

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

### United States Federal Trade Commission

The following template is submitted by the U.S. Federal Trade Commission pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

The Federal Trade Commission (FTC) is an independent federal agency with both consumer protection and competition law jurisdiction. The responses to this template apply only to the FTC’s competition law enforcement procedures. The FTC shares federal antitrust law enforcement responsibilities with the Antitrust Division of the U.S. Department of Justice.

For more about the FTC, see [www.ftc.gov](http://www.ftc.gov)

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

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 FTC exercises both prosecutorial and adjudicative functions. To enforce the FTC Act, the FTC may use its own administrative process, codified in its rules. Under this process, the FTC, following a full investigation, issues an administrative complaint, which initiates an enforcement proceeding that is overseen and resolved by an administrative law judge, subject to review by the full Commission and, ultimately, a U.S. court of appeals. Alternatively, in appropriate cases, following an investigation, the FTC may file an initial action in U.S. district court seeking a permanent injunction and associated relief. The FTC also may seek a preliminary injunction in U.S. district court in aid of an administrative proceeding, *e.g.*, to block a merger before it is consummated. Whether enforcing the law administratively or in court, the processes offer respondents similar procedural rights.

#### 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 FTC does not discriminate in the investigation and enforcement of the antitrust laws based on the nationality of the parties. See [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.*

All laws relating to the FTC's competition mission and law enforcement authority are published in the United States Code. In addition, the FTC's webpage provides the public with an overview of the statutes relating to its competition mission (<https://www.ftc.gov/enforcement/statutes>) and its law enforcement authority (<http://www.ftc.gov/ogc/brfovrw.shtm>).

The FTC's practices and procedures for investigating and enforcing the competition laws are also transparent. The Commission's procedures are codified in its [publicly-available Rules of Practice](#); Part 2 relates to investigational procedures, while Part 3 sets forth adjudicative procedures.

The FTC also provides substantive guidance about the application of the U.S. antitrust laws to promote transparency and encourage compliance with the law. Resources such as the Horizontal Merger Guidelines and the Antitrust Guidelines for Collaborations Among Competitors describe the standards used to analyze transactions or conduct that could raise an antitrust concern. These resources aid antitrust practitioners, policy makers, businesses, and consumers who have questions about the antitrust laws or competition policy. Such guidance is available on the FTC's website: <https://www.ftc.gov/tips-advice/competition-guidance>.

The FTC's website publishes [speeches](#) by Commissioners, senior management such as Bureau Directors and Office Heads, and other officials; [testimony](#) or statements before Congressional Committees and comments on legislation by FTC Commissioners and staff; and various other [policy statements](#). FTC [comments and submissions](#) related to public regulatory activities or rulemaking by other government agencies (federal and state), [advocacy filings](#), and [amicus briefs](#) submitted in private litigation are routinely published.

### **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.*

FTC rules state that “[a]ny person, partnership, or corporation under investigation compelled or requested to furnish information or documentary material shall be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law.” 16 C.F.R. § 2.6. The parties are informed of the legal basis early in any investigation. The parties often receive this information from the initial staff contact explaining that an investigation has been opened, or in writing via a request for information that indicates the purpose of the investigation.

Parties are provided the opportunity to meet and consult with staff throughout an investigation. This frequent interaction includes less formal phone discussions as well as periodic meetings. The FTC values open communication with the parties in its competition investigations, subject to appropriate confidentiality protections. At every stage of an FTC investigation, parties are encouraged to meet with the lawyers and the economists investigating the conduct at issue. The ongoing dialogue between FTC investigative staff and parties under investigation encompasses the procedural course of the investigation and staff’s substantive theories of the case, both in meetings and less formal discussions. Parties routinely request, and are granted, meetings with senior management and Commissioners at an appropriate stage of the investigation—typically at an advanced stage of the investigation prior to an enforcement decision

In competition investigations, the FTC focuses investigative requests on information relevant to issues under review and provides persons reasonable time to respond to requests. The FTC seeks to obtain the information it needs to make an enforcement decision without imposing an undue burden on respondents. When the FTC issues a compulsory request for information, it typically encourages the recipient to discuss the request and engage the staff in negotiations. Staff and counsel for the recipient may agree to modifications and/or deferrals that ensure that the FTC obtains the information it needs for its investigation, while minimizing the cost and burden on the recipient. FTC rules state that a recipient of FTC compulsory process “shall meet and confer” with staff after receipt of process “to discuss compliance and to address and attempt to resolve all issues . . .” 16 C.F.R. § 2.7(k). When the FTC requests additional information and documents from a party to a proposed transaction (*i.e.*, issues a “Second Request”), FTC rules state that an agency representative shall invite the recipient of such a request to discuss it, shall discuss the competitive issues raised by the proposed transaction, to the extent known, and shall confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. Per FTC rule, a party may raise objections to a subpoena or CID by filing a petition to limit or quash for decision by the Commission, and to a Second Request by filing a petition with the agency’s General Counsel.

