federal Trade Commission*, ANTITRUST SOURCE, Dec. 2007, at 9 ("[I] think people need to step back and ask themselves how severe the problem is and whether efforts to fix the problem potentially might make things worse."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec07_Blumenthal12_17.pdf; *Interview with FTC Commissioner Pamela Jones Harbour*, ANTITRUST SOURCE, Mar. 2006, at 10 ("As for the need for certainty in interagency clearance, call me a skeptic, but I do not believe that any tweaks to the clearance agreement will ever solve all of the clearance issues."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Mar06_HarbourIntrvw3_22f.pdf.

[3] *Roundtable Conference with Enforcement Officials: American Bar Association Section of Antitrust Law Spring Meeting, Washington, DC*, ANTITRUST SOURCE, Apr. 2009, at 9 (Statement of Scott D. Hammond, Acting Assistant Attorney General, Antitrust Division: "I have actually come up with a solution to this clearance dispute problem . . . . Going forward, the Antitrust Division will start looking at all Section 2 conduct criminally, and we will also review all mergers through our criminal enforcement program. [Laughter]."), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr09_EnforcerRT4_29f.pdf.

[4] *See, e.g.*, William J. Baer, The Dollars and Sense of Antitrust Enforcement, Prepared Remarks of William J. Baer, Director, Bureau of Competition, Federal Trade Commission, Prepared Remarks Before the Antitrust Section of the N.Y. State Bar Ass'n 13 (Jan. 25, 1996) ("One goal has been to expedite the process of determining which of the two agencies will investigate a particular merger transaction. . . . Our reforms have produced results."); William J. Baer, Director, Bureau of Competition, Federal Trade Commission, Prepared Remarks Before the American Bar Ass'n Antitrust Section Spring Meeting 1998 at 24 (Apr. 2, 1998) ("Ongoing concerns on our radar screen include clearance delays . . . ."), *available at* http://www.ftc.gov/speeches/other/baeraba98.htm; *Dep't of Justice & Fed. Trade Comm'n Merger Workshop* 141 (Feb. 19, 2004) (Statement of William Baer, Arnold & Porter) ("The whole problem with clearance remains an issue."), *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf; William J. Baer, Prepared Remarks on U.S. Merger Enforcement Policy Before the Antitrust Modernization Commission, 13 (Nov. 17, 2005) ("The existing clearance process unduly delays antitrust clearance, and confers little if any benefit on the parties, consumers, or the enforcers. . . . [The 2002 FTC-DOJ accord], or some variant of it, should be adopted promptly."), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Baer_Statement.pdf.

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titioners tapped by the agencies to recommend reforms),[5] Mr. Baer's presumed confirmation may invite a renewed effort to fix the clearance process.

History of the Clearance Process

The Antitrust Division and the FTC have discussed the allocation of their shared enforcement responsibilities since the formation of the FTC in 1914.[6] The first informal agreement was reached in 1938, but a formal clearance agreement was not executed until June 30, 1948.[7] The timing of that first formal agreement is not coincidental: it was likely the result of the Supreme Court's ruling earlier that year in *FTC v. Cement Institute*,[8] a case stemming from simultaneous FTC and Division investigations of the same entity for the same conduct. The Court held in that case that the FTC and the Division "can chase the same respondent if [they] wish to do so, Section 5 of the Federal Trade Commission Act being broader than Section 1 of the Sherman Act."[9]

The Antitrust Division and the FTC have discussed the allocation of their shared enforcement responsibilities since the formation of the FTC in 1914.

Since 1948, the agencies have formally modified that agreement four times (in 1962–1963, 1993, 1995, and 2002).[10] The modifications prior to 2002 were not widely publicized, while the modifications in 2002 received substantial publicity and were ultimately abandoned as a result of political pressure.[11]

The 1948 and 1962–1963 Clearance Agreements

The 1948 agreement was reached following a conference between the Assistant Chief Trial Counsel and Assistant Chief Examiner for the FTC and the Assistant Attorney General and the Chiefs of the Litigation and Complaint Sections of the Division for the Department of Justice.[12] The agreement provided for exchange of "cards" between the office of the Assistant Chief Examiner for the FTC and the office of the Chief of the Complaint Sections of the Division "regarding pending anti-monopoly investigations and of each new investigation at the time it is directed."[13] The cards (completed in duplicate with one copy retained and the second copy dispatched to the other agency) were to include a file number, title, date, description of the product and parties involved, and statement of the charges.[14] Upon receipt, a liaison officer at the recipient agency would circulate the card internally (e.g., to the Section Chiefs in the Division) and review the recip-

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[5] Timothy J. Muris, *Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission* 7–8 (Nov. 3, 2005) [hereinafter Muris Comments], *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf.

[6] *Id.* at 3 n.2.

[7] U.S. Dep't of Justice, Antitrust Division Manual VII-4 (4th ed. July 2009) [hereinafter Antitrust Div. Manual], *available at* http://www.usdoj.gov/atr/public/divisionmanual/index.html.

[8] 333 U.S. 683 (1948).

[9] Miles W. Kirkpatrick, *Enforcement Policies and Procedures—The Past As Prologue*, 42 Antitrust L.J. 1, 32 (1972) [hereinafter Kirkpatrick Comments].

