



Template pursuant to Section 3 (a) of the Framework on Competition Agency Procedures

United States Department of Justice, Antitrust Division; United States

The following template is submitted by U.S. Department of Justice, Antitrust Division (“Antitrust Division” or “Division”) pursuant to Section 3(a) of the Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The [Antitrust Division](#) is one of two government bodies in the United States, along with the Federal Trade Commission (“FTC”), responsible for enforcing the federal laws regarding restraints on competition, known as antitrust laws. The three primary federal antitrust statutes in the United States are: the [Sherman Act](#) (15 U.S.C. § 1 *et seq.*), the [Clayton Act](#) (15 U.S.C. § 12 *et seq.*), and the [Federal Trade Commission Act](#) (15 U.S.C. § 45 *et seq.*). The Antitrust Division enforces the Sherman Act and the Clayton Act; the Federal Trade Commission Act is enforced by the FTC.

The functions of the Antitrust Division [include](#): (1) civil and criminal enforcement of the federal antitrust laws and other federal laws relating to the protection of competition and the prohibition of restraints of trade and monopolization; (2) intervention or participation before federal administrative agencies in proceedings requiring consideration of the antitrust laws or competitive policies; and (3) advocacy of procompetitive policies before other branches of government.

The Division’s antitrust investigations arise from a variety of sources, including evaluations of merger filings under the [Hart-Scott-Rodino Antitrust Improvements Act](#) (“HSR Act”); complaints received from citizens and businesses; press reports on business practices; information obtained from individuals or companies applying for leniency; complaints received from other government agencies; analysis of particular industry conditions; or monitoring of private antitrust litigation. Once an investigation has been opened (which, in civil matters, involves clearance with the FTC), the Division conducts a thorough investigation that considers all available evidence and legal issues, including any relevant documents and testimony.

To enforce the antitrust laws, the Antitrust Division must initiate a civil or criminal proceeding in federal district court. The court will then determine whether the law has been violated and, if so, order appropriate remedies. Accordingly, the Division bears the burden of proving any violation of the antitrust laws it alleges in federal court before a district judge, who will examine the matter without deference to the Division’s views.

II. Laws, Regulations, and Policies relevant for the Implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The Antitrust Division does not discriminate in the investigation and enforcement of the antitrust laws based on the nationality of the parties. See U.S. DOJ & FTC, [Antitrust Guidelines for International Enforcement and Cooperation](#) (Jan. 13, 2017) (“The Agencies do not discriminate in the enforcement of the antitrust laws based on the nationality of the parties. Nor do the Agencies employ their statutory authority to further non-antitrust goals. When the Agencies determine that a sufficient nexus to the United States exists to apply the antitrust laws and that neither international comity nor the involvement of a foreign jurisdiction precludes investigation or enforcement, the Agencies apply the same substantive rules to all cases.”).

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

(i) All federal antitrust laws and regulation are publicly available. The antitrust statutes are codified in [Title 15](#) of the United States Code and the antitrust regulations are codified in [Title 28](#) of the [Code of Federal Regulations](#) (“CFR”). The Division has made available links to the statutes and regulations most directly applicable to competition enforcement in [Chapter II](#) of the [Antitrust Division Manual](#).

(ii) The United States has civil and criminal procedural rules in place applicable to both antitrust investigation and enforcement proceedings.

Investigations. In civil investigations, the [Civil Antitrust Process Act](#), 15 U.S.C. §§ 1311-1314, governs the Antitrust Division’s authority to compel the production of documents and oral testimony. Regulations adopted under this statute are codified at [28 C.F.R. §§ 49.1-49.4](#). Merger control proceedings under the [HSR Act](#), 15 U.S.C. § 18a, follow the rules set forth in that statute. The HSR Act grants broad rulemaking authority to the FTC, with Antitrust Division concurrence. The HSR Rules adopted by the FTC are codified at [16 C.F.R. §§ 801-803](#).