### **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.*

Typically, staff engages in an ongoing dialogue with the parties over the course of an investigation covering both substantive and procedural issues. This exchange includes the anticipated timing of major aspects of an investigation, such as agency requests for information, meetings with staff and senior management, and agency decision making.

The timing of merger investigations under the HSR Act is prescribed by statute, and detailed in many resources available on the FTC's website, such as [introductory guides to the premerger notification program](#).

The timing of other competition investigations is not set by statute, although specific investigative steps (such as compulsory requests for information) can have deadlines. It is common for staff to communicate with parties about how an investigation is proceeding, including its schedule.

While the timetable of a given investigation necessarily depends on the complexity of the factual and legal issues involved, the schedule for resolving an administrative adjudicative proceeding is defined expressly.

### **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.*

The FTC Act governs confidentiality protections for material obtained during the FTC's antitrust investigations and provides that confidential information cannot be disclosed publicly, with very limited exceptions. Information provided by parties under investigation and by third parties is generally treated as confidential by the FTC, both as a matter of policy and pursuant to statutory restrictions.

Sections 6 and 21 of the FTC Act (FTCA) protect confidential information and limit disclosure of materials submitted to the FTC. Section 6(f) of the FTCA generally prohibits the FTC from making public any trade secret, commercial, or financial information obtained from any person that is privileged or confidential. 15 U.S.C. § 46(f). In addition, under Section 21 of the FTC Act, all information received by the FTC pursuant to compulsory process in an investigation to determine whether a law has been violated is treated as confidential, and such information cannot be disclosed publicly without consent of the submitter, with limited exceptions, such as use in judicial proceedings under a protective order, discussed below. 15 U.S.C. § 57b-2(b); *see also* FTC Rule 4.10 (16 CFR Part 4.10).

Confidentiality protections continue to apply if the FTC files an administrative complaint pursuant to its rules or an action in federal court. The FTC's rules provide that material obtained through

compulsory process, information that is marked confidential, and confidential commercial or financial information may be disclosed in administrative or court proceedings, but state that the submitter will first be given an opportunity to seek an appropriate protective or *in camera* order from the adjudicator. In order to address the confidentiality concerns of third parties, the FTC has a model protective order that governs the use of confidential information submitted by third parties if a matter proceeds to an administrative adjudication. The model protective order limits disclosure to outside counsel, and does not allow confidential third-party materials to be disclosed to in-house counsel or business employees of the party in litigation. *See* 16 C.F.R. § 3.31 App. A.

Unauthorized disclosures of confidential information are subject to investigation by the FTC's Office of Inspector General and Office of General Counsel. Unauthorized disclosures of nonpublic information may also lead to disciplinary proceedings. Under Section 10 of the FTC Act, 15 U.S.C. § 50, unauthorized release of nonpublic information obtained by the Commission is subject to criminal prosecution and punishable by fines or imprisonment. In some cases, criminal sanctions may also be available under the Trade Secrets Act, 18 U.S.C. § 1905, or the Larceny Act, 18 U.S.C. § 641. *See also* FTC Rule 4.10(c).

FTC employees (from the day they begin work) are instructed in the importance of protecting confidentiality. Agency staff is made aware that improper disclosures of confidential information will not be tolerated.

#### **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.*

A number of statutes and regulations govern the conduct of executive branch employees. These rules are based in the Ethics in Government Act of 1978. 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. *See* U.S. OGE homepage at <http://www.oge.gov>.

Under the standards of conduct, staff and senior leadership are required, among other things, to act impartially and not give preferential treatment to any private organization or individual; not to hold financial interests that conflict with the conscientious performance of duty; not to solicit or accept gifts or items of monetary value from a person or entity seeking official action, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties; not to engage in outside employment or activities that conflict with official Government duties and responsibilities; and to endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.

It is mandatory for FTC employees to make financial disclosures and complete annual ethics training.

## **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.*

The FTC affords parties under investigation significant opportunities to be heard on the merits before the agency decides whether to bring an enforcement action. As part of an ongoing dialogue with parties, staff typically will explain the general nature of the evidence uncovered during the investigation, subject to confidentiality protections. These conversations are designed to ensure that the parties understand the nature of the evidence and staff concerns in sufficient detail to meaningfully respond. Parties also typically are able to meet directly with the FTC Commissioners and other senior officials, to explain their view of the case. Business executives and industry or economics experts, as well as the parties' lawyers, often attend to explain their views. They are able to submit written materials detailing their positions, describing why the conduct under investigation should not be challenged or why proposed remedies would be sufficient to prevent competitive harm.