[10] Muris Comments, *supra* note 5, at 3 n.2; Deborah Platt Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 Geo. Mason L. Rev. 121, 132 (2002).

[11] Majoras, *supra* note 10, at 132. Cf. Muris Comments, *supra* note 5, at 17 ("[T]here is a myth that the 2002 Clearance Agreement failed because of opposition from 'Congress.' The opposition came from only one member, albeit an important one, Senator Ernest Hollings (D-SC).").

[12] 5 Senate Comm. on Government Affairs, Study on Federal Regulation, S. Doc. No. 95-91, at 255 (2d Sess. 1977) [hereinafter Senate Committee Report] (including a copy of the agreement as "Appendix A").

[13] *Id.*

[14] *Id.*; *see also id.* at 235 (including a copy of a blank clearance request card).

ient agency's records regarding past and present investigations involving the disclosed information.[15] The liaison officer would then telephone his counterpart and disclose whether there was a pending investigation involving the parties, products, or charges for which clearance was sought.[16] Provided there was none, the submitting agency would commence its investigation.[17] If there was a pending investigation, however, "further liaison [was] to be effected . . . ."[18]

The 1948 agreement was designed to "avoid the silliest kind of mistake of all—both [the Division and the FTC] investigating the same thing," and to that extent, it worked well.[19] Whether shaped by that agreement or not, according to a report of the Attorney General's National Committee to Study the Antitrust Laws, by 1955 "an enforcement pattern ha[d] emerged from case-by-case action": while both agencies continued to enforce the Sherman Act and Section 7 of the Clayton Act, unless the conduct under investigation constituted part of a violation of the Sherman Act, the Division ceded to the FTC enforcement of Section 2 and Section 3 of the Clayton Act.[20] The report also concluded, however, that the clearance procedure could be improved: it recommended that the Division and FTC expand the exchange of cards to include "all proceedings and rulings of both agencies" (specifically noting "railroad releases, clearances under Sections 7 and 8 of the Clayton Act and comparable informal rulings"); keep each other informed about "significant subsequent developments" in cleared investigations; and coordinate agency-head to agency-head to ensure that investigations would be cleared based "not on any arbitrary allocation of jurisdiction, but on a case-by-case account of past experience, present manpower and remedies available to each agency."[21] While it is unclear whether all of these recommendations were implemented, by 1958 the Division was publicly stating that allocation of investigations was in fact determined on "a case-by-case account of past experience, present manpower and remedies available to each agency."[22]

In 1962 the agencies first formally amended the 1948 agreement. As a result of complaints from the Division that the FTC sometimes failed to respond to clearance requests for up to ten days, the Assistant Attorney General for the Division and the Chairman of the FTC agreed via exchange of letters that an investigation would be cleared if the recipient agency failed to respond within twenty-four hours of receipt of the request.[23]

In March and April of 1963 the agencies again amended the 1948 Agreement when the Assistant Attorney General for the Division and the Chairman of the FTC exchanged a series of letters refining the clearance procedures as a result of several perceived shortcomings, includ-

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[15] *Id.* at 234.

[16] *Id.* at 234 & 255.

[17] *Id.* at 255.

[18] *Id.*

[19] *An Interview With the Honorable Donald F. Turner, Assistant Attorney General In Charge of the Antitrust Division*, 30 A.B.A. ANTITRUST SECTION 100, 112 (1966); Marcus A. Hollabaugh, Chief, Special Litigation Section, Antitrust Division, *Development of an Antitrust Case*, 4 A.B.A. ANTITRUST SECTION 14, 18 (1954) ("[N]o investigation is started without prior clearance from the F.T.C., in order that there will be no conflict between the two agencies. A workable and near fool-proof procedure has been established to make sure that no conflicts occur.").

[20] ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 376 (1955).

[21] *Id.* at 376–77. The report also recommended more cooperation between the agencies in general, including sharing investigative files, consulting with each other's economists, and consolidating and sharing FBI resources. *Id.*

[22] Victor R. Hansen, Assistant Attorney General in Charge of the Antitrust Division, *Functioning of the Antitrust Division—Its Relationship to the Federal Trade Commission and Current Policies of the Division*, 13 A.B.A. ANTITRUST SECTION 20, 22 (1958).

[23] Senate Committee Report, *supra* note 12, at 236.

ing the failure to exchange full and accurate information about the scope of the proposed investigations.[24] The result of this exchange was a mutual commitment to "fully advise" each other of the purpose and scope of a proposed investigation (including providing "all information" in response to questions about that scope), and an agreement that a broad-scale study of an economic field by one agency did not prohibit the other from later using that information or investigating specific items within that field.[25] In addition, the agencies agreed that in the event that the liaison officers could not resolve a dispute, the issue would be escalated within each agency, ultimately, if necessary, to the FTC Chairman and the Assistant Attorney General.[26]

These clearance procedures (the 1948 agreement as amended by the 1962–1963 letter agreements) remained relatively unchanged over the next several decades, worked well in practice, and generated little controversy.