Criminal investigations under the federal antitrust laws typically involve proceedings before a grand jury, which is an independent body whose function is the investigation of potential crimes and the decision whether or not to issue an indictment. Grand jury proceedings are governed by Rule 6 of the [Federal Rules of Criminal Procedure](#) (“Fed. R. Crim. P.”). In addition, various investigative techniques require compliance with specific federal laws, such as electronic surveillance ([18 U.S.C. § 2510 et seq.](#)) or searches and seizures (Fed. R. Crim. P. 41).

Enforcement Proceedings. Proceedings in civil actions brought by the Division are governed by the [Federal Rules of Civil Procedure](#) (“Fed. R. Civ. P.”). Proceedings in criminal actions are governed by the [Federal Rules of Criminal Procedure](#). In addition, specific aspects of criminal proceedings are governed by various statutes, including [18 U.S.C. § 3143](#) (release or detention of a defendant pending sentence or appeal), [§§ 3161-3174](#) (Speedy Trial Act), [§ 3500](#) (production of statements and reports of witnesses), and [§§ 6001-6005](#) (immunity of witnesses).

(iii) The statutes and regulations governing the Antitrust Division's proceedings are publicly available, in print and in electronic format, through the [Office of the Federal Register](#) and the [Government Publishing Office](#), as well as many other sources. The Division also has made available statutes governing its proceedings through its [website](#).

(iv) The Antitrust Division follows applicable procedural rules in investigations and enforcement proceedings. Failure to do so would subject the Division to potential sanctions in federal court, including potential exclusion of evidence if obtained in violation of Procedural Rules.

(v) The Antitrust Division has published, and continuously updates, information clarifying or explaining its investigations and enforcement proceedings. The Division's internal practices and procedures are exhaustively described in its [Antitrust Division Manual](#), which is available to the public at the Division's [website](#). With respect to criminal proceedings, the publicly available [Justice Manual](#) provides additional information regarding the U.S. Department of Justice's practices and procedures in criminal prosecutions, including in antitrust matters. Additionally, the Antitrust Division has published various [guidelines and statements](#) on substantive and procedural matters related to the enforcement of the antitrust laws. This information is supplemented in various ways, including [speeches, press statements, and press releases](#), as well as [briefs in private litigation](#) filed by the Division that describe its policies.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

(i) The Antitrust Division informs persons subject to a civil or criminal investigation as soon as practical and legally permissible, and includes information regarding the legal basis of the investigation and the conduct or action that is under investigation.

In civil investigations, notice is typically provided to persons shortly after the investigation is opened. Indeed, with respect to merger investigations, staff is advised to contact the parties "[e]arly in the investigation" in order to "discuss possible competitive concerns and request information." See [Antitrust Division Manual](#) at [III-38](#). Typically, staff contacts the parties within days from opening the investigation. In other civil investigations, notice is likewise provided early, typically in connection with the issuing of a voluntary request for information or of a Civil Investigative Demand ("CID") compelling the production of documents or information.

In a criminal case, a grand jury may properly subpoena a person and question him or her about their involvement in the crime under investigation. See [Justice Manual](#) at [9-11.150](#). In appropriate cases, the target of an investigation may also be notified – and the [Justice Manual](#) in fact encourages such notification – in order to afford that person the opportunity to testify before the grand jury. However, such notification will not be provided where inappropriate such as when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, or undue delay. *Id.* at 9-11.153. Notice may also be provided through mandatory requests for documentary material (subpoenas duces tecum), which are often issued to companies. Notice may also be provided in connection with the execution of a search or seizure. Generally, unless the Antitrust Division views it necessary to place an indictment

under seal to keep it confidential, individual or companies will be informed of the investigation at an appropriate time before a criminal indictment is sought.

(ii) The Antitrust Division provides any person subject to a civil or criminal investigation with reasonable and timely engagement on significant and relevant factual, legal, economic, and procedural issues.

