



## MEMORANDUM

From: AMC Staff

To: All Commissioners

Date: July 20, 2006

Re: Federal Enforcement Institutions—Interagency Clearance Agreement

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In 2002, the Department of Justice Antitrust Division (“DOJ”) and Federal Trade Commission (“FTC”) agreed to a protocol (the “2002 Agreement”) for allocating merger and other civil investigations between them in order to avoid delay that can result from clearance disputes. The agencies subsequently abandoned the agreement in response to Congressional opposition.<sup>1</sup> On May 23, 2006, the Commission reached a tentative consensus to recommend that Congress either encourage or require the FTC and DOJ to re-adopt a clearance procedure. The Commission deferred resolution of whether to recommend that a particular “tie-breaker” be adopted by the agencies (or imposed by Congress).

The Commission sought additional staff research on two issues: First, a possible statutory amendment to the Hart-Scott-Rodino Act that would require clearance disputes to be resolved within a set time; second, an evaluation of possible tie-breaker mechanisms, either for use by the agencies or for incorporation into the statute. This memorandum (1) describes a

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<sup>1</sup> See Enforcement Institutions-Federal Discussion Memorandum, at 11-13 (May 19, 2006).

possible statutory amendment to the Hart-Scott-Rodino Act that would impose a time limit for clearance determinations, and (2) evaluates various possible tie-breaker mechanisms.

## **I. Statutory Amendment**

One possible amendment to the existing HSR statute might provide as follows:

*Amend 15 U.S.C. § 18a to add subsection (e)(1)(B) as follows, and redesignate existing subsection (e)(1)(B) as subsection (e)(1)(C).*

No later than the end of the seventh day after the beginning of the waiting period as defined in subsection (b)(1)(A) of this section, the Federal Trade Commission or the Assistant Attorney General shall inform both persons (or in the case of a tender offer, the acquiring person) whether the Federal Trade Commission or the Assistant Attorney General will have the authority to issue a request for additional information (if any) pursuant to this subsection.

If such an amendment were created, specification of a tie-breaker in the statute likely would not be necessary, as DOJ and FTC would be required to reach some resolution within a set time.

## **II. Possible Tie-breakers**

As a general matter, the FTC and DOJ determine clearance on the basis of relevant expertise in industries implicated by the transaction. However, when both agencies claim relevant expertise, and they cannot agree which one will review a matter, they may need to resort to a “tie-breaker” to decide. The following clearance tie-breakers have been proposed or used.

Arbitration: When both agencies refuse to clear a transaction to the other, a neutral arbitrator will make a binding decision on clearance.

- This approach was adopted as the tie-breaker mechanism in the 2002 clearance agreement, which includes a detailed description of how it would operate. An arbitrator from a pre-selected list would have 48 hours to render a recommendation, based on the principles set forth in the agreement.
- Although the mechanism was not used during the brief period that the 2002 clearance agreement was in effect, an arbitrator was used to resolve a clearance

dispute regarding investigation of two on-line music joint ventures among the major record labels—MusicNet (EMI, BMG and Warner) and Pressplay (EMI, Sony and Vivendi).

- This approach does not appear to be subject to manipulation, or “gaming.” The clearance decision would be based on a neutral and objective assessment of criteria embodied in the clearance agreement. In addition, if one agency has an objectively weaker claim, it is more likely to concede clearance to the other agency (assuming the arbitration process does not frequently produce erroneous decisions). This approach accordingly may reduce the frequency of having to resort to it.
- Arbitration produces an informed determination of which agency should review a transaction, rather than a random allocation. That may avoid possible public perceptions that clearance decisions depend on luck (though this concern may be of less significance if the two agencies truly operate by the same procedures and substantive rules).
- If used in lieu of elevating the clearance decision to the heads of the DOJ and FTC, this approach may avoid unproductive friction between them.

Coin flip: The agencies flip a coin to decide who will review transactions when they both refuse to clear to the other.

- This approach provides a very quick determination once the tie-breaker has been invoked.
- The agencies have resolved clearance disputes through a coin flip in the past.
- The approach is potentially subject to gaming. That is, by refusing to clear a transaction, an agency has a 50 percent chance of getting the matter itself.
- The random nature of the determination could lead to a negative public perception that merger enforcement policies are arbitrary and clearance to one agency or the other a matter of “luck” (though this concern is of less significance where the two agencies truly operate by the same procedures and substantive rules).

Possession arrow: The agencies alternate in reviewing transactions when they both refuse to clear to the other.

- This approach provides a very quick determination once the tie-breaker has been invoked.
- The agencies resolved clearance disputes using the possession arrow in the past.
- The approach is potentially subject to gaming. That is, one agency may refuse to clear a transaction knowing that the arrow will point to it. Alternatively, even if the arrow would point to the other agency, the first agency may still refuse to

clear the present transaction in order to “flip” the possession arrow back to it, so that it will be in that agency’s favor for the next clearance dispute.

Even/odd filing number: Transactions with even file numbers are allocated to one agency and those with odd file numbers to the other agency when both agencies refuse to clear a transaction to the other.

- This approach provides a very quick determination once the tie-breaker has been invoked.
- It does not appear that the agencies have used this approach in the past.
- The parties to a transaction will know in advance which agency will review the transaction should clearance be contested, thus potentially reducing the costs that result from uncertainty as to which agency will review the transaction (although it is not clear this certainty has any value to the parties so long as neither agency will begin to investigate a matter pending clearance).
- The approach is potentially subject to gaming. That is, because the file number is known when clearance is sought, an agency will know that it will get the matter if it refuses to agree to clearance. As a result, that agency may have an incentive to refuse clearance to the other absent clearly stronger expertise with the other agency.

Parties’ choice: If both agencies refuse to clear a matter to the other, the parties (or one of the parties) will designate which agency may review the transaction.

- This approach provides a very quick determination once the tie-breaker has been invoked.
- The agencies have not used this approach in the past.
- The parties to a transaction will know in advance which agency will review the transaction should clearance be contested, thus potentially reducing the costs that result from uncertainty as to which agency will review the transaction (although it is not clear this certainty has any value to the parties so long as neither agency will begin to investigate a matter pending clearance).
- The approach is potentially subject to gaming. That is, because the parties choose which agency would review the transaction, an agency may have an incentive to contest clearance if it believes the parties would pick it to review the transaction.
- The approach could raise questions whether one agency’s review is less rigorous than another, should a pattern develop that one agency is more frequently selected by the parties.