The agencies did not, however, agree on the Division's proposal to more formally allocate enforcement responsibility.[27] Specifically, the FTC rejected the Division's proposal to assign to the Division "all matters involving per se violations of the Sherman Act, matters primarily concerned with Sherman Act violations, and matters within the scope of Section 3 of the Robinson-Patman Act"[28] and leave to the FTC "[m]atters involving primarily violations of Section 5 of the FTC Act, matters with a primary thrust of unfair competitive practices, or unfair or deceptive practices affecting consumers, and matters involving discriminatory pricing or other practices within the scope of the Robinson-Patman Act (except Section 3 thereof)."[29]

These clearance procedures (the 1948 agreement as amended by the 1962–1963 letter agreements) remained relatively unchanged over the next several decades, worked well in practice, and generated little controversy.[30] Success, however, was still measured in terms of simply avoiding duplication of effort—neither the agencies nor the bar appeared to be focused on the speed with which clearance decisions were made, likely because delays were not a problem.[31] Indeed, the 1977 Study on Federal Regulation by The Senate Committee on Governmental Affairs, although recommending some revisions to the clearance process,[32] concluded that "[g]enerally,

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[24] *Id.*; *see also id.* at 256–60 (including copies of the correspondence between Hon. Lee Loevinger, Assistant Attorney General for the Antitrust Division, and Paul Rand Dixon, FTC Chairman).

[25] *Id.* at 236.

[26] *Id.*

[27] *Id.* at 237.

[28] *Id.* at 259.

[29] *Id.* at 257.

[30] *See* Muris Comments, *supra* note 5, at 3 ("Clearance problems had not been serious when I was at the FTC in the 1980s; in my time as head of the Bureau of Competition, I encountered perhaps a handful of disputes each year."); Kirkpatrick Comments, *supra* note 9, at 32 ("At the moment [the liaison meetings] are more or less continuous, such that any matter that comes in that involves the opening of an investigation is cleared through that committee to one agency or the other on quite reasonable, frequently de facto, bases."); Comments of Commissioner Philip Elman, *Analysis of the Merger Movement—Antitrust Aspects: Panel Discussion*, 39 ANTITRUST L.J. 148, 161 (1969–1970) ("[T]here has long been a pre-merger arrangement . . . and there hasn't been any change in that arrangement which, by and large, works out pretty well.").

[31] Kirkpatrick Comments, *supra* note 9, at 32 ("It is a clearance procedure, so that there isn't any overlapping or duplication; we want to be sure that we don't chase the same hapless respondent on the same set of facts. That has happened in my recollection really only once—in [*FTC v. Cement Institute*, 333 U.S. 683 (1948)].").

[32] The Report recommended that (i) representatives of the FTC and the Division meet at least weekly to ensure that matters not resolved in 10 days "are not forgotten or neglected," and (ii) the FTC and the Division be required to report to the appropriate Congressional committees the existence of and reasons for any clearance disputes exceeding 60 days. Senate Committee Report, *supra* note 12, at 241. The Report further noted that by the time of its issuance, the FTC and the Division had already agreed to meet on a weekly basis, and agreed "to allow a more completed exchange of information when a clearance has been denied." *Id.*

the liaison arrangement appears to have worked well in accomplishing its principal purpose: avoiding outright duplication of effort."[33]

The 1993 and 1995 Clearance Agreements

By the early 1990s, the clearance process was no longer functioning as it had in previous decades. Clearance disputes increased several fold, from an average of 10 per year between 1982 and 1989 to an average of 83 per year between 1990 and 2001.[34] As a result, the agencies and the bar were no longer measuring the success of the clearance procedures solely by the lack of duplicative investigations. Rather, they were increasingly focused on whether clearance decisions were made "quickly."[35] The reason the clearance decisions were not being made quickly was likely a combination of increases in the number and complexity of mergers[36] along with technological changes and deregulation resulting in mergers of previously disparate industries which "blurred the traditional boundaries between different products and, consequently, [] eroded the basis on which the two agencies had distributed antitrust matters between them."[37]

Regardless of the underlying causes, the agencies made their first moves to reduce delays in December 1993 when they entered into an agreement to "improve and expedite the operation of [the 1948 agreement's] current successor"[38] and in March 1995 when they announced additional revisions to further expedite the process.[39] The combination of the 1993 and 1995 agreements establish the clearance procedures that are now in effect.[40]

Under the 1993 clearance procedures, the process commenced with the filing of a "claim" by the liaison office of the agency requesting exclusive investigative authority.[41] Unless a counterclaim was filed within seven days for HSR reportable mergers (with shorter deadlines for cash tender offers and bankruptcy filings) or ten days for non-HSR reportable mergers, the matter was cleared to the agency filing the claim.[42]

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[33] *Id.* at 237.

[34] Muris Comments, *supra* note 5, at 6.

[35] *Merger Enforcement at the Antitrust Division*, 58 ANTITRUST L.J. 329, 347 (1989) ("[T]he Division and the FTC] agree early on, or certainly try to, which of us will investigate a particular merger, if it is to be investigated at all. We try to do that, as I said, quickly. Before it is done, it is very hard to talk with anybody. . . . We try to do it quickly.") (Statement of John W. Clark, Deputy Director of Operations, Antitrust Division).

