



MEMORANDUM

From: Civil Non-merger and Criminal Timetables *Ad Hoc* Group

To: All Commissioners

cc: Andrew J. Heimert and Commission Staff

Date: March 23, 2005

Re: Whether the Commission Should Study the Advisability of Timetables for Civil Non-Merger and Criminal Investigations by the Department of Justice and Federal Trade Commission

This *ad hoc* group was formed to consider further whether the Commission should study more fully whether the Department of Justice and the Federal Trade Commission should have timetables for civil non-merger and criminal investigations. Both issues were recommended not to be studied by the relevant working groups, but decision on the issue was postponed until after further information gathering. *See* Civil Procedure and Remedies Working Group Memorandum, at 13 (Dec. 22, 2004) (Issue 6); Criminal Procedure and Remedies Working Group Memorandum, at 7 (Dec. 22, 2004) (Issue 7). Based on further investigation and consideration, the group recommends that the Commission not study the issue, and leave to the agencies the question of how best to ensure that criminal and civil non-merger investigations are conducted expeditiously and efficiently.

Members of the group spoke with both Chairman Deborah Majoras and Assistant Attorney General R. Hewitt Pate to obtain both information about current efforts to ensure the length of investigations is minimized and their thoughts on whether the Commission should study the issue. Both generally agreed that reducing the time to conduct investigations is a

worthwhile goal, and that both continue to take steps to shorten investigations. In particular, both have confirmed that they seek to ensure that management at their respective agencies continue to push investigations forward, in order expeditiously to reach a decision on whether to close an investigation or file an action. Both Majoras and Pate recognized that rarely does it make sense to extend an investigation indefinitely.

Neither Majoras nor Pate believed that the Commission could offer much assistance to the agencies by studying the issue. A legislative solution was considered to be particularly troubling because a “one size fits all” approach that any statute might impose would not be adaptable to the circumstances of each case. Likewise, a regulatory approach would likely suffer from the same shortcomings, as any generally applicable policy likely would not sufficiently address all possible circumstances.

The group also considered the possibility of internal, non-binding guidelines. The Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights suggested that the Commission consider some type of internal time limit on investigations. *See* Letter from Mike DeWine and Herbert Kohl to Antitrust Modernization Commission, at 3 (Oct. 1, 2004). For comparison, the Federal Communications Commission has a self-imposed 180-day timeline for its review of proposed license transfers made in connection with mergers. *See* Federal Communications Commission, “Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses”, *available at* <http://www.fcc.gov/transaction/timeline.html>. The timeline does not bind the FCC, but does constitute a general goal, from which the commission acknowledges deviation may nonetheless be necessary depending on the circumstances of the matter. One potential problem with such an approach that was identified is that, with a timeline, responding parties would have a specific time limit at which point they

could complain more vociferously that the agency was not completing its investigation expeditiously. A timeline could also exacerbate the delay that parties create by incomplete or slow disclosures of requested or subpoenaed documents and other materials, because parties know at the outset how long they need to stall. (The FCC limits this possible problem by permitting the commission to “stop the clock” when either external events or the parties’ own delay impedes the commission’s expeditious consideration of the proposed license transfer.)

While an internal timeline that creates no rights for parties is a possibility deserving of further consideration, the group believes that any such initiative is most appropriately undertaken by the agencies themselves. First, the agencies are best positioned to determine what time frame would be most appropriate, and what events (if any) might trigger a clock-stop. Second, because publication of any internal timelines might hamper the agencies’ ability to complete investigations expeditiously, leaving the determination to the agencies of an appropriate timeline also allows them to decide the degree to which it would make those timelines public. While the Commission should encourage the agencies to continue (if not redouble) efforts to reduce the time of investigations, the group recommends that the Commission focus its energy on the other topics it has selected for study.

Although we believe that no further Commission investigation of these issues is necessary, we acknowledge the universal recognition that non-merger investigation delays can be substantial and therefore are a source of concern. We therefore recommend to the Commission that a brief statement, consistent with the views expressed in the preceding paragraph, be included in the Commission’s final report.