In a civil investigation, parties are always free, at any stage of the investigation, to present relevant information or other facts directly to the investigating staff. These discussions encompass both the procedural course of the investigation as well as staff's substantive theories of the case. In a typical investigation, ongoing discussions with parties will involve senior staff, including the Deputy Assistant Attorneys General. Before any civil investigation matures into a lawsuit, parties ordinarily will have a chance to meet directly with the Assistant Attorney General, as well as to present materials outlining their positions in detail. See [Antitrust Division Manual](#) at [III-111-112](#).

In criminal investigations, the Antitrust Division provides various opportunities for meaningful and timely engagement to individual and companies after they are informed that they are under investigation. Before staff seeks an indictment, parties are generally afforded an opportunity to present their views to allow staff to evaluate the arguments and make a better-informed assessment of the evidence. See [Antitrust Division Manual](#) at [III-112, 119-120](#).

(iii) The Antitrust Division focuses investigative requests only on information relevant to competition issues under review and provides persons reasonable time to respond to requests during investigations.

The Antitrust Division seeks to obtain the information it needs to make an enforcement decision without imposing an undue burden on respondents. The Antitrust Division issues compulsory requests for information either in the form of a Request for Additional Information and Documentary Materials in a merger investigation ("Second Request"), a Civil Investigative Demand (CID), or a grand jury subpoena. When it does so, it typically encourages the recipient to discuss the request and, indeed, recipients almost always engage the staff in negotiations. Staff and counsel for the recipient may agree to modifications and/or deferrals that ensure that the Division obtains the information it needs for its investigations, while minimizing, to the extent possible, the cost and burden on the recipient. See [Antitrust Division Manual](#) at [III-40-41, III-52-53, and III-86-87](#).

Regarding timing, Second Request compliance is in the hands of the merging companies. There is no deadline for parties to comply with Second Requests, but they cannot close their merger until a specific number of days following substantial compliance with the request. With regard to CIDs and subpoenas, the demand includes a deadline for response, which is set by the Division so as to give the recipient reasonable time to respond, considering both the burden imposed on the recipient and the urgency for the Division to obtain the requested material. Moreover, the response date is typically subject to negotiation and the Division can extend it if circumstances warrant.

Judicial review is available for both CIDs (see [15 U.S.C. § 1314](#)) and subpoenas (see [Fed. R. Crim. P. 17\(c\)\(2\)](#)), although the grounds for objecting to either are limited, and court challenges are rare. While Second Requests are not subject to judicial review, the Antitrust Division has practices and procedures that effectively provide an appeal process in merger investigations (see [Second Request Internal Appeal Procedure](#) (June 2001)).

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The Antitrust Division always endeavors to conclude investigations and enforcement proceedings within a reasonable time period.

With respect to merger reviews under the HSR Act, the Act places time limits on Antitrust Division investigations. Under the HSR system, merging parties notify both the Division and the FTC before

consummating transactions exceeding certain monetary thresholds. The HSR Act typically provides the agencies 30 days after notification to investigate before the parties might consummate the transaction. [15 U.S.C. § 18a\(b\)\(1\)\(B\)](#). Recognizing that even the full initial waiting period is not always necessary, the Division and FTC frequently grant requests for [early termination](#) of the waiting period. Conversely, if the Antitrust Division determines a transaction warrants an extended investigation, the Division can issue a Second Request. [18 U.S.C. § 18a\(e\)\(1\)\(A\)](#). If the Division issues a Second Request, the transaction cannot be consummated until the parties have “substantially complied” with that request. [18 U.S.C. § 18a\(e\)\(2\)](#). Because the transaction cannot be consummated prior to substantial compliance, parties have an interest in complying in a timely manner. The Antitrust Division endeavors to negotiate [process and timing agreements](#) with the parties that ensure a timely but complete investigation. Parties may agree to delay closing the transaction in exchange for limits on document requests and a reasonable schedule for engaging substantively with the Division, further document production, depositions, and other investigatory milestones. Ultimately, however, the timing in merger matters is determined by the HSR rules, which apply absent an agreed-upon schedule that alters this timing.