[36] *Roundtable Conference with Antitrust Enforcement Officials*, 67 ANTITRUST L.J. 453, 481 (1999) ("1999 is not like 1976 by a long shot, in terms of the numbers of mergers, the size of mergers. . . . [T]here are three times as many mergers filed today as just five or six years ago . . . ." (Comments of FTC Chairman Robert Pitofsky); Antitrust Modernization Commission Hearings on Harmonizing FTC and DOJ Injunction Procedures 2 (Oct. 24, 2005) (Testimony of Michael N. Sohn, Arnold & Porter, LLP) [hereinafter Sohn Testimony], *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Sohn_Statement.pdf.

[37] Muris Comments, *supra* note 5, at 8; Sohn Testimony, *supra* note 36, at 2; Antitrust Modernization Commission Hearings on the FTC-DOJ Clearance Process 1–2 (Nov. 3, 2005) (Statement by John M. Nannes), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/federal_enforcement.htm.

[38] *60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission*, 63 ANTITRUST L.J. 277, 293 (1994).

[39] *Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 956 (1995) (Remarks of Anne K. Bingaman, Assistant Attorney General, Antitrust Division) [hereinafter Bingaman Remarks].

[40] ANTITRUST DIVISION MANUAL, *supra* note 7, at VII-4.

[41] *Clearance Procedures Between Division and FTC*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1643, at 746 (1993).

[42] *Id.*

For HSR reportable mergers, if a counterclaim was filed, the agencies agreed to seek to resolve the claims within ten calendar days of receipt of the filings;[43] but if only fifteen days remained in the waiting period and the matter was not resolved, then the dispute was escalated to the first of two levels where a representative of each agency served as a reviewer.[44] If the matter was not resolved by the two first level reviewers within two days, the dispute was then escalated to the two second level reviewers, where the dispute was to be immediately resolved.[45] At any time during a clearance dispute, the agency that lost or conceded the prior clearance dispute could invoke the "merger possession arrow" and obtain clearance for the matter then in dispute.[46]

The principal ground for resolving clearance disputes under the 1993 clearance procedures was "expertise in the product involved in the investigation to be conducted gained through a substantial antitrust investigation of the product within the last five years."[47] The agencies defined "product involved" to include not only the product, but also (in descending order of importance) substitutes, inputs, outputs, or products used in conjunction with the product.[48] Where each agency's expertise with the product involved was relatively equal, priority was to be given where an agency had ongoing contacts with a party as a result of an ongoing investigation or where an agency had in the last three years conducted an investigation involving a party and that investigation had presented "failing firm" issues.[49]

The agencies defined "substantial investigation" to mean an investigation where documents were produced and reviewed in response to a subpoena or other compulsory process or where there was ongoing familiarity with a product as a result of outstanding civil decrees or consent orders (or the potential for the investigation to interfere with outstanding civil decrees or consent orders).[50] Investigations where second requests were not issued and criminal prosecution was not under consideration were generally not to be considered substantial investigations absent extraordinary circumstances.[51] Where each agency's expertise with a substantial investigation was relatively equal, priority was given (in descending order) to litigated cases, filed cases (including settled cases), announced challenges (including fix-it-first situations in response to potential challenges), merger investigations, civil conduct investigations, and criminal investigations.[52]

On March 23, 1995, the agencies jointly announced eight HSR "Premerger Program Improvements."[53] The improvements were intended to expedite the pre-merger review process and were the product of a comprehensive review of the clearance process, including consultations with the bar, business groups, and members of Congress.[54] Included among the improvements were the

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* The process for resolving non-HSR reportable merger clearance dispute was identical, but with longer deadlines.

[47] *Id.* The period would be extended to ten years where neither agency had significant experience within the past five years.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] ANTITRUST DIVISION MANUAL, *supra* note 7, at VII-4.

[54] A copy of the Premerger Program Improvements is available at 2 STEPHEN M. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT app. at E-6 (3d ed. 2010).

following commitments related directly to clearance procedures: (1) clearance would be determined within six business days for "the vast majority" of HSR matters, and within nine business days for "all" HSR matters, and procedures would be implemented to ensure compliance with these deadlines;[55] (2) the agencies would coordinate to enable parties to request preclearance meetings with and submit preclearance documents to both agencies in order to assist the clearance process and potentially expedite the review;[56] and (3) if the matter was not cleared by the ninth business day, the Chairman of the FTC and head of the Antitrust Division would "get on the phone and decide which agency will review the merger."[57]

Efforts to Reform the Clearance Process 2001–2002

Notwithstanding the efforts to expedite the clearance process evidenced by the 1993 and 1995 announcements, clearance disputes continued unabated, and indeed worsened.

Notwithstanding the efforts to expedite the clearance process evidenced by the 1993 and 1995 announcements, clearance disputes continued unabated, and indeed worsened. A more substantial effort to reform the clearance process therefore began in the late 1990s, ending unsuccessfully in 2002 due to the opposition of Senator Hollings, then ranking member on both the Senate Commerce Committee and the Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary.[58]

By the early 2000s, clearance disputes took an average of approximately three weeks to resolve.[59] Even in cases where clearance ultimately was not formally contested, the agencies were sometimes spending weeks deciding whether to contest allocation.[60] This increase was attributed to several factors: the blurring of lines of traditional responsibility associated with the convergence of industries, duplication of experience, and the inefficient allocation of areas of primary responsibility.[61] Ultimately, the clearance tail began to wag the investigation dog—decisions on whether to contest clearance, and indeed whether to investigate at all, were sometimes driven by whether experience (or lack thereof) garnered by an investigation would be used as ammunition in later clearance disputes.

