INTRODUCTION

Under the Antitrust Division's Business Review Procedure, 28 C.F.R. § 50.6, 1/ business entities can ascertain the Division's present enforcement intentions with respect to proposed business conduct.

Purpose

The Business Review Procedure benefits both the Division and the business community by providing a mechanism for the Division to analyze and comment on the prospective competitive impact of proposed business conduct.

Manner of Request

The business review process is initiated by a written request to the Assistant Attorney General. 2/ At the outset, the Division, in its discretion, may refuse to consider the request. Such a refusal would occur where the request did not qualify for business review treatment. This most frequently involves requests relating to on-going business conduct since only proposed business conduct qualifies for the Business Review Procedure. Where the business conduct is subject to approval by a regulatory agency, the Division may decline to consider a business review request until agency approval has been obtained. In any event, the procedure relates only to the enforcement intentions under the antitrust laws, not under any other federal or state statute or regulatory scheme. 28 C.F.R. § 50.6(7)(a).

1/ 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).

2/ The initiation of a business review request does not in any way alter the responsibility of a requesting party 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).

Processing the Request

If a request involves a matter appropriate for business review consideration, the Division's Office of Operations refers the request to the section or field office having commodity or geographic jurisdiction over the product or service involved in the request.

The length of time necessary for the Division to respond to a business review request will depend 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 concerning the proposed transaction.

Investigating a Busines Review

Under the business review regulations, the requesting parties are under an affirmative obligation to provide the Division with all information and documents in their possession that the Division may need to review the matter. 28 C.F.R. § 50.6(5). The Division may also request additional information from the party or parties seeking review. Staff attorneys also conduct whatever independent investigation they deem necessary.

Review Procedures

After examining a business review request, the Division may state its present enforcement intentions with respect to the proposed business conduct, decline to pass on the request, or take such other position or action as it considers appropriate. 28 C.F.R. § 50.6(8).

A party requesting a business review letter generally receives one of three responses from the Division: (a) that the Department of Justice does not presently intend to bring an enforcement action against the proposed conduct; (b) that the Department of Justice declines to state its enforcement intentions; or (c) that the Department of Justice will sue if

the proposed conduct is put into effect. The second response means that the Division may or may not file suit should the proposed conduct be implemented, while the latter indicates a clear intention to sue.

Generally, each letter sets forth (a) the procedural history of the request; (b) a description of the representations made by the requestor, (c) a statement of the Division's enforcement intentions, and (d) a description of the Division's procedures in making public the information in the business review file. A business review letter is signed by the Assistant Attorney General, or, in his absence, by the Acting Assistant Attorney General.

At the same time the Division notifies the requesting party of the Division's action on the business review request, a press release is issued describing the action and attaching a copy of the Division's letter of response. Also at this time, the letter requesting the business review and the Division's letter in response are indexed and placed in a file available for public inspection. 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 Legal Procedure Unit.

The business review regulations provide that information submitted by a requesting party may be withheld from disclosure to the public upon a showing that disclosure would have a detrimental effect on the requesting party's operations or relations with customers, employees, suppliers, stockholders, or competitors. 28 C.F.R. § 50.6(10)(c). The type of information generally withheld from public disclosure under this provision 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 enforcement intentions of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently

comes to believe is required by the public interest. 3/ However, where the Division has stated a present intention not to bring suit, the Division has never subsequently exercised its prosecutorial discretion to bring a criminal action if there was full disclosure at the time the business review request was presented to the Division.

3/ 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).