In civil non-merger cases, there are no formal time limits on the length of investigations. To conserve scarce resources and ensure that anticompetitive behavior is timely challenged, however, the Antitrust Division endeavors to move investigations forward as quickly as possible, and to close investigations if they fail to progress.

Similarly, in criminal matters, Division staff endeavors to conduct investigations in a speedy manner. The Division also needs to take into account in criminal investigation the relevant statute of limitations, which places an upward time limit on the filing of suit (five years for criminal violations of the Sherman Act; see [18 U.S.C. § 3282\(a\)](#)).

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

(i) The Antitrust Division’s investigations are subject to a number of rules, policies, and guidance documents regarding the identification and treatment of confidential information. With respect to merger notifications, the HSR Act prohibits public disclosure of any information provided to the Division pursuant to the HSR rules, except as may be relevant to any administrative or judicial action or proceeding to which the FTC or Division is a party, or to Congress. [15 U.S.C. § 18a\(h\)](#). With respect to information obtained through a CID, the Antitrust Civil Process Act, [15 U.S.C. § 1313\(c\)-\(d\)](#), provides that no material documents, interrogatory responses, or deposition transcripts received in response to a CID may be made public unless the submitter has waived confidentiality. CID material may also be used in proceedings before courts, administrative bodies, or grand juries. HSR and CID materials are expressly exempted from disclosure under the [Freedom of Information Act](#) (“FOIA”), 5 U.S.C. § 552. Both HSR Act and Antitrust Civil Process Act are accessible through the Division’s [website](#). The [Antitrust Division Manual](#) contains further guidance regarding these confidentiality protections (see [III-30-32](#) (HSR material), and [III-62-69](#) (CID material)). The Division’s policies regarding the protection of voluntarily provided information are outlined in its model [Voluntary Production Letter](#) and in the [Antitrust Division Manual](#) (see [III-19-20](#)).

With respect to criminal investigations, documents provided under a grand jury subpoena are protected from disclosure by [Federal Rule of Criminal Procedure 6\(e\)](#). The Antitrust Division also has a strict confidentiality policy with respect to leniency applications, under which the Division protects both the identity of leniency applicants and the information obtained from them. See [Antitrust Division](#)

[Manual](#) at [III-101-102](#). Trade secrets and other confidential business information obtained in criminal investigations are also exempted under [FOIA](#).

Several laws and regulations provide for sanctions for breaches of the confidentiality laws, including [18 U.S.C. § 1905](#) (Trade Secrets Act); [18 U.S.C. § 641](#) (Theft of Government Property Statute), and [5 C.F.R. § 2635.703](#) (Standards of Ethical Conduct for Employees of the Executive Branch).

With respect to enforcement proceedings, courts typically issue protective orders to protect confidential information while allowing parties some access to evidence against them. See [Fed. R. Civ. P. 26\(c\)](#) and [Fed. R. Crim. P. 16\(d\)\(1\)](#). Judges may protect particularly sensitive information of the parties or third-party witnesses by, for example, sealing parts of the record or even, in extraordinary circumstances, excluding specific persons or the public from portions of the trial in which confidential information is disclosed.

(ii) The Antitrust Division protects from unlawful disclosure all confidential information obtained or used during investigations or enforcement proceedings. Consistent with its legal obligations, the Antitrust Division has developed rules and policies to ensure that it protects confidential information against disclosure, while at the same time providing parties to a proceeding with access to the evidence necessary to prepare an adequate legal defense.