In 1999 and 2000, FTC Chairman Robert Pitofsky and Assistant Attorney General Joel Klein engaged in "intense negotiations" in an effort to "overhaul the clearance process and to adopt a comprehensive allocation of specific industries between the two agencies."[62] When Charles James and Timothy Muris assumed office in the summer of 2001 as Assistant Attorney General and FTC Chairman, respectively, the efforts to reform the clearance process continued.[63]

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[55] *Id.* at E-9.

[56] *Id.* at E-10.

[57] Bingaman Remarks, *supra* note 39, at 956.

[58] Muris Comments, *supra* note 5, at 17.

[59] Fed. Trade Comm'n, *Clearance Delays*, http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm (noting that from October 1999 to February 2002, there were 136 contested clearances requiring an average of 17.8 business days to resolve, and 164 uncontested clearances requiring an average of 12.8 business days to resolve) [hereinafter *Clearance Delays*].

[60] Muris Comments, *supra* note 5, at 2–3.

[61] Press Release, Fed. Trade Comm'n, FTC Releases Antitrust Clearance Process Documents (Feb. 27, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance.shtm.

[62] Muris Comments, supra note 5, at 4; Antitrust Modernization Commission Public Hearing 77 (Nov. 3, 2005) (Remarks of Timothy J. Muris), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051103_Federal_Enforc_Transcript_reform.pdf ("[The allocation of industries] was the part that Joel Klein and Bob Pitofsky spent a lot of time on—an enormous exchange of memos . . . .").

[63] Press Release, Fed. Trade Comm'n, Timothy J. Muris Becomes FTC Chairman (June 5, 2001), *available at* http://www.ftc.gov/opa/2001/06/muris.shtm; Press Release, Dep't of Justice, Attorney General Statement on the Confirmation of Charles James (June 15, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/8397.htm.

Clearance disputes between the agencies by this time had become severe enough that one lasted for over a year and required the intervention of a mediator to resolve the dispute.[64]

At the same time that the agencies were addressing problems with the clearance process, the Division was also reforming its merger review process. Revisions to the DOJ's merger review process and efforts to reform the clearance process were intertwined:

> Days lost in debating clearance rob the agencies of time to narrow the scope of second requests to issues of genuine competitive concern. In addition, these delays sometimes can trigger the issuance of a second request simply to permit an investigation that would have occurred, but for the clearance dispute, in the initial thirty-day waiting period. In other cases, to reduce the probability of a second request, the filing is withdrawn and then re-filed.[65]

On August 7, 2001, the Division announced a new merger investigation program designed to "more quickly identify critical legal and economic issues regarding transactions, facilitate more efficient and more focused investigative discovery and provide for an orderly process for the evaluation of evidence."[66] This new "Merger Review Process Initiative" encouraged enforcement staff to be "as aggressive as possible during the initial fifteen- or thirty-day waiting period in attempting to dispense with transactions that are not candidates for further investigation, and to narrow and refine issues for transactions likely to progress to formal HSR Second Request inquiries."[67] At the time, however, clearance battles between the FTC and the Division were taking approximately three and a half weeks to resolve, i.e., over half of the time identified in the new Merger Review Process Initiative for "aggressive" investigation.[68] As such, reforming the clearance process was a prerequisite to effective implementation of the new Merger Review Process Initiative.

In August 2001, James and Muris met with four former Division and FTC officials—Kevin Arquit, William Baer, Joe Sims, and Steven Sunshine—to discuss reforms to the clearance process.[69] These practitioners (of whom two had served under Democratic administrations, one under a Republican administration, and one under both) were given access to records and personnel at both agencies and asked to (1) consider ways in which decisions regarding allocations could be made more quickly to afford the agencies more time for substantive investigation during the initial thirty-day period, and (2) evaluate the then-current clearance process and suggest methods

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[64] Muris Comments, *supra* note 5, at 5; Majoras, *supra* note 10, at 132 ("When Assistant Attorney General James and Chairman Muris took office and found a matter that had languished in the clearance process for well over a year, they realized that reforms were in order.").

[65] Muris Comments, *supra* note 5, at 6. *See also* Initial Recommendations Joint Letter from Kevin Arquit, Bill Baer, Joe Sims & Steve Sunshine to Messrs. James & Muris, at 1 (Dec. 21, 2001) [hereinafter Joint Letter] ("At the end of the original 30-day stay, the only agency options (in some cases, the parties could withdraw and refile the HSR notification) are to issue a Second Request, thus extending the stay, or allow the transaction to close, thus eliminating the potential for preliminary relief. It will surprise no one that, where the agency is uncertain as to the competitive effects of a transaction, it will likely opt for issuing a Second Request. Since this imposes significant burdens on the merger parties, they will in most cases have an interest in seeing as much substantive work done by the agency during that first 30-day stay as possible. This work cannot be done before a clearance decision is made. Thus, every day lost in the clearance process is a day lost to substantive investigation, and increases the potential for additional (and perhaps unnecessary) burdens on the parties to the transaction."), *available at* http://www.ftc.gov/opa/2002/02/clearance/clearideas.htm.