Parties are not provided with access to the evidence during an investigation because such evidence is subject to confidentiality protections. If a case proceeds to trial, parties are entitled to extensive review of the evidence gathered for the case. If the FTC decides enforcement is warranted, the charges are identified in an administrative complaint or, as applicable, in a federal court complaint. The FTC's Part 3 rules, like the federal procedural rules that govern actions in federal courts, provide for the parties to obtain discovery from one another. Once the FTC files an administrative complaint against a respondent, the agency's Part 3 rules ensure that the respondent continues to have the opportunity to present its arguments and views formally into the record of the enforcement proceeding for consideration by the administrative law judge and any review by the full Commission or a court. For example, pursuant to the Part 3 rules, respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." 16 C.F.R. §3.41(c).

Under the FTC's rules, a Part 3 administrative trial is typically expected to occur within five months of the filing of the complaint in cases in which the agency is also seeking preliminary injunctive relief in federal court, and within eight months in all other cases. 16 C.F.R. § 3.11(b)(4).

From investigating staff to the highest levels of agency decision-makers, the FTC's investigatory process is transparent and designed to give respondents every opportunity to develop and present their views on relevant issues in an investigation.

## **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.*

Persons appearing in an FTC antitrust investigation can be represented by qualified legal counsel of their choosing. Rules governing specific aspects of FTC investigations expressly recognize a person's right to be represented by counsel. For example, an FTC Rule states that "[a]ny witness compelled to appear in person in a deposition or investigational hearing may be accompanied, represented, and advised by counsel." 16 C.F.R. §2.9 (b).

The FTC provides persons with the opportunity to present their views through qualified counsel. Parties under investigation have multiple opportunities to meet with staff and senior leadership to explain views, present evidence, and engage on substantive and procedural issues. In almost all such instances, persons appearing before the FTC are represented by counsel, and they typically allow their counsel to lead the presentation.

The FTC recognizes applicable privileges, including attorney-client privilege and attorney work product. FTC Rules 2.11 on withholding requested material and 3.31 on general discovery provisions address the withholding and disclosure of privileged or protected information.

## **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.*

In the FTC's administrative enforcement proceedings, the complaint, hearing record, and initial decision are public documents, except to the extent they contain confidential information submitted by private parties. Similar to a complaint filed in federal district court, the administrative complaint must contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law," as well as a "[r]ecital of the legal authority and jurisdiction for institution of the proceeding." 16 C.F.R. § 3.11(b). The administrative law judge's initial decision is subject to review by the full



Commission, and the Commission's decision, in turn, is subject to review by a U.S. court of appeals. Both of these decisions are also public documents. The initial administrative decision "shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence. The initial decision shall include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . and an appropriate rule or order." 16 C.F.R. § 3.51(c)(1). A Commission decision on appeal "will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions." 16 C.F.R. § 3.54(b).

The FTC's acceptance of a proposed consent agreement initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later. 16 C.F.R. § 2.32. If the FTC accepts a proposed consent agreement, the proposed agreement and complaint are available for public comment. To facilitate input by the public, the FTC simultaneously publishes an analysis to aid public comment, which explains in lay terms the violations alleged and proposed remedies. It is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm.

When the agency brings an enforcement action in U.S. district court, the filings, hearing records, and court decisions are public, except for confidential information of private parties that is designated for *in camera* treatment under a protective order. Appeals from U.S. district court decisions are also public, both in the courts of appeals and the U.S. Supreme Court.

The FTC routinely issues press releases for agency actions such as decisions, opinions, orders and events. See FTC's online newsroom: <https://www.ftc.gov/news-events/press-releases>. The FTC's website also catalogues competition enforcement actions by the type of violation (merger or nonmerger), action (consent order, injunction, or administrative complaint), and date <https://www.ftc.gov/enforcement/cases-proceedings>. The FTC's adjudicative opinions are also available online.

#### **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 FTC's antitrust enforcement process often involves an administrative trial, which is conducted pursuant to Part 3 of the agency's rules and overseen by an administrative law judge, who will resolve the matter by issuing an initial decision. The respondent has a right to appeal the initial decision to the full Commission, which will conduct a *de novo* review of the administrative law judge's decision. The respondent can then appeal the final decision of the full Commission to a U.S. court of appeals and can petition the U.S. Supreme Court to review the court of appeals decision. These courts will review the Commission's legal conclusions *de novo*, while accepting its findings of



fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

When the FTC seeks relief in U.S. district court, whether on an interim basis (such as to prevent consummation of a merger pending an administrative trial) or in seeking permanent injunctive relief, the district court's action is subject to review by a federal appeals court and ultimately the U.S. Supreme Court. There are no defined timetables for the court to rule on a preliminary injunction, but given the importance and urgency of the issues involved in such a proceeding, the court typically acts as quickly as it can, given its caseload.