During the course of an investigation, information provided by parties under investigation or by third parties is generally treated as confidential by the Division, both as a matter of policy and pursuant to statutory restrictions. The Division is especially careful to protect the identities of any complainants. Thus, although the Division will often share the nature of its concerns with the party under investigation, as well as its general understanding of the facts and evidence, throughout the course of the investigation, the Division will not – and, indeed, cannot – share specific confidential information submitted by third parties. Information provided voluntarily to the Antitrust Division does not receive statutory protection; however, as a matter of policy the Division generally does not disclose such information without good cause and in accordance with the process outlined in its [Voluntary Production Letter](#) and in the [Antitrust Division Manual](#) (see [III-19-20](#)).

(iii) The Antitrust Division takes into consideration the interests of persons and the public regarding the disclosure of confidential information during enforcement proceedings. If the Antitrust Division initiates an enforcement proceeding in a federal district court, the procedure is governed by the [Federal Rules of Civil](#) or [Criminal Procedure](#). Generally, the other parties to the proceeding have a right to obtain and review the specific evidence against them in accordance with the U.S. Constitution and Federal Rules of Procedure as administered by independent federal judges.

Federal judges have a broad range of tools available to protect confidential business information and the rights of parties during enforcement proceedings. During pre-trial proceedings, protective orders are the primary means of protecting confidential information. See [Fed. R. Civ. P. 26\(c\)](#); [Fed. R. Crim. P. 16\(d\)\(1\)](#).

The Antitrust Division typically will support the entry of an appropriate protective order to govern the use of confidential information throughout the enforcement proceeding in order to appropriately protect the interests of the persons concerned and of the public in fair, effective, and transparent enforcement (see [Antitrust Division Manual](#) at [III-70-73](#)).

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

The Antitrust Division has rules, policies and guidelines to ensure that its officials are objective and impartial and do not have material conflicts of interest. These rules are based in the [Ethics in Government Act of 1978](#), codified in 5 U.S.C. App. The Act provides for financial disclosure obligations for officers and senior employees of the federal government and places restrictions on lobbying efforts

by former public officials. The Act also authorized the Office of Government Ethics (“OGE”) to promulgate standards of conduct that apply government-wide. These standards are codified at [5 C.F.R. §§ 2635.101-902](#). In addition, the Department of Justice has issued supplemental regulations for its employees. See [5 C.F.R. §§ 3801.101-106](#). Additional rules are contained in executive orders issued by the President.

Under the applicable standards of conduct, staff and senior leadership are required, among other things, (i) to act impartially and not give preferential treatment to any private organization or individual; (ii) not to hold financial interests that conflict with the conscientious performance of duty; (iii) not to solicit or accept gifts or items of monetary value from a person or entity seeking official action from the Division, or whose interests may be substantially affected by the performance or nonperformance of the employee’s duties; (iv) not to engage in outside employment or activities that conflict with official Government duties and responsibilities; and (v) to endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards. See [5 C.F.R. § 2635.101\(b\)](#). Detailed rules implementing these principles are contained in [5 C.F.R. §§ 2635.201-809](#).

It is mandatory for Antitrust Division employees to attend annual briefings on ethics and standards of conduct. Guidance on ethics and standards of conduct is also provided by the Department of Justice’s Ethics Office and the Antitrust Division’s Ethics Officer, in addition to the OGE. Violations of the ethics rules may result in disciplinary action. In addition, [18 U.S.C. Chapter 11](#) makes violations of certain ethical obligations criminal offenses.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant’s possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

(i) The Antitrust Division provides persons with timely notice of the alleged violations or claims against them in enforcement proceedings. The subjects of civil investigations have ample opportunity to interact with Antitrust Division staff and senior leadership and to discuss the theories that the Division is pursuing during the investigation. A decision by the Division to bring a civil case therefore does not come as a surprise to the party. If the Division decides to bring an enforcement action, the notice of the alleged violations and claims against the person, including the facts and legal assessment, will be set forth in a complaint filed in federal court and available to the public. See [Fed. R. Civ. P. 3](#). The procedure following the filing of the complaint, including the form and timeframe for the other party to respond and the further pretrial proceedings, are governed by the Federal Rules of Civil Procedure, which ensure that parties have sufficient time to prepare an adequate defense.