[66] Press Release, U.S. Dep't of Justice, Assistant Attorney General Charles A. James Announces New Program for Conducting Merger Investigations 1 (Aug. 7, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/8763.pdf.

[67] U.S. Dep't of Justice, Merger Review Process Initiative 1 (Oct. 12, 2001), http://www.justice.gov/atr/public/9300.pdf.

[68] *Clearance Delays*, *supra* note 59.

[69] Muris Comments, *supra* note 5, at 7–8.

for improving resolution of disputes.[70] After meeting with officials at both agencies and reviewing considerable information relating to the clearance process, the group produced an initial report in the form of a letter dated December 21, 2001.[71]

The group found that while the then-current clearance process worked "very well in the vast majority of situations," cases where the clearance process did not work well were "highly visible," created "unnecessarily adversarial relationships," caused "significant delays," and had overall significance "out of proportion to their rarity."[72] Focusing on speed and correct decisions (in that order) as the two critical elements, the group suggested several modifications to the clearance process.[73] Among those suggestions was formal allocation of primary areas of enforcement responsibility according to a "Commodity List," according to which fourteen products and industries were allocated exclusively to the FTC and eleven allocated exclusively to the Antitrust Division.[74]

Based on these initial recommendations, the agencies planned to unveil a new clearance agreement in early January 2002.[75] Senator Hollings, however, expressed concerns about the agreement, objecting to Muris's and James's failure to seek input from all of the FTC Commissioners and Congress,[76] characterizing the agreement as a "change [in] the authority of the authorizing statute,"[77] and questioning the assignment to the Antitrust Division of all entertainment and media mergers (based on the concern that the Department of Justice was more susceptible to political pressure from the White House than the five FTC commissioners, two of whom must be of a different political party than the President),[78] resulting in several weeks of dialogue between him and the agencies. Two FTC Commissioners released statements expressing disappointment in Senator Hollings' opposition to the agreement,[79] while two others released statements echoing Senator Hollings' concerns.[80]

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[70] Antitrust Modernization Commission Hearings on Harmonizing FTC and DOJ Injunction Procedures 4 (Nov. 3, 2005) (Statement of Joe Sims) [hereinafter Sims Statement], *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Sims_Statement.pdf; Joint Letter, *supra* note 65, at 1.

[71] Joint Letter, *supra* note 65, at 1.

[72] *Id.*

[73] *Id.* at 3–5. The suggested modifications included standardizing deadlines for the clearance process; assigning dedicated staff to clearance issues; using a common lexicon and common forms and procedures; allocating enforcement responsibilities; and reducing these changes to a comprehensive Joint Clearance Manual. *Id.* at 3–7.

[74] *Id.* at 4, 8.

[75] Press Release, Fed. Trade Comm'n, FTC Chair and Antitrust Chief to Unveil Clearance Procedures for Antitrust Investigations at Press Conference (Jan. 17, 2002), *available at* http://www.ftc.gov/opa/2002/01/ftcdojma.shtm.

[76] Ilene Knable Gotts & Phillip A. Proger, *Federal Antitrust Agencies Merger Clearance Pact—Dead or Delayed?*, M&A LAW., May 2002, at 25.

[77] Jeff Bater, *FTC Chief Defends Merger Review Accord in Budget Hearing*, DOW JONES NEWSWIRES, Mar. 19, 2002.

[78] William J. Baer et al., *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST, Spring 2004, at 15, 21. Hollings also asserted that the FTC should handle media deals because "its dual roles in competition policy and consumer protection allow it to guard against monopoly power better than the DOJ." Jaret Seiberg, *Hollings Howls at Antitrust Agencies*, THE DEAL L.L.C. CORPORATE CONTROL ALERT, Mar. 28, 2002.

[79] Statement of Commissioners Orson Swindle and Thomas B. Leary on the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Jan. 18, 2002), *available at* http://www.ftc.gov/opa/2002/01/ftcdojostl.shtm.

[80] Statement of Commissioner Shelia F. Anthony on the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures for Investigations (Jan. 18, 2002), http://www.ftc.gov/opa/2002/01/ftcdojsa.shtm; Statement of Commissioner Mozelle W. Thompson Concerning the Abandoned Memorandum of Agreement Between The Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Jan. 2002), *available at* http://www.ftc.gov/opa/2002/01/ftcdojmt.shtm.

The 2002 Clearance Agreement

In late February 2002, the FTC announced that it and the Antitrust Division had negotiated a "Memorandum of Agreement" adopting "many, although not all" of the recommendations in the December 21 Letter.[81] Released at the same time were three letters (one from eleven former heads of the FTC and the Antitrust Division, one from the Antitrust Section of the ABA and one from the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce) applauding and endorsing the effort to clarify the areas of responsibility between the agencies and thereby improving the clearance process.[82] The Memorandum of Agreement itself was released several days later,[83] despite the ongoing opposition of Senator Hollings.[84]

Among the recommendations adopted in the Memorandum of Agreement was the allocation of industries, products, and service categories between the agencies.[85] These allocations were generally based on which agency had the greater experience in the industry.[86] Each agency had a "right of first refusal" to review transactions in industries allocated to it, but each also still retained the right to seek clearance for mergers in industries allocated to the other agency.[87] In the event a dispute arose, the Memorandum of Agreement created a resolution mechanism (including the use of an arbitrator) which required a clearance decision within ten days.[88]

The March 2002 Memorandum of Agreement allocated enforcement responsibilities as follows:[89]

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[81] Press Release, Fed. Trade Comm'n, FTC Releases Antitrust Clearance Process Documents (Feb. 27, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance.shtm.

