



U.S. Department of Justice
Washington, DC 20530

Introduction *to* Antitrust Division Business Reviews

Purpose

The Antitrust Division's business review procedure provides a way for businesses to determine how the Division may respond to proposed joint ventures or other business conduct. 28 C.F.R. § 50.6.ⁱ

The business review procedure benefits both the Division and the business community because the Division can analyze and comment on the possible competitive impact of proposed business conduct, possibly avoiding lawsuits or other actions.

Requesting a Review

The business review process starts with a written request to the Assistant Attorney General.ⁱⁱ The Division may refuse to consider the request. Refusals usually occur when the request relates to on-going instead of proposed business conduct. If the business conduct must be approved by a regulatory agency, the Division may decline to consider a request until after agency approval is obtained. In any event, the procedure relates only to the Division's enforcement intentions under the antitrust laws, not under any other Federal or state statute or regulation. 28 C.F.R. § 50.6(7)(a).

Processing the Request

If the Division agrees to consider a request, the Division's Office of Operations refers the request to the section or field office having jurisdiction over the product or service involved.

The business must provide the Division with all information and documents identified in the regulation. 28 C.F.R. § 50.6(5). The Division may request additional information. Staff attorneys also may conduct whatever independent investigation they think is necessary.

The amount of time it takes for the Division to respond depends on the complexity of the proposed conduct and the time required for the requesting party to compile

all information sought by the Division. However, for business reviews concerning export trade, a response will be issued within 30 business days from the date that the Division receives all relevant data.

The Division's Response: Business Review Letters

A business requesting a business review generally receives one of three responses in a business review letter from the Division:

- The Department of Justice does not presently intend to bring an enforcement action against the proposed conduct.
- The Department of Justice declines to state its enforcement intentions. The Division may or may not file suit if the proposed conduct happens.
- The Department of Justice will sue if the proposed conduct happens.

Generally, a business review letter from the Division includes the following:

- The procedural history of the request.
- A description of the representations made by the business.
- A statement of the Division's enforcement intentions.
- A description of how the Division makes public the information in the business review file.

A business review letter is signed by the Assistant Attorney General or the Acting Assistant Attorney General.

At the same time that the Division issues a business review letter to the requesting business, the Division issues a press release describing the action and attaching a copy of the Division's business review letter. The request letter and the Division's business review letter are placed in a file available to the public. Within 30 days after notification, the information supplied in support of the business review request is placed in the publicly available file in the Division's Antitrust Documents Group.

Information submitted by a requesting business may be withheld from public disclosure if that disclosure would have a detrimental effect on the business's operations or relations with customers, employees, suppliers, stockholders, or competitors. 28 C.F.R. § 50.6(10)(c). The type of information usually withheld from public disclosure is confidential commercial or financial information exempt from compulsory disclosure under the Freedom of Information Act. 5 U.S.C. § 552(b)(4).

It is important to note that a business review letter states only the Division's enforcement intentions as of the date of the letter, and the Division remains free to bring whatever action it subsequently comes to believe is required by the public interest.ⁱⁱⁱ However, when the Division has stated an intention not to bring suit, the Division has never subsequently brought a criminal action (see 28 CFR §506 n.9) if there was full disclosure at the time the business review request was presented to the Division.

ⁱ The regulations were issued on February 1, 1968, 33 Fed. Reg. 2,422, and have been amended twice, 38 Fed. Reg. 34,804, (December 19, 1973) and 42 Fed. Reg. 11,831 (March 1, 1977).

ⁱⁱ The initiation of a business review request does not in any way alter the responsibility of a requesting business to comply with the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 28 C.F.R. § 50.6(7)(b).

ⁱⁱⁱ *United States v. Grinnell Corporation*, 30 F.R.D. 358, 363, (D.R.I. 1962) (The Department of Justice's statement of a "present intention not to take action" cannot be equated with future immunity). See *United States v. New Orleans Chapter, Associated General Contractors of America, Inc.*, 382 U.S. 17 (1965), reversing 238 F. Supp. 273 (E.D. La. 1965); *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 597-98 (1957); and *United States v. Firestone Tire and Rubber Co.*, 374 F. Supp. 431, 434 n.1 (N.D. Ohio 1974).