Similarly, the subjects of criminal investigations generally have several opportunities to interact with staff and to present arguments why the Division should not bring a criminal case. Except for cases where the Division decides to file indictments under seal, defendants are generally on notice of the Division’s intent to seek an indictment by a grand jury. Even if an indictment is sealed, the Division is required to provide the defendant with a copy of the indictment or information once the accused is brought to court to answer the criminal charge (“arraignment”). See [Fed. R. Crim. P. § 10\(a\)\(2\)](#). Post-arraignment procedure is governed by the Federal Rules of Criminal Procedure, which likewise ensure that the defendant has sufficient time to prepare an adequate defense.

(ii) The Antitrust Division provides persons subject to enforcement proceedings with timely access to information necessary to prepare an adequate defense. When an Antitrust Division's case proceeds to court, the parties are entitled, under Constitutional law and federal procedural rules, to extensive discovery of the Division's evidence. Discovery in civil cases brought by the Division is governed by the same rules that apply in any private litigation. See [Fed. R. Civ. P. 26-37](#). Those rules require the Division to provide, for example, documents, as well as the names of individuals, that it may use to support its claims, and entitle parties to request relevant documents from the government, to depose the government's witnesses, and to obtain substantial information about the government's expert testimony, if any.

Discovery in criminal cases brought by the Division is governed primarily by [Federal Rule of Criminal Procedure 16](#), as amended. Under these rules, the Division is required to disclose, for example, any documents, tangible objects, or other item in its possession, custody or control if the item is material to preparing the defense, if the government intends to use the item in its case-in-chief at trial, or if the item was obtained from or belongs to the defendant. It must also disclose reports of examinations and test in its possession, custody, or control if the item is material to preparing the defense or if the Antitrust Division intends to use it in its case-in-chief. In addition, the Division must produce the prior statements of a government witness after the witness testifies on direct examination. Additional information regarding discovery in criminal proceedings is available at the [website of the U.S. Department of Justice](#).

(iii) Section (h) (iii) is not applicable to Antitrust Division proceedings as the Division does not conduct Administrative Proceedings.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

(i) The Antitrust Division grants requests by persons appearing in an investigation to be represented by qualified legal counsel of their choosing. In fact, in compliance with their obligations as attorneys under the [rules of professional ethics](#), Division staff generally communicate with parties that are represented by counsel through that counsel. This principle applies to both parties to the investigation, as well as complainants or witnesses.

Rules governing specific aspects of the Division's investigations expressly recognize a person's right to be represented by counsel. In civil litigation, each party can freely choose its counsel, which only the court can disqualify. Under [15 U.S.C. § 1312\(i\)\(2\) and \(7\)](#), counsel may attend a person's (non-public) CID deposition and represent and advise its client at the deposition.

In criminal matters, the [Sixth Amendment](#) to the [U.S. Constitution](#) provides for the right to be represented by counsel. In grand jury proceedings in criminal investigations, witnesses have the right to consult with counsel (outside of the grand jury room) and it is standard practice of the Division to advise witnesses of that right. See [Antitrust Division Manual](#) at [III-88-89](#).

(ii) The Antitrust Division provides persons with the opportunity to present their views through qualified counsel. As outlined above, it is the practice of the Antitrust Division to afford persons under investigation multiple opportunities to meet with staff and senior leadership to explain its views, present evidence, and engage with the Division on substantive and procedural issues. The Division is also open to meetings or calls with third parties. In almost all such instances, persons appearing before the

Division are represented by counsel, and counsel typically lead the presentation. Indeed, the Division welcomes presentations by counsel as this practice often helps to better focus the discussions of relevant legal issues, including both substantive issues and procedural matters. With respect to factual issues Division staff may, however, ask or indicate a preference for presentations by individuals involved in the relevant business, in order to obtain this type of information directly from knowledgeable persons rather than through counsel.