[82] Letter from Roxanne C. Busey, Chair, ABA Section of Antitrust Law, to Charles A James, Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice & Timothy J. Muris, Chairman, Fed. Trade Comm'n (Jan. 23, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/aba.pdf; Letter from John J. Catellani, President, The Bus. Roundtable et al., to The Honorable Timothy J. Muris, Chairman, Fed. Trade Comm'n (Feb. 5, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/brt.pdf; Letter from Joel I. Klein et al. to Charles A James, Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice & Timothy J. Muris, Chairman, Fed. Trade Comm'n (Feb. 4, 2002), *available at* http://www.ftc.gov/ opa/2002/02/clearance/multiletters.pdf.

[83] Press Release, U.S. Dep't of Justice, DOJ and FTC Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), *available at* http://www.justice.gov/atr/public/press_releases/2002/10171.pdf.

[84] Statement of Commissioner Mozelle W. Thompson Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearancemwt.shtm.

[85] *See* U.S. Dep't Of Justice & Fed. Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations 3, 8–11 (Mar. 5, 2002) [hereinafter 2002 Agreement], *available at* http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf.

[86] *Id.* at 1–4.

[87] *Id.*

[88] *Id.* at 5–6.

[89] *Id.* at 8–11.

Federal Trade Commission

1. Airframes
2. Autos and Trucks
3. Building Materials
4. Chemicals
5. Computer Hardware
6. Energy
7. Healthcare
8. Industrial Gases
9. Munitions
10. Operation of Grocery Stores and Grocery Manufacturing, including distilled spirits and tobacco products
11. Operation of Retail Stores
12. Pharmaceuticals and Biotechnology (other than that associated with agriculture)
13. Professional Services
14. Satellite Manufacturing and Launch, and Launch Vehicles
15. Textiles

Antitrust Division

1. Agriculture and Associated Biotechnology
2. Avionics, Aeronautics, and Defense Electronics
3. Beer
4. Computer Software
5. Cosmetics and Hair Care
6. Financial Services/Insurance/Stock and Option, Bond, and Commodity Markets
7. Flat Glass
8. Health Insurance, and Healthcare Products and Services over Which the FTC Determines It May Lack Jurisdiction
9. Industrial Equipment
10. Media and Entertainment
11. Metals, Mining, and Minerals
12. Missiles, Tanks, and Armored Vehicles
13. Naval Defense Products
14. Photography and Film
15. Pulp, Paper, Lumber, and Timber
16. Telecommunications Services and Equipment
17. Travel and Transportation
18. Waste

Although the Memorandum of Agreement had reduced clearance to a one-day process and eliminated all pending clearance disputes,[90] received wide-spread support among practitioners,[91] and was lauded by members of the Senate Subcommittee on Antitrust, Business Rights, and Competition for its goals of improving efficiency and streamlining the clearance process,[92] Senator Hollings remained firmly opposed to it. Indeed, he threatened to use his position on the Senate Appropriations Committee to suspend funding for the salaries of all Commissioners and senior staff at the FTC and to slash the budget of the Department of Justice.[93]

[90] Charles A. James, Assistant Attorney General, Antitrust Div. U.S. Dep't of Justice, Rediscovering Coordinated Effects, Address at the American Bar Association Section of Antitrust Law Annual Meeting: Rediscovering Coordinated Effects 6 (Aug. 13, 2002), *available at* http://www.justice.gov/atr/public/speeches/200124.pdf.

[91] Sims Statement, *supra* note 70, at 4.

[92] Letter from Senator Herb Kohl, Chairman, Subcomm. on Antitrust, Business Rights, and Competition & Senator Mike DeWine, Ranking Member, Subcomm. on Antitrust, Business Rights, and Competition, to The Honorable John Ashcroft, Attorney Gen., U.S. Dep't of Justice et al. 2 (Mar. 1, 2002), *available at* http://www.ftc.gov/opa/2002/03/clearance/kohldewine.pdf.

[93] Press Release, Fed. Trade Comm'n, Statement of FTC Chairman Timothy J. Muris (Apr. 15, 2002), *available at* http://www.ftc.gov/opa/2002/04/020415stmt.shtm; Press Release, U.S. Dep't of Justice, Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement (May 20, 2002) [hereinafter James Clearance Agreement Statement], *available at* http://www.justice.gov/atr/public/press_releases/2002/11178.pdf. *See also* Robert N. Cook & Robert A. Skitol, *Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision*, ANTITRUST SOURCE, July 2002, at 4–5, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/cookskitol.authcheckdam.pdf; Appropriations for Fiscal Year 2003: *Hearing Before the Subcomm. on Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the Comm. on Appropriations*, 107th Cong. 420 (Statement of Sen. Hollings) ("What we will have to do is, by gosh, just come here and just cut that budget around so that we get their attention, whether we do away with the political