(iii) The Antitrust Division recognizes applicable privileges, including attorney-client privilege, attorney work product, and the right against self-incrimination (see [Federal Rules of Evidence 501](#)). The most commonly invoked privileges in antitrust cases are (i) the attorney-client privilege, which generally protects communications between a person and its attorney related to the solicitation or rendering of legal advice, and covers both outside counsel and in-house counsel, and (ii) the work product doctrine, which protects materials prepared in anticipation of litigation. In addition, the privilege against self-incrimination can be invoked in any sort of proceeding in which a witness is asked a question that they believe will require him to implicate himself criminally; this privilege only applies to natural persons. The privilege rules protect against any form of compelled disclosure, including in both civil and criminal antitrust investigations and enforcement proceedings, and these principles are expressly recognized by the HSR rules ([16 CFR § 803.3\(d\)](#)) and the Antitrust Civil Process Act ([15 U.S.C. § 1312\(c\)\(1\)](#)).

With respect to the treatment of privileged information obtained in investigations, the Antitrust Division has an internal policy addressing inadvertently produced privileged documents. This policy roughly mirrors the rules of civil procedure (see [Fed. R. Civ. P. 26\(b\)\(5\)\(B\)](#)). The Division will sequester documents it identifies as privileged and will do the same with potentially privileged documents identified by a producing party. However, the Division expects the producing party to undertake some remediation when privileged documents are identified.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

(i) The Antitrust Division is not in charge of issuing decisions or orders within the meaning of this provision. The only adverse enforcement decision the Division can take is to bring a civil lawsuit or criminal charge, both of which are public. The contents of civil complaints and criminal charging documents are a matter of federal procedural rules. Those rules require a civil complaint to contain a “short and plain statement of the grounds for the court’s jurisdiction,” as well as a “short and plain statement of the claim showing that the pleader is entitled to relief.” See [Fed. R. Civ. P. 8\(a\)](#). A criminal indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. See [Fed. R. Crim. P. 7\(c\)\(1\)](#).

(iii) The Antitrust Division accepts commitments with parties that resolve competition concerns in writing. When the Antitrust Division concludes a civil antitrust investigation by settlement, the [Tunney Act](#), 15 U.S.C. § 16, requires the Division to file a complaint, proposed settlement (in the form of a proposed consent judgment), and a competitive impact statement in federal district court. The competitive impact statement must explain the nature and purpose of the proceeding; describe the facts giving rise to the alleged antitrust violation; explain the proposed settlement and the remedies available to potential private plaintiffs; describe the procedures available for modification of the

proposal; and describe and evaluate alternatives to the proposed judgment considered by the Division. The Act provides for wide publication of the details of any proposed settlement, and for a period of public comment. The statute requires the Department to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect.

In criminal cases, the Division may enter into a plea agreement with an individual or company, under which they agree to plead guilty to a particular charge in return for some concession from the Division. The Division's plea agreements are in writing and the Division has published on its website model plea agreements for [companies](#) and for [individuals](#). Plea agreements must generally be disclosed in open court and require court approval. See [Fed. R. Crim. P. 11\(c\)](#). Plea agreements entered into by the Antitrust Division are made available at the Division's [website](#).

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

The Antitrust Division does not have the authority to impose, by itself, a prohibition, remedy, or sanction in a contested proceeding. Rather, it is required to bring a case in a federal district court where it has to prove its allegations based on the evidence presented at trial. Final decisions of federal district courts are subject to appeal to a federal court of appeals, see [28 U.S.C. § 1291](#). Accordingly, prohibitions, remedies or, sanctions in contested proceedings are not only subject to review by an independent, impartial adjudicative body, but can only be imposed by such body.