Unable to work out a compromise with Senator Hollings,[94] and despite the fact that "antitrust investigations were being commenced within a matter of days, and there were no clearance disputes between the agencies," the Antitrust Division responded to Senator Hollings' threats by announcing that the prospect of "budgetary consequences" required that it no longer adhere to the agreement.[95] The agencies thereafter returned to their pre-Memorandum of Agreement clearance process, under which delays then increased from an average of three days in 2002 to an average of about six days by 2005.[96]

The Antitrust Modernization Commission

In November of 2002, Congress created the Antitrust Modernization Commission (AMC) to investigate and recommend changes in the antitrust laws.[97] Among the issues it examined was whether the clearance process should be changed. In April 2007, after three years of work (including the solicitation and receipt of testimony from former officials, including those who had been involved in the 2002 effort to reform the clearance process), the AMC issued its Report and Recommendations, which included a recommendation that Congress "authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies."[98] The Report urged that any future agreement should include an express allocation of primary areas of responsibility to minimize areas of dispute and also include a tie-breaker mechanism to ensure final resolution of any dispute no later than nine days from the initial filing.[99] It also recommended that Congress enact legislation explicitly *requiring* the agencies to resolve clearance disputes within a short period, i.e., nine days.[100] These recommendations have yet to be implemented.

The Future of the Clearance Process

But for a dual-enforcement regime that would, with narrow exceptions, permit separate FTC and Division investigations of the same conduct by the same entities, there would be no need for a clearance process. In fact, for many years, the sole goal of the clearance process was to prevent

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positions, repeal 605, reprogramming authority to your Federal Trade Commission, or actually I am studying to see whether or not legally we can cut the pay. Sometimes when you cut pay, you get their final attention."), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107shrg78462/pdf/CHRG-107shrg78462.pdf.

94 Yochi J. Dreazen & John R. Wilke, *Justice Department, FTC Deal Dividing Merger Reviews Collapses*, WALL ST. J., May 21, 2002, at B6 ("In recent closed-door meetings with Mr. Hollings's staffers, the agencies had discussed modifying the plan to restore some media oversight to the FTC in exchange for some other industries, but they couldn't reach agreement with the senator, according to people close to the talks.").

95 James Clearance Agreement Statement, *supra* note 93. Congress considered, but ultimately abandoned, a legislative provision barring subsequent re-implementation of the Agreement. *Interview with Deborah P. Majoras, Chairman, Federal Trade Commission*, ANTITRUST SOURCE, March 2005, at 3, http://www.abanet.org/antitrust/at-source/05/03/01-mar05-majoras323.pdf ("Incidentally, the provision in the appropriations bill that forbade us from executing the abandoned clearance agreement has been removed. However, as I said during my confirmation hearing, I will not reinstitute that particular agreement.").

96 U.S. Department of Justice, *Antitrust Division Update* 3 (Spring 2005), http://www.justice.gov/atr/public/244041.pdf.

97 Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11051-60, 116 Stat. 1856 (2002), *available at* http://govinfo.library.unt.edu/amc/pdf/statute/amc_act.pdf.

98 U.S. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS iv (2007) [hereinafter AMC REPORT], *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

99 *Id.* at 136.

100 *Id.* at 137.

just that possibility. Over time, however, the goal of the clearance process expanded to include the *efficient* allocation of enforcement responsibilities. The difficulty, of course, is that the dual-enforcement regime is by its very nature inefficient. For many years, that inefficiency has been viewed as an acceptable price to pay for other benefits from continuing to have two agencies share enforcement duties: fresh perspectives and a healthy sense of competition based on two different agency cultures, different enforcement tools based on different statutory powers, a balance between the executive and legislative branches, and a failsafe to help guard against moribund enforcement.[101]

The Division may soon be headed by William Baer, who has repeatedly called for the adoption of a new clearance process similar to the ill-fated 2002 agreement.

The Division may soon be headed by William Baer, who has repeatedly called for the adoption of a new clearance process similar to the ill-fated 2002 agreement. Mr. Baer testified to the Senate Judiciary Committee on July 26, 2012, that he has no pre-set agenda for the Division; but if he is confirmed, it seems likely that he will make some effort to rectify the shortcomings of the current clearance process. Differences between the climate in 2002 and the climate at present, however, include two that may bear particularly on his prospects for success in this arena: (1) the economic downturn of the past several years has led to a renewed interest in government efficiency; and (2) there is now a third federal agency (the Consumer Financial Protection Bureau) charged with protecting consumers. Indeed, there are calls from even within the FTC to cut the FTC's budget and hand off duties in the name of greater efficiency.[102] These changes could push not only for a more efficient clearance process but also for a much broader assessment of whether the sharing of antitrust enforcement between the FTC and the Division has outlived its benefits. ●

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[101] Senate Committee Report, *supra* note 12, at 246–51. *See also* AMC REPORT, *supra* note 98, at 129 ("Although concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits.").

[102] Ira Teinowitz, *Rosch Says FTC May Need to Give Up Some Merger Duties*, DEAL PIPELINE, Mar. 6, 2012, http://pipeline.thedeal.com/tdd/ViewArticle.dl?id=10005681226 (subscription required).